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JUDICIARY

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**STATE OF MAINE
SENATE
126TH LEGISLATURE
FIRST REGULAR SESSION**

COMMITTEE AMENDMENT “ ” to S.P. 484, L.D. 1377, Bill, “An Act To Protect Cellular Telephone Privacy”

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

Sec. 1. 16 MRSA c. 3, sub-c. 10 is enacted to read:

SUBCHAPTER 10

PORTABLE ELECTRONIC DEVICE CONTENT INFORMATION

§641. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

- 1. Adverse result.** "Adverse result" means:
 - A. Immediate danger of death or serious physical injury;
 - B. Flight from prosecution;
 - C. Destruction of or tampering with evidence;
 - D. Intimidation of a potential witness;
 - E. Substantially jeopardizing an investigation; or
 - F. Undue delay of a trial.

2. Content information. "Content information," when used with respect to any wire, oral or electronic communication, includes any information concerning the substance, purport or meaning of that communication.

COMMITTEE AMENDMENT

1 **3. Electronic communication service.** "Electronic communication service" means a
2 service that provides to users the ability to send or receive spoken or electronic
3 communications.

4 **4. Government entity.** "Government entity" means a state or local government
5 agency, including but not limited to a law enforcement entity or any other investigative
6 entity, agency, department, division, bureau, board or commission or an individual acting
7 or purporting to act for or on behalf of a state or local government agency.

8 **5. Owner.** "Owner" means the person or entity having the legal title, claim or right
9 to a portable electronic device.

10 **6. Portable electronic device.** "Portable electronic device" means a portable device
11 that enables access to, or use of, an electronic communication service or remote
12 computing service.

13 **7. Remote computing service.** "Remote computing service" means computer
14 storage or processing services provided by means of an electronic communication
15 service.

16 **8. User.** "User" means a person or entity that uses a portable electronic device.

17 **§642. Authority to obtain and disclose content information**

18 **1. Authority to obtain.** A government entity may obtain portable electronic device
19 content information only in accordance with a valid warrant issued by a duly authorized
20 judge or justice using procedures established pursuant to Title 15, section 55 or as
21 otherwise provided in this subchapter.

22 **2. Authority to disclose.** A provider of an electronic communication service may
23 disclose portable electronic device content information to a government entity only
24 pursuant to a warrant issued by a duly authorized judge or justice or as otherwise
25 provided in this subchapter.

26 **§643. Notice**

27 Notice must be given to the owner or user of a portable electronic device whose
28 content information was obtained by a government entity.

29 **1. Timing and content of notice.** Unless delayed notice is ordered under subsection
30 2, the government entity shall provide notice to the owner or user that content
31 information was obtained by the government entity from that owner's or user's portable
32 electronic device within 10 days of obtaining the content information. The notice must be
33 made by service or delivered by registered or first-class mail, e-mail or any other means
34 reasonably calculated to be effective as specified by the court issuing the warrant. The
35 notice must contain the following information:

36 A. The nature of the law enforcement inquiry, with reasonable specificity;

37 B. The content information of the owner or user that was supplied to or requested by
38 the government entity and the date on which it was provided or requested;

39 C. If content information was obtained from a provider of an electronic
40 communication service or other 3rd party, the identity of the provider of the

1 electronic communication service or the 3rd party from whom the information was
2 obtained; and

3 D. Whether the notification was delayed pursuant to subsection 2 and, if so, the court
4 that granted the delay and the reasons for granting the delay.

5 **2. Delay of notification.** A government entity acting under section 642 may include
6 in the application for a warrant a request for an order to delay the notification required
7 under this section for a period not to exceed 90 days. The court shall issue the order if the
8 court determines that there is reason to believe that notification may have an adverse
9 result. Upon expiration of the period of delay granted under this subsection and any
10 extension granted under subsection 4, the government entity shall provide the owner or
11 user with a copy of the warrant together with a notice pursuant to subsection 1.

12 **3. Preclusion of notice to owner or user subject to warrant for content**
13 **information.** A government entity acting under section 642 may include in its
14 application for a warrant a request for an order directing a provider of an electronic
15 communication service to which a warrant is directed not to notify any other person of
16 the existence of the warrant for a period of not more than 90 days. The court shall issue
17 the order if the court determines that there is reason to believe that notification of the
18 existence of the warrant may have an adverse result.

19 **4. Extension.** The court, upon application, may grant one or more extensions of
20 orders granted under subsection 2 or 3 for up to one additional year.

21 **§644. Exceptions**

22 **1. Consent of owner or user.** When disclosure of portable electronic device content
23 information is not prohibited by federal law, a government entity may obtain the
24 information without a warrant with the informed, affirmative consent of the owner or user
25 of the portable electronic device concerned, except when the device is known or believed
26 by the owner or user to be in the possession of a 3rd party known to the owner or user.

27 **2. Emergency.** When a government entity cannot, with due diligence, obtain a
28 warrant in time to address an emergency that involves or is believed to involve an
29 imminent threat to life or safety, a government entity may obtain the content information
30 from a portable electronic device without a warrant, and a provider of an electronic
31 communication service may disclose such information to the requesting government
32 entity without a warrant.

33 **§645. Conditions of use of content information**

34 **1. Use of content information obtained in violation of this subchapter not**
35 **admissible.** Except as proof of a violation of this subchapter, evidence obtained in
36 violation of this subchapter is not admissible in a criminal, civil, administrative or other
37 proceeding.

38 **2. Conditions of use of content information in proceeding.** Portable electronic
39 device content information obtained pursuant to this subchapter or evidence derived from
40 that content information may be received in evidence or otherwise disclosed in a trial,
41 hearing or other proceeding only if each party, not less than 10 days before the trial,

1 hearing or proceeding, has been furnished with a copy of the warrant and accompanying
2 application under which the content information was obtained.

3 **3. Ten-day requirement; exception.** The 10-day requirement under subsection 2
4 may be waived if a judge or justice makes a finding that it is not possible to provide a
5 party with the warrant and accompanying application 10 days prior to a trial, hearing or
6 proceeding and that the party will not be prejudiced by the delay in receiving the content
7 information.

8 **§646. Violations; private actions; enforcement**

9 **1. Civil suit authorized.** A person damaged as a result of a violation of this
10 subchapter has a cause of action in Superior Court against the provider of an electronic
11 communication service that disclosed portable electronic device content information in
12 violation of this subchapter, and, in addition to actual damages, costs and attorney's fees,
13 the court may award statutory damages in an amount not to exceed \$5,000. A suit
14 authorized under this section may not be maintained by any person who has sought or is
15 seeking civil damages under federal law for the same disclosure.

16 **2. Exceptions.** No cause of action may be brought against any provider of an
17 electronic communication service or its officers, employees, agents or other specified
18 persons for providing any information, facilities or assistance to a law enforcement
19 officer or agency in response to a warrant, whether properly issued or not, or with the
20 affirmative consent of the apparent owner or user of the portable electronic device or in
21 response to an emergency request made by a government entity claiming authority to
22 make the request under this subchapter.

23 **3. Limitation.** A civil action under this subchapter may not be commenced later
24 than 2 years after the date upon which the claimant first discovered or had a reasonable
25 opportunity to discover the violation.

26 **4. Injunctive relief.** A person damaged as a result of a violation of this subchapter
27 has a cause of action in court against a government entity that fails to comply with the
28 provisions of this subchapter, and the court may award injunctive relief.

29 **5. Attorney General.** The Attorney General may enforce the provisions of this
30 subchapter.

31 **Sec. 2. Appropriations and allocations.** The following appropriations and
32 allocations are made.

33 **ATTORNEY GENERAL, DEPARTMENT OF THE**

34 **Administration - Attorney General 0310**

35 Initiative: Provides funds for 2 Research Assistant positions and related costs to manage
36 the notification provisions of this Act.

| | | | |
|----|-------------------------------|----------------|----------------|
| 37 | GENERAL FUND | 2013-14 | 2014-15 |
| 38 | POSITIONS - LEGISLATIVE COUNT | 2,000 | 2,000 |
| 39 | Personal Services | \$92,542 | \$128,851 |

| | | | |
|---|--------------------|------------------|------------------|
| 1 | All Other | \$7,801 | \$5,068 |
| 2 | | | |
| 3 | GENERAL FUND TOTAL | <u>\$100,343</u> | <u>\$133,919</u> |
| 4 | | | |

SUMMARY

6 This amendment is the minority report of the Joint Standing Committee on Judiciary.
7 It replaces the bill.

8 This amendment enacts provisions governing the disclosure of information regarding
9 the content of communications conveyed using portable electronic devices such as
10 cellular telephones. This amendment prohibits a government entity from obtaining
11 content information concerning the substance, purport or meaning of the communication
12 conveyed using a cellular telephone or other portable electronic device without a valid
13 warrant, except that a government entity may obtain such information with the consent of
14 the owner or user of the portable electronic device or in an emergency.

15 This amendment requires a government entity to inform the owner or user of a
16 portable electronic device that content information was obtained from that person's device
17 within 10 days of obtaining the information, unless the court determines there is good
18 cause to delay this notification. The delay may be for a period of up to 90 days. The
19 government entity may request subsequent delays for up to one additional year. The
20 government entity may also request that the court order the provider of an electronic
21 communication service that is subject to the warrant not to notify any person about the
22 existence of the warrant for the same time periods.

23 This amendment provides that, except as proof of a violation of the new provisions,
24 evidence obtained in violation of the provisions is not admissible in a criminal, civil,
25 administrative or other proceeding. Content information may be received in evidence or
26 otherwise disclosed in a proceeding only if each party has been furnished with a copy of
27 the warrant and accompanying application under which the content information was
28 obtained at least 10 days before the proceeding, unless the 10-day requirement is waived
29 by the court.

30 This amendment provides that a person damaged as a result of a violation of these
31 provisions has a cause of action in Superior Court against the provider of an electronic
32 communication service that disclosed portable electronic device content information in
33 violation of these provisions, and, in addition to actual damages, costs and attorney's fees,
34 the court may award statutory damages in an amount not to exceed \$5,000. There is no
35 liability if the action taken was in response to a warrant or with the affirmative consent of
36 the apparent owner or user of the portable electronic device. The amendment also
37 provides that a person damaged as a result of a violation of these provisions has a cause
38 of action in court against a government entity that fails to comply with these provisions,

1 and the court may award injunctive relief. Finally, the bill authorizes the Attorney
2 General to enforce these provisions.

3 The amendment also adds an appropriations and allocations section.

4 **FISCAL NOTE REQUIRED**

5 **(See attached)**