

SENATE No. 796

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 updating privacy protections for personal electronic information.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: |
|--------------------------------|--|
| <i>Karen E. Spilka</i> | <i>Second Middlesex and Norfolk</i> |
| <i>Martha M. Walz</i> | <i>8th Suffolk</i> |
| <i>William N. Brownsberger</i> | <i>Second Suffolk and Middlesex</i> |
| <i>Kay Khan</i> | <i>11th Middlesex</i> |
| <i>Chris Walsh</i> | <i>6th Middlesex</i> |
| <i>James J. O'Day</i> | <i>14th Worcester</i> |
| <i>Michael Barrett</i> | <i>Third Middlesex</i> |
| <i>Timothy J. Toomey, Jr.</i> | <i>26th Middlesex</i> |
| <i>Sal N. DiDomenico</i> | <i>Middlesex and Suffolk</i> |
| <i>Brian R. Mannel</i> | <i>2nd Barnstable</i> |
| <i>Sonia Chang-Diaz</i> | <i>Second Suffolk</i> |
| <i>Kenneth J. Donnelly</i> | <i>Fourth Middlesex</i> |
| <i>Ryan C. Fattman</i> | <i>18th Worcester</i> |
| <i>Christopher G. Fallon</i> | <i>33rd Middlesex</i> |
| <i>Sheila C. Harrington</i> | <i>1st Middlesex</i> |
| <i>John V. Fernandes</i> | <i>10th Worcester</i> |
| <i>Diana DiZoglio</i> | <i>14th Essex</i> |
| <i>Timothy R. Madden</i> | <i>Barnstable, Dukes and Nantucket</i> |

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| <i>Benjamin B. Downing</i> | <i>Berkshire, Hampshire, Franklin and Hampden</i> |
| <i>Carolyn C. Dykema</i> | <i>8th Middlesex</i> |
| <i>Patricia D. Jehlen</i> | <i>Second Middlesex</i> |
| <i>Michael O. Moore</i> | <i>Second Worcester</i> |
| <i>Denise Andrews</i> | <i>2nd Franklin</i> |
| <i>Denise Provost</i> | <i>27th Middlesex</i> |
| <i>F. Jay Barrows</i> | <i>1st Bristol</i> |
| <i>Ellen Story</i> | <i>3rd Hampshire</i> |
| <i>Thomas P. Conroy</i> | <i>13th Middlesex</i> |
| <i>Sean Garballey</i> | <i>23rd Middlesex</i> |
| <i>James B. Eldridge</i> | <i>Middlesex and Worcester</i> |
| <i>Paul R. Heroux</i> | <i>2nd Bristol</i> |
| <i>Stephen M. Brewer</i> | <i>Worcester, Hampden, Hampshire and Middlesex</i> |
| <i>Thomas M. McGee</i> | <i>Third Essex</i> |
| <i>Brian A. Joyce</i> | <i>Norfolk, Bristol and Plymouth</i> |
| <i>Byron Rushing</i> | <i>9th Suffolk</i> |
| <i>Katherine M. Clark</i> | <i>Fifth Middlesex</i> |

SENATE No. 796

By Ms. Spilka, a petition (accompanied by bill, Senate, No. 796) of Karen E. Spilka, Martha M. Walz, William N. Brownsberger, Kay Khan and other members of the General Court for legislation to update privacy protections for personal electronic information. The Judiciary.

The Commonwealth of Massachusetts

—————
In the Year Two Thousand Thirteen
—————

An Act updating privacy protections for personal electronic information.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to protect the privacy of personal electronic information, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience., therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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 1B of chapter 276 of the General Laws, as appearing in the 2010
2 Official Edition, is hereby amended by inserting after the definition of “electronic
3 communication services” the following definition:-

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

6 SECTION 2. Said section 1B of said chapter 276, as so appearing, is hereby further
7 amended by inserting after the definition of “foreign corporation” the following definitions:-

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

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

12 SECTION 3. Subsection (b) of said section 1B of said chapter 276, as so appearing, is
13 hereby amended by striking out the language in lines 38 to 45, inclusive, and inserting in place
14 thereof the following:-

15 (b) A court or justice authorized to issue warrants in criminal cases may, upon complaint
16 on oath that the complainant believes

17 (i) that particular identified records or information hereinafter described are
18 actually or constructively possessed by a Massachusetts or foreign corporation that provides
19 electronic communication services, remote computing services or location information services,
20 and

21 (ii) that such records or information constitute evidence of or the means or
22 instrumentalities of the commission of a specified criminal offense under the laws of the
23 commonwealth, if satisfied that there is probable cause for such beliefs, issue a warrant
24 identifying those records to be searched for and commanding the person making application for
25 the warrant to properly serve the warrant upon the corporation and take all other actions
26 prescribed by this section:-

27 SECTION 4. Said subsection (b) of said section 1B of said chapter 276, as so appearing,
28 is hereby further amended by striking out, in line 51, the word “or”.

29 SECTION 5. Said subsection (b) of said section 1B of said chapter 276, as so appearing,
30 is hereby further amended by striking out paragraph (5) and inserting in place thereof the
31 following:-

32 (5) the content of those communications stored by an electronic communication or
33 remote computing service; or

34 (6) location information.

35 SECTION 6. Subsection (c) of said section 1B of said chapter 276, as so appearing, is
36 hereby amended by striking out the language in lines 54 to 58, inclusive, and inserting in place
37 thereof the following:-

38 (c) The following provisions shall apply to any search warrant issued under this section
39 and to any subpoena issued in the course of a criminal investigation or proceeding directed to a
40 Massachusetts or foreign corporation that provides electronic communication services, remote
41 computing services or location information services:

42 SECTION 7. Said subsection (c) of said section 1B of said chapter 276, as so appearing,
43 is hereby further amended by striking out, in lines 61, 69, 72 and 83, the word “foreign”.

44 SECTION 8. Said section 1B of said chapter 276, as so appearing, is hereby further
45 amended by adding the following:-

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

52 (g) Not later than 7 days after information described in paragraphs (1) to (6), inclusive, of
53 subsection (b) is obtained by a government office or public official under this section, that office
54 or official shall serve upon, or deliver by registered or first-class mail, electronic mail, or other
55 means reasonably calculated to be effective as specified by the court issuing the warrant to the
56 customer or subscriber a copy of the warrant, a copy of the application for the warrant and notice
57 that informs the customer or subscriber of the following:

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

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

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

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

67 (5) which court made the certification or determination under which that delay was
68 made, if applicable.

69 (h) A government office or public official may include in its application for a warrant a
70 request for an order delaying the notification required under subsection (g) for a period not to
71 exceed 90 days, and the court shall issue the order if it determines there is reason to believe that
72 notification of the existence of the warrant may have an adverse result. Upon expiration of any
73 period of delay granted under this subsection, the government office or public official shall
74 provide the customer or subscriber a copy of the warrant together with notice required under, and
75 by the means described in, subsection (g).

76 (i) A government office or public official may include in its application for a warrant a
77 request for an order directing a corporation to which a warrant is directed not to notify any other
78 person of the existence of the warrant for a period of not more than 90 days, and the court shall
79 issue the order if the court determines that there is reason to believe that notification of the
80 existence of the warrant will have an adverse result.

81 (j) The court may, upon application, grant 1 or more extensions of orders granted under
82 subsections (h) and (i) for an additional 90 days.

83 (k) Notwithstanding any general or special law to the contrary, a government office or
84 public official may obtain information described in paragraphs (1) to (6), inclusive, of subsection
85 (b):

86 (1) with the express consent of the owner or user of the electronic communications
87 device concerned;

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

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

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

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

99 (l) On the second Friday of January of each calendar year, any judge issuing or denying a
100 warrant under this section during the preceding calendar year shall report on each such warrant
101 to the office of court management within the trial court:

102 (1) the fact that the warrant was applied for;

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

104 (3) the offense specified in the warrant or application therefor;

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

107 (5) the fact that the warrant was granted as applied for, was modified or was denied;
108 and

109 (6) the period of disclosures authorized by the warrant, and the number and duration
110 of any extensions of the warrant.

111 In June of each year, beginning in 2014, the court administrator in the office of court
112 management within the trial court shall transmit to the legislature a full and complete report

113 concerning the number of applications for warrants authorizing or requiring the disclosure of
114 information described in paragraphs (1) to (6), inclusive, of subsection (b) under this act. The
115 reports shall include a summary and analysis of the data required to be filed with that office. The
116 reports shall be filed with the offices of the clerk of the house and the senate and shall be public
117 records. The court administrator in the office of court management within the trial court shall
118 issue guidance regarding the form of the reports.

119 (m) Except in a judicial proceeding alleging a violation of this section, no information
120 obtained in violation of this section shall be admissible in any criminal, civil, administrative or
121 other proceeding.

122 SECTION 9. Chapter 276 is hereby amended by inserting after section 2A the following
123 section:-

124 Section 2A½. A warrant for records or data from a corporation providing electronic
125 communication services, remote computing services or location information services shall be in
126 substantially the following form:

127 THE COMMONWEALTH OF MASSACHUSETTS.

128 (COUNTY), ss. (NAME) COURT.

129 To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any
130 Constable or Police Officer of any city or town, within our said Commonwealth.

131 Proof by affidavit having been made this day before (name of person authorized to issue
132 warrant) by (names of person or persons whose affidavits have been taken) that there is probable
133 cause for believing that certain records or data in the possession of (identify corporation)
134 constitute evidence of or the means or instrumentalities of the commission of (specified criminal
135 offense under the laws of the commonwealth).

136 We therefore command you to present this warrant to (identify corporation), which
137 warrant shall operate as an order for immediate disclosure of the following records or data:

138 (description of records or data),

139 and if any such records or data are disclosed to bring it before (court having jurisdiction)
140 at (name of court and location).

141 Dated at (city or town) this _____ day of _____, (insert year).

142 Clerk.

143 SECTION 10. Section 2B of said chapter 276, as appearing in the 2010 Official Edition,
144 is hereby amended by striking clauses 3 and 4 of the model affidavit and inserting in place
145 thereof the following:-

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

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

152 SECTION 11. Section 3A of said chapter 276, as so appearing, is hereby amended by
153 inserting after the word “search”, in line 1, the following words:- or to obtain electronic
154 communication, remote computing or location information records.

155 SECTION 12. Said section 3A of said chapter 276, as so appearing, is hereby further
156 amended by striking out, in line 6, the word “search”.