

STATE OF MAINE

KATHRYN SLATTERY
DISTRICT I

JACQUELINE SARTORIS
DISTRICT II

NEIL MCLEAN
DISTRICT III

MAEGHAN MALONEY
DISTRICT IV



R. CHRISTOPHER ALMY
DISTRICT V

NATASHA IRVING
DISTRICT VI

ROBERT GRANGER
DISTRICT VII

TODD R. COLLINS
DISTRICT VIII

MAINE PROSECUTORS ASSOCIATION
ANDREW BERGGREN, ASSISTANT DISTRICT ATTORNEY

“An Act to Update the Laws Governing Electronic Device Information as Evidence”
and

“An Act Restricting State Assistance in Federal Collection of
Personal Electronic Data and Metadata”

Before the Joint Standing Committee on Judiciary
Testimony in Opposition of LD 1576 and LD 1056

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary. My name is Andrew Berggren, I am an Assistant District Attorney in Prosecutorial District I, York County, I represent the Maine Prosecutors Association and I am testifying in opposition of LD 1576 and LD 1056.

On September 11, 2023, the Joint Standing Committee on Judiciary posed four questions to be answered in considering both LD 1576 and LD 1056. Below are specific responses to the questions.

1. Electronic Communication Data vs. Metadata

Under Maine Law, there are no definitions of either electronic communication data or metadata. The types of data that are defined and generally fit under those two terms are defined as:

Content Information – any information concerning the substance, purport or meaning of a communication. 16 M.R.S. § 641.

Location Information – information concerning the location of an electronic device, including both the current location and any prior location of that device, that in whole or in part is generated, derived from, or obtained by the operation of an electronic device. 16 M.R.S. § 647.

Subscriber Information – No specific provision under Maine law defines subscriber records, however, under federal law, 18 USC § 2703(c)(2), subscriber records are narrowly defined as:

- Name / Address / Local and Long-Distance Telephone Records or records of session times and durations.
- Length of Service
- Telephone or Instrument Number or temporarily assigned network numbers, commonly referred to as IP addresses.
- Means and Sources of payment for such services. (Card Number or a Bank Account Number).

So-called “metadata” is not a defined term under federal or Maine law. Metadata is the information about the information. Examples of this include the GPS data that is digitally stamped to a photo taken by a cell phone, the device location when a phone call was made, what cell phone towers were being used to triangulate a call. However, a more specific definition is difficult to provide because the stored metadata

will always be predicated on the manufacturer and service providers ability to store, capture or log information.

2. Law Enforcement Access to Electronic Communication Data vs. Metadata under current state and federal law?

Under Maine law, access to either content information or location information can only be obtained pursuant to a search warrant or a statutory exception¹.

Currently, law enforcement agencies can obtain subscriber records pursuant to either a search warrant, a grand jury subpoena (issued by either the local District Attorney's Office or the Office of the Attorney General) or by an exception. The standard to issue such a subpoena is a legitimate investigation.

The other way subscriber records can be obtained is if a third party provides records to law enforcement, this is generally done pursuant to the provider's privacy policy when a user violates the provider's terms of usage.

3. The Third-Party Doctrine

How does the third-party doctrine impact law enforcement access to data and metadata?

The Third-party doctrine impacts access to both subscriber information as well as content. The doctrine is the legal precedent in a series of U.S. Supreme Court cases that say, generally, where an individual conveys to a third-party certain information, that individual no longer has a reasonable expectation of privacy in that information and, as such, a warrant is not required in order to review the information. For example, banking records is the written data compiled by a bank about an individual's financial dealings with that institution. The doctrine allows those records to be provided to prosecutors through either a search warrant or a grand jury subpoena.

This precedent also forms the basis of the second way that certain subscriber records can be provided to law enforcement which is in the form of tips or reports to organizations such as the National Center for Missing & Exploited Children (NCMEC) made directly by the third party (i.e. Google, Yahoo etc.). The Doctrine in sum and substance allows a company to provide information about a customer if that customer is using the company's service to commit a crime, (theft, sexual exploitation of minors, etc). If a company learns their services are being used in furtherance of a crime, they can pursuant to their privacy policy provide information about the user to law enforcement. The doctrine applies here where an individual is using a service provider to view or disseminate Child Sexual Abuse Material (CSAM), the provider can provide certain information to investigators.

4. Implementation Concerns

From a prosecuting attorney's perspective, education is a significant concern. The definitions used in both bills leave many questions about what meets these proposed statutory definitions. They are not consistent with federal law and because of the ambiguity, the ability for DAs and ADAs to provide consistent education, feedback and advice when reviewing search warrants will be incredibly difficult. The current

¹ The exceptions for content information are consent of the user, if the information was provided in a public setting (i.e., a Facebook post on a public page visible to all users) or an emergency. 16 M.R.S. § 644.

For location information the exceptions are 1) use by emergency services, 2) consent of the owner or user, 3) the consent of a family member or 4) the reasonable belief of imminent danger of death or serious injury. 16 M.R.S. § 650.

legal definitions are simple to understand (not to be confused with basic or lacking) and allow for prosecutors to give consistent guidance in reviewing legal process in investigations.

Andrew Berggren, Esq.
Assistant District Attorney
Maine Prosecutors Association
aeberggren@yorkcountymaine.gov