

# SENATE . . . . . No. 903

## The Commonwealth of Massachusetts

PRESENTED BY:

***Karen E. Spilka***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to protect electronic privacy.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
<i>Karen E. Spilka</i>	<i>Second Middlesex and Norfolk</i>	
<i>Angelo J. Puppolo, Jr.</i>	<i>12th Hampden</i>	
<i>Bradley H. Jones, Jr.</i>	<i>20th Middlesex</i>	
<i>Michael J. Rodrigues</i>	<i>First Bristol and Plymouth</i>	
<i>Chris Walsh</i>	<i>6th Middlesex</i>	
<i>Jason M. Lewis</i>	<i>Fifth Middlesex</i>	
<i>Aaron Vega</i>	<i>5th Hampden</i>	
<i>Michael J. Barrett</i>	<i>Third Middlesex</i>	
<i>F. Jay Barrows</i>	<i>1st Bristol</i>	
<i>Michael O. Moore</i>	<i>Second Worcester</i>	
<i>Timothy R. Madden</i>	<i>Barnstable, Dukes and Nantucket</i>	
<i>Keiko M. Orrall</i>	<i>12th Bristol</i>	
<i>Kenneth J. Donnelly</i>	<i>Fourth Middlesex</i>	
<i>James B. Eldridge</i>	<i>Middlesex and Worcester</i>	
<i>Mary S. Keefe</i>	<i>15th Worcester</i>	
<i>Marjorie C. Decker</i>	<i>25th Middlesex</i>	
<i>Leonard Mirra</i>	<i>2nd Essex</i>	
<i>Ruth B. Balser</i>	<i>12th Middlesex</i>	

<i>Jeffrey N. Roy</i>	<i>10th Norfolk</i>	
<i>Kay Khan</i>	<i>11th Middlesex</i>	
<i>Carolyn C. Dykema</i>	<i>8th Middlesex</i>	
<i>David M. Rogers</i>	<i>24th Middlesex</i>	
<i>Thomas J. Calter</i>	<i>12th Plymouth</i>	
<i>Thomas M. McGee</i>	<i>Third Essex</i>	
<i>Benjamin B. Downing</i>	<i>Berkshire, Hampshire, Franklin and Hampden</i>	
<i>James E. Timilty</i>	<i>Bristol and Norfolk</i>	
<i>Barbara A. L'Italien</i>	<i>Second Essex and Middlesex</i>	
<i>Daniel A. Wolf</i>	<i>Cape and Islands</i>	
<i>Ryan C. Fattman</i>	<i>Worcester and Norfolk</i>	
<i>Byron Rushing</i>	<i>9th Suffolk</i>	
<i>Brian A. Joyce</i>	<i>Norfolk, Bristol and Plymouth</i>	
<i>Kathleen O'Connor Ives</i>	<i>First Essex</i>	
<i>Timothy J. Toomey, Jr.</i>	<i>26th Middlesex</i>	
<i>Leah Cole</i>	<i>12th Essex</i>	
<i>John F. Keenan</i>	<i>Norfolk and Plymouth</i>	
<i>Sal N. DiDomenico</i>	<i>Middlesex and Suffolk</i>	
<i>Patricia D. Jehlen</i>	<i>Second Middlesex</i>	<i>10/6/2015</i>

# SENATE . . . . . No. 903

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By Ms. Spilka, a petition (accompanied by bill, Senate, No. 903) of Karen E. Spilka, Angelo J. Puppolo, Jr., Bradley H. Jones, Jr., Michael J. Rodrigues and other members of the General Court for legislation to update privacy protections for personal electronic information. The Judiciary.

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[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. 796 OF 2013-2014.]

## The Commonwealth of Massachusetts

\_\_\_\_\_  
In the One Hundred and Eighty-Ninth General Court  
(2015-2016)  
\_\_\_\_\_

An Act to protect electronic privacy.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Section 17B of chapter 271 of the General Laws is hereby repealed.

2           SECTION 2. Chapter 276 of the General Laws is hereby amended by striking section 1B  
3 and replacing it with the following:-

4           Section 1B. (a) As used in this section, the following words shall have the following  
5 meanings:—

6           “Adverse result”, occurs when notification of the existence of a warrant or subpoena  
7 results in:—

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

(2) a flight from prosecution;

(3) the destruction of or tampering with evidence;

(4) the intimidation of a potential witness or witnesses; or

(5) serious jeopardy to an investigation or undue delay of a trial.

“Electronic communication services”, shall be construed in accordance with sections 2701 to 2711 Title 18, of the United States Code. This definition shall not apply to corporations that do not provide electronic communication services to the general public.

“Electronic device”, any device that enables access to, or use of, an electronic communication service, remote computing service or location information service.

“Foreign corporation”, any corporation or other entity that makes a contract or engages in a terms of service agreement with a resident of the commonwealth to be performed in whole or in part by either party in the commonwealth. The making of the contract or terms of service agreement shall be considered to be the agreement of the foreign corporation that a warrant or subpoena which has been properly served on it has the same legal force and effect as if served personally within the commonwealth.

“Location information”, any information concerning the location of an electronic device that, in whole or in part, is generated by or derived from the device or any of its applications.

“Location information service”, a global positioning service or other mapping, locational or directional information service.

“Massachusetts corporation”, any corporation or other entity that is subject to chapter 155 or chapter 156B.

“Personal electronic records”, records hereinafter described in the actual or constructive custody of a Massachusetts or foreign corporation that provide electronic communication services, remote computing services or location information services:--

(1) records which, alone or in combination, could reveal the identity of a customer using those services ;

(2) data stored by or on behalf of a customer;

(3) records of a customer’s use of those services;

(4) means and source of payment for such services, including any credit card or bank account number;

(5) records of the source of communications sent to a customer, or records of the recipient of communications sent from a customer;

(6) any content of communications stored by an electronic communication or remote computing service;

(7) internet protocol addresses; or

(8) location information.

“Properly served”, delivery of a warrant or subpoena by hand, by United States mail, by commercial delivery service, by facsimile or by electronic communication to any officer of a corporation or its general manager in the commonwealth, to any natural person designated by it

as agent for the service of process, or if such corporation has designated a corporate agent, to any person named in the latest certificate filed pursuant to section 15.03 of chapter 156D.

“Remote computing services”, shall be construed in accordance with sections 2701 to 2711, inclusive, of Title 18, of the United States Code. This definition shall not apply to corporations that do not provide those services to the general public.

“Subpoena”, a grand jury or trial subpoena issued in the course of a criminal proceeding.

(b) A government office or public official may obtain personal electronic records only with a valid warrant or subpoena issued pursuant to this section. Upon complaint on oath that the complainant believes (i) that particular identified personal electronic records are in the actual or constructive custody of a Massachusetts or foreign corporation, and (ii) that such records or information constitute evidence of or the means or instrumentalities of the commission of a specified criminal offense under the laws of the commonwealth, a justice of the superior court may, if satisfied that there is probable cause for such beliefs, issue a warrant identifying those records to be sought and authorizing the person making application for the warrant to properly serve the warrant upon the corporation and to take all other actions prescribed by this section.

(c) The following provisions shall apply to any warrant issued pursuant to this section:

(1) when properly served with a warrant issued by a court of the commonwealth or by a justice of the superior court of the commonwealth pursuant to this section or with a subpoena, a corporation subject to this section shall provide all records sought pursuant to that warrant or subpoena within 14 days of receipt, including those records maintained or located outside the commonwealth;

(2) if the applicant makes a showing and the court or justice finds that failure to produce records within less than 14 days would cause an adverse result, a warrant may require production of records within less than 14 days;

(3) a court or justice may reasonably extend the time required for production of the records upon finding that the corporation has shown good cause for that extension and that an extension of time would not cause an adverse result;

(4) a corporation seeking to quash a warrant served on it pursuant to this section shall seek relief from the court that issued the warrant within the time required for production of records pursuant to this section. The court shall hear and decide such motion not later than 14 days after the motion is filed; and

(5) the corporation shall verify the authenticity of records that it produces by providing an affidavit from the person in custody of those records certifying that they are true and complete.

(d) No cause of action shall lie against any foreign or Massachusetts corporation subject to this section, its officers, employees, agents or other persons for providing records, information, facilities or assistance in accordance with the terms of a warrant or subpoena issued pursuant to this section.

(e) Warrants or subpoenas issued under this section shall designate the corporation or other entity in possession of the records or data sought and shall describe, with particularity, the record systems and information to be provided. Warrants shall be issued in the form and manner prescribed in sections 2A½ and 2B, in so far as they are applicable, and shall be directed to the government office or public official making application for the warrant, which shall serve the warrant upon the corporation or other entity.

(f) Not later than 7 days after personal electronic records are obtained by a government office or public official pursuant to a warrant or subpoena under this section, that office or official shall serve upon, or deliver by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective as specified by the court (i) a copy of the warrant and the application for the warrant, or (ii) a copy of the subpoena, and notice that informs the customer or subscriber of the following:

(1) the nature of the law enforcement inquiry with reasonable specificity;

(2) that information maintained for the customer or subscriber by the provider of an electronic communications service, remote computing service or location information service was requested by or supplied to that government office or public official, and a description of that information;

(3) the dates on which the request was made and on which the information was supplied;

(4) whether notification of the customer or subscriber was delayed under subsection (h);  
and

(5) the court which made the certification or determination authorizing that delay, if applicable.

(g) A government office or public official may request an order delaying the notification required under subsection (f) for a period not to exceed 90 days, and the court shall issue the order if it determines there is reason to believe based on articulated facts that notification may have an adverse result. Upon expiration of any period of delay granted under this subsection, the



111 government office or public official shall provide the customer or subscriber the notice as  
112 described in subsection (f).

113 (h) A government office or public official may request an order directing a corporation to  
114 which a warrant or subpoena is directed not to notify any other person of the existence of the  
115 warrant or subpoena for a period of not more than 90 days, and the court shall issue the order if  
116 the court determines that there is reason to believe based on articulated facts that notification will  
117 have an adverse result.

118 (i) The court may, upon application, grant one or more extensions of orders granted under  
119 subsections (g) and (h) for an additional 90 days if the court determines that there is reason to  
120 believe based on articulated facts that notification will have an adverse result.

121 (j) Notwithstanding any general or special law to the contrary, a government office or  
122 public official may obtain personal electronic records:

123 (1) with the specific contemporaneous consent of the owner or user of the electronic  
124 communications device concerned;

125 (2) in order to respond to the user's call or request for emergency services; or

126 (3) if it reasonably believes that an emergency involving immediate danger of death or  
127 serious physical injury to any person requires obtaining without delay information relating to the  
128 emergency; provided, however, that the request is narrowly tailored to address the particular  
129 emergency and subject to the following:

(i) the request shall document the factual basis for believing that an emergency involving immediate danger of death or serious physical injury to a person requires obtaining the information relating to the emergency without delay; and

(ii) not later than 48 hours after obtaining access to records, the applicant government office shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the office setting forth the grounds for the emergency access.

(k) On the second Friday of January of each calendar year, any judge issuing or denying an emergency request pursuant to subsection (j), a subpoena, or a warrant under this section during the preceding calendar year shall report on each to the office of court management within the trial court:

(1) the fact that the warrant, subpoena, or emergency request was applied for;

(2) the identity of the agency making the application;

(3) the offense specified;

(4) the nature of the facilities from which or the place where the information was to be obtained;

(5) the fact that the warrant, subpoena, or emergency request was granted as applied for, was modified or was denied;

(6) the period of disclosures authorized, and the number and duration of any extensions; and

(7) any order directing delayed notification.

150 In June of each year, beginning in 2016, the court administrator in the office of court  
151 management within the trial court shall transmit to the legislature a full and complete report  
152 concerning the number of applications for warrants authorizing or requiring the disclosure of  
153 personal electronic records under this act. The reports shall include a summary and analysis of  
154 the data required to be filed with that office. The reports shall be filed with the offices of the  
155 clerk of the house and the senate and shall be public records. The court administrator in the  
156 office of court management within the trial court shall issue guidance regarding the form of the  
157 reports.

158 (l) Except in a judicial proceeding alleging a violation of this section, no information  
159 obtained in violation of this section shall be admissible in any criminal, civil, administrative or  
160 other proceeding.

161 SECTION 3. Chapter 276 is hereby amended by inserting after section 2A the following  
162 section:-

163 Section 2A½. A warrant for personal electronic records shall be in substantially the  
164 following form:

165 THE COMMONWEALTH OF MASSACHUSETTS.

166 (COUNTY), ss.

(NAME) COURT.

167 To the (person or persons or offices authorized to execute the warrant issued under  
168 section 1B of chapter 276 of the general Laws)

169 Proof by affidavit having been made this day before (name of person authorized to issue  
170 warrant) by (names of person or persons whose affidavits have been taken) that there is probable

171 cause for believing that certain records or data in the possession of (identify corporation)  
172 constitute evidence of or the means or instrumentalities of the commission of (specified criminal  
173 offense under the laws of the commonwealth).

174 We therefore command you to present this warrant to (identify corporation), which  
175 warrant shall operate as an order for the provision of the following records or data:

176 (description of particular records or data),

177 and if any such records or data are provided to bring it before (court having jurisdiction)  
178 at (name of court and location).

179 Dated at (city or town) this \_\_\_\_\_ day of \_\_\_\_\_, (insert year).

180 Clerk.

181 SECTION 4. Section 2B of said chapter 276, as appearing in the 2012 Official Edition,  
182 is hereby amended by striking clauses 3 and 4 of the affidavit form and inserting in place thereof  
183 the following:-

184 3. Based upon the foregoing reliable information (and upon my personal knowledge)  
185 there is probable cause to believe that the property, records or data hereinafter described (has  
186 been stolen, or is being concealed, or constitutes evidence of a particular offense, etc.) and may  
187 be found (in the possession of A. B. or any other person or corporation) at premises (identify).

188 4. The (property, records, or data) for which I seek issuance of a warrant is the following:  
189 (here describe the property, records, or data as particularly as possible).

190           SECTION 5. Section 3A of said chapter 276, as so appearing, is hereby amended by  
191 inserting after the word “search”, in line 1, the following words:- or to obtain electronic  
192 communication, remote computing or location information records.

193           SECTION 6. Said section 3A of said chapter 276, as so appearing, is hereby further  
194 amended by striking out, in line 6, the word “search”.