

STATE OF NEW YORK

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2021-2022 Regular Sessions

IN ASSEMBLY

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Introduced by M. of A. DINOWITZ, RODRIGUEZ, GOTTFRIED, GALEF, JOYNER, RICHARDSON, ABINANTI, QUART, L. ROSENTHAL, STECK, SOLAGES, M. MILLER, WALKER, WEPRIN, VANEL -- Multi-Sponsored by -- M. of A. COOK, DAVILA, ENGLEBRIGHT, GLICK, RAMOS, ROZIC, SIMON -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to establishing the New York electronic communications privacy act ("NYECPA")

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The criminal procedure law is amended by adding a new article 695 to read as follows:

ARTICLE 695

SEARCH AND SEIZURE OF ELECTRONIC DEVICES AND ELECTRONIC COMMUNICATIONS

2 Section 695.05 Search and seizure of electronic devices and electronic communications; definitions.

3 695.10 Search and seizure of electronic devices and electronic communications; in general.

4 695.15 Search and seizure of electronic devices and electronic communications; in an emergency.

5 695.20 Search and seizure of electronic devices and electronic communications; when evidence can be suppressed.

6 695.25 Search and seizure of electronic devices and electronic communications; annual report.

7 § 695.05 Search and seizure of electronic devices and electronic communications; definitions.

8 As used in this article, the following definitions shall apply:

9 1. "Adverse result" means any of the following:

10 (a) danger to the life or physical safety of an individual;

11 (b) flight from prosecution;

12 (c) destruction of or tampering with evidence;

13 EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 (d) intimidation of potential witnesses; or

2 (e) serious jeopardy to an investigation.

3 2. "Authorized possessor" means the person in possession of an elec-
4 tronic device when that person is the owner of the device or has been
5 authorized to possess the device by the owner of the device.

6 3. "Electronic communication" means the transmission of signs,
7 signals, writings, images, sounds, data, or intelligence of any nature
8 in whole or in part by a wire, radio, electromagnetic, photoelectric, or
9 photo-optical system.

10 4. "Electronic communication information" means information related to
11 an electronic communication or the use of an electronic communication
12 service including, but not limited to the contents, sender, recipients,
13 or format of an electronic communication; the precise or approximate
14 location of the sender or recipients of an electronic communication at
15 any time during such communication; the time or date such communication
16 was created, sent, or received and information pertaining to an individ-
17 ual or device involved in the communication including but not limited to
18 an internet protocol address. Electronic communication information does
19 not include subscriber information as defined in this article and does
20 not include information in the public domain.

21 5. "Electronic communication service" means a service that provides
22 subscribers to or users of such service the ability to send or receive
23 an electronic communication as defined in this article, including a
24 service that acts as an intermediary in the transmission of electronic
25 communications, or that stores electronic communication information.

26 6. "Electronic device" means a device that stores, generates, or tran-
27 smits information in electronic form.

28 7. "Electronic device information" means information stored in or
29 generated through the operation of an electronic device, including
30 information related to the location of such device at any time.

31 8. "Electronic information" means electronic communication information
32 or electronic device information.

33 9. "Law enforcement agency" means any agency which is empowered by law
34 to conduct an investigation or to make an arrest for an offense under
35 the penal law, and an agency which is authorized by law to prosecute or
36 participate in the prosecution of an offense under the penal law.

37 10. "Law enforcement officer" means any public servant who is
38 empowered by law to conduct an investigation of or to make an arrest for
39 an offense under the penal law, and any attorney authorized by law to
40 prosecute or participate in the prosecution of an offense under the
41 penal law.

42 11. "Location information" means information regarding the general or
43 specific location of an electronic device.

44 12. "Service provider" means a person or entity that provides an elec-
45 tronic communication service.

46 13. "Specific consent" means consent provided directly to a law
47 enforcement agency or law enforcement officer seeking information
48 regarding an electronic communication, including but not limited to
49 circumstances in which a law enforcement agency or law enforcement offi-
50 cer is the addressee or intended recipient or a member of the intended
51 audience for such communication.

52 14. "Subscriber information" means the name, street address, telephone
53 number, email address, or similar contact information provided by a
54 subscriber to the service provider in order to establish or maintain a
55 communication channel or an account for electronic communication
56 services, as well as a subscriber identifier or account number, the

1 period of time in which the subscriber receives service; and the types
2 of services used by a user of or subscriber to a service provider.
3 § 695.10 Search and seizure of electronic devices and electronic commu-
4 nications; in general.

5 1. Except as provided in this section, a law enforcement agency or law
6 enforcement officer shall not:

7 (a) compel, induce or offer incentives for the production of or access
8 to electronic communication information from a service provider;

9 (b) compel the production of or access to electronic device informa-
10 tion from any person or entity other than the authorized possessor of
11 the device; or

12 (c) access electronic device information by means of physical inter-
13 action or electronic communication with the electronic device.

14 2. A law enforcement agency or law enforcement officer may compel the
15 production of or access to electronic communication information from a
16 service provider, or compel the production of or access to electronic
17 device information from any person or entity other than the authorized
18 possessor of the device only under the following circumstances:

19 (a) pursuant to a warrant issued in accordance with article six
20 hundred ninety of this title and subject to subdivision four of this
21 section, unless the law enforcement agency or law enforcement officer is
22 required under section 250.00 of the penal law and article seven hundred
23 of this title to obtain a warrant issued pursuant to article seven
24 hundred of this title; or

25 (b) pursuant to a warrant issued in accordance with article seven
26 hundred of this title.

27 3. A law enforcement agency or law enforcement officer may access,
28 without consent, as provided in this section, electronic device informa-
29 tion by means of physical interaction or electronic communication with
30 the device only as follows:

31 (a) pursuant to a warrant in accordance with article six hundred nine-
32 ty of this title and subject to subdivision four of this section, unless
33 the law enforcement agency or law enforcement officer is required under
34 section 250.00 of the penal law and article seven hundred of this title
35 to obtain a warrant issued pursuant to article seven hundred of this
36 title;

37 (b) pursuant to a warrant issued in accordance with article seven
38 hundred of this title;

39 (c) with the specific consent of the authorized possessor of the
40 device;

41 (d) with the specific consent of the owner of the device, only when
42 the device has been reported as lost or stolen; or

43 (e) if the law enforcement agency or law enforcement officer, in good
44 faith, believes the device to be lost, stolen, or abandoned, provided
45 that the law enforcement agency or law enforcement officer shall access
46 electronic device information only for the purpose of attempting to
47 identify, verify, or contact the owner or authorized possessor of the
48 device.

49 4. Any warrant for electronic information shall:

50 (a) describe with particularity the information to be seized by speci-
51 fying the time periods for which such information is sought and, as
52 appropriate and reasonable, the target individuals or accounts, the
53 applications or services covered, and the types of information sought;
54 and

55 (b) comply with all applicable provisions of state and federal law,
56 including such provisions that prohibit or limit the use of search

1 warrants, or that impose additional requirements, beyond the scope of
2 this article, regarding search warrants.

3 (c) If an affidavit, declaration, deposition, allegation of fact or
4 other material is submitted in support of the application for a warrant,
5 the judge must file it with the court within twenty-four hours of the
6 issuance of a warrant.

7 5. A service provider may voluntarily disclose electronic communi-
8 cation information or subscriber information when that disclosure is not
9 otherwise prohibited by this article or by other provisions of state law
10 or by federal law.

11 6. A law enforcement agency or law enforcement officer that receives
12 electronic communication information provided voluntarily shall seal
13 that information within ninety days and access to the information shall
14 be prohibited except in one or more of the following circumstances:

15 (a) a law enforcement officer or agency obtains specific consent from
16 the sender or recipient of the electronic communications about which
17 information has been disclosed; or

18 (b) a law enforcement officer or agency obtains a court order author-
19 izing access to the electronic communication information. A court shall
20 issue an access order upon the same finding required for issuing a
21 warrant pursuant to article six hundred ninety of this title and subject
22 to subdivision four of this section.

23 (c) information retained by a law enforcement officer or agent that is
24 subject to this provision shall not be shared with:

25 (i) persons or entities that do not agree to limit the use of the
26 provided information to those purposes identified in the court authori-
27 zation; and

28 (ii) persons or entities that:

29 (A) are not legally obligated to destroy the provided information upon
30 the expiration or rescindment of the court's retention order; or

31 (B) do not voluntarily agree to destroy the provided information upon
32 the expiration or rescindment of the court's retention order.

33 7. A law enforcement agency or law enforcement officer that obtains
34 electronic information pursuant to an emergency involving danger of
35 death or serious physical injury to a person, which requires access to
36 the electronic information without delay, shall within three days after
37 obtaining the electronic information file with the appropriate court an
38 application for a warrant or order that authorizes access to such elec-
39 tronic information, or a motion seeking approval of the emergency
40 disclosures that sets forth the facts giving rise to the emergency, and
41 if applicable, a request supported by a sworn affidavit for an order
42 delaying notification to the court as required under paragraph (a) of
43 subdivision two of section 695.15 of this article. The court shall
44 promptly rule on such application or motion, and shall order the immedi-
45 ate destruction of all information obtained, and immediate notification
46 to the targets of a warrant or emergency request, pursuant to subdivi-
47 sion one of section 695.15 of this article, if such notice has not
48 already been given, upon a finding that the facts did not give rise to
49 an emergency, or upon a ruling that rejects the warrant or order appli-
50 cation on any other ground.

51 8. This section does not limit the authority of a law enforcement
52 agency or law enforcement officer to use an administrative, grand jury,
53 trial, or civil discovery subpoena to do any of the following:

54 (a) require an originator, addressee, or intended recipient of an
55 electronic communication to disclose any electronic communication infor-
56 mation associated with that communication;

1 (b) require an entity that provides electronic communications services
2 to its officers, directors, employees, or agents for the purpose of
3 carrying out their duties, to disclose electronic communication informa-
4 tion associated with an electronic communication to or from an officer,
5 director, employee, or agent of the entity; or

6 (c) require a service provider to provide subscriber information.

7 9. This section does not prohibit the intended recipient of an elec-
8 tronic communication from voluntarily disclosing electronic communi-
9 cation information concerning that communication to a law enforcement
10 agency or law enforcement officer.

11 10. Nothing in this section shall be construed to expand any authority
12 under state law to compel the production of or access to electronic
13 information.

14 § 695.15 Search and seizure of electronic devices and electronic commu-
15 nications; in an emergency.

16 1. Except as otherwise provided in this section, a law enforcement
17 agency or law enforcement officer that executes a warrant, or obtains
18 electronic information in an emergency pursuant to section 695.10 of
19 this article, shall serve upon or deliver to the target of a warrant or
20 emergency request by registered or first-class mail, electronic mail, or
21 by other means reasonably calculated to be effective, a notice that
22 informs the recipient that information about the recipient has been
23 compelled or requested. Such notice shall state with reasonable specif-
24 icity the nature of the government investigation pursuant to which the
25 information is sought. The notice shall include a copy of the warrant or
26 a written statement setting forth facts giving rise to the emergency.
27 The notice shall be provided contemporaneously with the execution of a
28 warrant, or, in the case of an emergency, within three days after
29 obtaining the electronic information. The target of the warrant is
30 entitled to request a copy of the electronic information obtained in the
31 same form it was received upon request. Notice shall include
32 instructions for requesting copies and a law enforcement agency and law
33 enforcement officer must provide copies of information obtained in the
34 same form within three days of receiving the request from the target of
35 the warrant.

36 2. (a) When a warrant is sought or electronic information is obtained
37 in an emergency under section 695.10 of this article, the law enforce-
38 ment agency or law enforcement officer may submit a request to a court
39 supported by a sworn affidavit for an order delaying notification and
40 prohibiting any party providing information from notifying any other
41 party that information has been sought. The court shall issue the order
42 if the court determines that there is reason to believe that notifica-
43 tion may have an adverse result, but only for the period of time that
44 the court finds there is reason to believe that the notification may
45 have that adverse result, and not to exceed ninety days.

46 (b) The court may grant extensions of the delay of up to ninety days
47 each on the same grounds as provided in paragraph (a) of this subdivi-
48 sion.

49 (c) Upon expiration of the period in which notification is delayed, a
50 law enforcement agency or law enforcement officer shall serve upon the
51 identified targets of a warrant or deliver to those targets by regis-
52 tered or first-class mail, electronic mail, or other means reasonably
53 calculated to be effective as specified by the court issuing the order
54 authorizing delayed notification, a document that includes the informa-
55 tion described in subdivision one of this section, along with a copy of
56 all electronic information obtained in the same form it was received,

1 and a statement of the grounds for the court's determination to grant a
2 delay in notifying the individual.

3 3. If there is no identified target of a warrant or emergency request
4 at the time of its issuance, the law enforcement agency or law enforce-
5 ment officer shall submit to the attorney general of this state within
6 three days of the execution of the warrant or issuance of the request a
7 report regarding the information required in subdivision one of this
8 section. If an order delaying notice is obtained pursuant to subdivision
9 two of this section, the law enforcement agency or law enforcement offi-
10 cer shall submit to the attorney general upon the expiration of the
11 period of delay of the notification a report regarding the information
12 required in paragraph (c) of subdivision two of this section. The attor-
13 ney general's office shall publish such reports on its internet website
14 within ninety days of receipt. The attorney general shall redact names
15 and other personal identifying information from the reports.

16 4. Except as otherwise provided in this section, nothing in this arti-
17 cle shall prohibit or limit a service provider or any other party from
18 disclosing information about any request or demand for electronic infor-
19 mation.

20 § 695.20 Search and seizure of electronic devices and electronic commu-
21 nications; when evidence can be suppressed.

22 1. Persons who are party to or otherwise subject to a trial, hearing,
23 or other legal or administrative proceeding may move to suppress elec-
24 tronic information obtained or retained in violation of this article,
25 the United States Constitution, State Constitution, the New York State
26 Constitution or the provisions of the criminal procedure law. The motion
27 shall be made and shall be subject to review by a court in accordance
28 with the procedures set forth in article seven hundred ten of this
29 title.

30 2. The attorney general of this state may commence a civil action to
31 compel a law enforcement agency or law enforcement officer to comply
32 with the provisions of this article. This does not preclude action by
33 an individual, service provider, or other recipient of a warrant, order,
34 or other legal process that is inconsistent with this article.

35 3. An individual, service provider or other recipient of a warrant,
36 order, or other legal process may petition the issuing court to quash or
37 modify the warrant, order, or process, or to order the destruction of
38 information that is sought pursuant to such a warrant, order or other
39 legal process, on the basis that the warrant, order or process violates
40 the United States Constitution, the New York State Constitution, or is
41 otherwise contrary to federal or state law. The warrant recipient may
42 also move the quash on the basis that the information or records
43 requested are unusually voluminous in nature or compliance with such
44 order otherwise would cause an undue burden on such provider. The
45 court's decision to grant or deny that petition, in whole or in part,
46 filed under this paragraph is immediately appealable pursuant to section
47 fifty-seven hundred one of the civil practice law and rules.

48 4. A state, territory or commonwealth of the United States and foreign
49 and domestic corporations as well as officers, employees, and agents of
50 these entities shall not be subject to a cause of action for providing
51 records, information, facilities, or other forms of assistance in
52 accordance with the terms of a warrant, court order, statutory authori-
53 zation, emergency certification, or wiretap order issued pursuant to
54 this article. This does not preclude a cause of action for providing
55 records, information, facilities, or other forms of assistance in a
56 manner that is inconsistent with this article.

§ 695.25 Search and seizure of electronic devices and electronic communications; annual report.

1. A law enforcement agency or law enforcement officer that obtains electronic communication information pursuant to this article shall make an annual report to the attorney general of this state regarding such information. The report shall be made on or before February first, two thousand twenty-two, and on February first of each year thereafter. To the extent such information can be reasonably determined, the report shall include the following:

(a) the total number of times electronic information was sought or obtained pursuant to this article;

(b) the number of times such information was sought or obtained, and the number of records obtained for each of the following categories the types of electronic information:

(i) electronic communication content;

(ii) location information;

(iii) electronic device information (not including location information); and

(iv) other electronic communication information.

(c) for each type of information identified in paragraph (b) of this subdivision:

(i) the number of times the information was sought or obtained pursuant to:

(1) wiretap orders obtained pursuant to this article;

(2) search warrants obtained pursuant to this article; and

(3) emergency requests subject to subdivision eight of section 695.10 of this article.

(ii) the total number of individuals whose information was sought or obtained;

(iii) the total number of instances in which information was sought or obtained that did not specify a target individual from whom or about whom the information was requested;

(iv) for demands or requests issued upon a service provider, the number of such demands or requests complied with in full, partially complied with, and not complied with;

(v) the number of times notice to targeted individuals of a warrant, court order, statutory authorization, emergency certification, or wiretap order issued pursuant to this article was delayed and the average length of the delay;

(vi) the number of times records obtained pursuant to a warrant, court order, statutory authorization, emergency certification, or wiretap order issued pursuant to this article were shared with other government entities or any department or agency of the federal government, and the agencies with which such records were shared;

(vii) the average period of time for which location information was obtained or received; and

(viii) the number of instances in which electronic information sought or obtained pursuant to this article was relevant to a criminal proceeding that led to a conviction.

2. On or before April first, two thousand twenty-three, and each April first thereafter, the attorney general's office shall publish on its internet website a summary aggregating data related to each type of electronic communication identified in paragraphs (a), (b) and (c) of subdivision one of this section by county.

- 1 3. Nothing in this article shall prohibit or restrict a service
- 2 provider from producing an annual report summarizing the demands or
- 3 requests it receives under this article.
- 4 § 2. This act shall take effect immediately.