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:

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

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

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

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

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

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

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

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

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

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

(b) flight from prosecution;

(c) destruction of or tampering with evidence;

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

LBD05306-01-1

(d) intimidation of potential witnesses; or

(e) serious jeopardy to an investigation.

2. "Authorized possessor" means the person in possession of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device.

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

4. "Electronic communication information" means information related to an electronic communication or the use of an electronic communication service including, but not limited to the contents, sender, recipients, or format of an electronic communication; the precise or approximate location of the sender or recipients of an electronic communication at any time during such communication; the time or date such communication was created, sent, or received and information pertaining to an individual or device involved in the communication including but not limited to an internet protocol address. Electronic communication information does not include subscriber information as defined in this article and does not include information in the public domain.

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

6. "Electronic device" means a device that stores, generates, or transmits information in electronic form.

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

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

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

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

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

12. "Service provider" means a person or entity that provides an electronic communication service.

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

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

period of time in which the subscriber receives service; and the types of services used by a user of or subscriber to a service provider.

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

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

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

(b) compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device; or

(c) access electronic device information by means of physical interaction or electronic communication with the electronic device.

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

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

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

3. A law enforcement agency or law enforcement officer may access, without consent, as provided in this section, electronic device information by means of physical interaction or electronic communication with the device only as follows:

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

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

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

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

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

4. Any warrant for electronic information shall:

(a) describe with particularity the information to be seized by specifying the time periods for which such information is sought and, as appropriate and reasonable, the target individuals or accounts, the applications or services covered, and the types of information sought; and

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

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

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

5. A service provider may voluntarily disclose electronic communication information or subscriber information when that disclosure is not otherwise prohibited by this article or by other provisions of state law or by federal law.

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

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

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

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

(i) persons or entities that do not agree to limit the use of the provided information to those purposes identified in the court authorization; and

(ii) persons or entities that:

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

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

7. A law enforcement agency or law enforcement officer that obtains electronic information pursuant to an emergency involving danger of death or serious physical injury to a person, which requires access to the electronic information without delay, shall within three days after obtaining the electronic information file with the appropriate court an application for a warrant or order that authorizes access to such electronic information, or a motion seeking approval of the emergency disclosures that sets forth the facts giving rise to the emergency, and if applicable, a request supported by a sworn affidavit for an order delaying notification to the court as required under paragraph (a) of subdivision two of section 695.15 of this article. The court shall promptly rule on such application or motion, and shall order the immediate destruction of all information obtained, and immediate notification to the targets of a warrant or emergency request, pursuant to subdivision one of section 695.15 of this article, if such notice has not already been given, upon a finding that the facts did not give rise to an emergency, or upon a ruling that rejects the warrant or order application on any other ground.

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

(a) require an originator, addressee, or intended recipient of an electronic communication to disclose any electronic communication information associated with that communication;

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

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

9. This section does not prohibit the intended recipient of an electronic communication from voluntarily disclosing electronic communication information concerning that communication to a law enforcement agency or law enforcement officer.

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

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

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

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

(b) The court may grant extensions of the delay of up to ninety days each on the same grounds as provided in paragraph (a) of this subdivision.

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

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

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

4. Except as otherwise provided in this section, nothing in this article shall prohibit or limit a service provider or any other party from disclosing information about any request or demand for electronic information.

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

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

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

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

4. A state, territory or commonwealth of the United States and foreign and domestic corporations as well as officers, employees, and agents of these entities shall not be subject to a cause of action for providing records, information, facilities, or other forms of assistance in accordance with the terms of a warrant, court order, statutory authorization, emergency certification, or wiretap order issued pursuant to this article. This does not preclude a cause of action for providing records, information, facilities, or other forms of assistance in a 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.

3. Nothing in this article shall prohibit or restrict a service provider from producing an annual report summarizing the demands or requests it receives under this article.

§ 2. This act shall take effect immediately.