

# STATE OF NEW YORK

5045

2021-2022 Regular Sessions

## IN ASSEMBLY

February 10, 2021

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.