

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND SEVENTEEN

H.P. 246 - L.D. 332

**An Act Regarding Service of Criminal Process on Electronic Communication
Service Providers and Remote Computing Service Providers**

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the business of electronic communication service providers and remote computing service providers is growing rapidly and their involvement with the criminal justice system is increasing; and

Whereas, for the purposes of the timely administration of criminal justice in this State, amendments to current law are needed immediately to explicitly provide a procedure for the service of criminal process on foreign and domestic entities that are providers of electronic communication service and providers of remote computing service; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §113, sub-§6 is enacted to read:

6. Service of criminal process on providers of electronic communication service or providers of remote computing service. A commercial clerk or registered agent of a provider is an agent of the provider authorized to receive service of a grand jury subpoena or a search warrant required or permitted by law to be served on the entity. Service of criminal process must be accomplished as provided in this subsection.

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

(1) "Criminal process" means a grand jury subpoena or search warrant issued pursuant to this section, Title 15, section 55 or 56 or Rule 17 or 17A of the Maine Rules of Unified Criminal Procedure.

(2) "Electronic communication service" means a service that provides to users the ability to send or receive spoken, wire or electronic communications.

(3) "Electronic communication service provider" or "provider of electronic communication service" means an entity that provides electronic communication service to the general public.

(4) "Provider" means an electronic communication service provider or a remote computing service provider.

(5) "Remote computing service" means computing storage or processing services provided by means of an electronic communication service.

(6) "Remote computing service provider" or "provider of remote computing service" means an entity that provides remote computing service to the general public.

(7) "Service of criminal process" means any service of a grand jury subpoena or search warrant.

B. The authority granted in this subsection applies to criminal process served pursuant to Title 15, section 55 or 56, Rule 17 or 17A of the Maine Rules of Unified Criminal Procedure or any other provision of state or federal law upon a provider in accordance with paragraph C.

C. For purposes of this subsection, criminal process is properly served if it is:

(1) Delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service or facsimile to a commercial clerk or commercial registered agent as provided in section 106; section 107, subsection 4; or this section;

(2) Delivered by specific means identified by the provider for service of criminal process, including, but not limited to, e-mail, facsimile or submission via an Internet web portal; or

(3) Delivered to the provider's place of business within the State.

If service is made pursuant to subparagraph (1) or (3) and the provider promptly notifies the law enforcement agency of the specific means of service identified by the provider pursuant to subparagraph (2) for criminal process, service must be made by the means of service specified by the provider if possible.

D. Service of criminal process pursuant to this section governs party and nonparty recipients.

Sec. 2. 15 MRSA §55, as amended by PL 1995, c. 388, §3 and affected by §8, is further amended to read:

§55. Search warrants; issuance by justice, judge or justice of the peace

A justice of the Superior Court, a judge of the District Court or a justice of the peace shall issue search warrants for any place in the State for such purposes as the Constitution of the United States and the Constitution of Maine permit, including with respect to any violation over which the Passamaquoddy Tribe or the Penobscot Nation or the Houlton Band of Maliseet Indians exercises exclusive jurisdiction under Title 30, section 6209-A or 6209-B or 6209-C. The evidence presented to the magistrate in support of the search warrant may consist of affidavits and other evidence under oath or affirmation that is capable of being reduced to a record for purposes of review. The Supreme Judicial Court shall by rule provide the procedure of the application for and issuance of search warrants; provided that, when no procedure is specified by the Supreme Judicial Court, the justice, judge or justice of the peace shall proceed in any reasonable manner that will allow the issuance of a search warrant for any constitutional purpose. A justice, a judge or a justice of the peace shall issue a search warrant for a domestic or foreign entity that is a provider of electronic communication service or a provider of remote computing service in accordance with the provisions of this section and section 56.

Sec. 3. 15 MRSA §56 is enacted to read:

§56. Service of criminal process on providers of electronic communication service or providers of remote computing service

The following provisions apply to a service of criminal process on an electronic communication service provider and a remote computing service provider that are domestic or foreign entities.

1. Definitions. As used in this section, unless the context otherwise indicates, the following words have the following meanings.

A. "Adverse result" means:

- (1) Immediate danger of death or serious physical injury;
- (2) Flight from prosecution;
- (3) Destruction of or tampering with evidence;
- (4) Intimidation of a potential witness;
- (5) Potentially jeopardizing an investigation;
- (6) Undue delay of a trial; or
- (7) Other significantly detrimental consequence.

B. "Applicant" means a law enforcement officer who has applied for or received a search warrant pursuant to section 55 or this section.

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

D. "Court" means the Superior Court or the District Court.

E. "Criminal process" means a search warrant issued pursuant to Title 5, section 113; section 55; or this section, or a grand jury subpoena issued pursuant to Rule 17 or 17A of the Maine Rules of Unified Criminal Procedure and this section.

F. "Domestic entity" means an entity whose internal affairs are governed by the laws of this State.

G. "Electronic communication service" means a service that provides to users the ability to send or receive spoken, wire or electronic communications.

H. "Electronic communication service provider" means an entity that provides electronic communication service to the general public.

I. "Entity" means an entity as defined in Title 5, section 102, subsection 7.

J. "Foreign entity" means an entity other than a domestic entity.

K. "Location information" means information concerning the location of an electronic device, including both the current location and any prior location of the device, that, in whole or in part, is generated, derived from or obtained by the operation of an electronic device.

L. "Properly served" means that a search warrant or grand jury subpoena has been:

(1) Delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service or facsimile to a commercial clerk or commercial registered agent as provided in Title 5, section 106; Title 5, section 107, subsection 4; or this section;

(2) Delivered by specific means identified by the provider for service of criminal process, including, but not limited to, e-mail, facsimile or submission via an Internet web portal; or

(3) Delivered to the provider's place of business within the State.

If service is made pursuant to subparagraph (1) or (3) and the provider promptly notifies the law enforcement agency of the specific means of service identified by the provider pursuant to subparagraph (2) for criminal process, service must be made by the means of service specified by the provider if possible.

M. "Provider" means an electronic communication service provider or a remote computing service provider.

N. "Remote computing service" means computing storage or processing services provided by means of an electronic communication service.

O. "Remote computing service provider" means an entity that provides remote computing service to the general public.

2. Requirements applicable to a foreign entity provider. The following provisions apply to criminal process issued pursuant to this section that requires a search for records that are in the possession or control of a foreign entity provider when those records would reveal the identity of a customer using services, data stored by or on behalf of a customer, a customer's usage of the service, the recipient or destination of communications sent to or from a customer, content information or location information.

A. A foreign entity provider served with a search warrant pursuant to this section shall produce to the applicant all records sought, including those records maintained or located outside this State, within 14 days of service. The 14 days may be extended by the court as follows:

(1) By the 10th day following service, the foreign entity provider in writing or electronically must notify the law enforcement officer who served the warrant that producing all the records within 14 days is not practicable, the reasons why compliance is not practicable and the date by which the foreign entity provider will complete the production; and

(2) The law enforcement officer shall file a notice with the court of the reasons under subparagraph (1).

If the court finds that good cause exists for the delay, the court may extend the 14-day period to the date of production specified by the foreign entity provider and the provider is prohibited from asserting that the warrant has expired. For purposes of this paragraph, good cause includes, but is not limited to, impracticability of timely response, difficulty of identifying and retrieving the data requested and the volume of data or number of sources sought.

B. A foreign entity provider served with a grand jury subpoena pursuant to this section shall produce to the prosecutor or grand jury all records sought, including those records maintained or located outside this State, by or at the time of the grand jury appearance. The grand jury subpoena must include the address of the prosecutor or grand jury to which the provider must produce the records.

C. A foreign entity provider shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in the Maine Rules of Evidence, Rule 902(12). Admissibility of these records in a court in this State is governed by the Maine Rules of Evidence, Rule 803(6).

D. A foreign entity provider that produces records or testifies pursuant to this subsection is immune from criminal or civil liability for the release of the requested information to the court, attorney for the State or law enforcement agency involved in the investigation.

3. Requirements applicable to a domestic entity provider. The following provisions apply to criminal process issued pursuant to this section that requires a search for records that are in the possession or control of a domestic entity provider when those records would reveal the identity of a customer using services, data stored by or on behalf of a customer, a customer's usage of the service, the recipient or destination of communications sent to or from a customer, content information or location information.

A. A domestic entity provider, when served with criminal process issued by another state to produce records that would reveal the identity of a customer using services, data stored by or on behalf of a customer, a customer's usage of the service, the recipient or destination of communications sent to or from a customer, content information or location information, shall produce those records as if that criminal process had been issued by a court in this State.

B. A domestic entity provider served with a search warrant pursuant to this section shall produce to the applicant all records sought, including those records maintained or located outside this State, within 14 days of service. The 14-day period may be extended by the court as follows:

(1) By the 10th day following service, the domestic entity provider in writing or electronically must notify the law enforcement officer who served the warrant that producing all the records within 14 days is not practicable, the reasons why compliance is not practicable and the date by which the domestic entity provider will complete the production; and

(2) The law enforcement officer shall file a notice with the court of the reasons under subparagraph (1).

If the court finds that good cause exists for the delay, the court may extend the 14-day period to the date of production specified by the domestic entity provider and the provider is prohibited from asserting that the warrant has expired. For purposes of this paragraph, good cause includes, but is not limited to, impracticability of timely response, difficulty of identifying and retrieving the data requested and the volume of data or number of sources sought.

C. A domestic entity provider served with a grand jury subpoena pursuant to this section shall produce to the prosecutor or grand jury all records sought, including those records maintained or located outside this State, by or at the time of the grand jury appearance. The grand jury subpoena must include the address of the prosecutor or grand jury to which the provider must produce the records.

D. A domestic entity provider shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in the Maine Rules of Evidence, Rule 902(11) or on a form provided by the requesting jurisdiction. Admissibility of these records in a court in this State is governed by the Maine Rules of Evidence, Rule 803(6).

E. A domestic entity provider that produces records or testifies pursuant to this subsection is immune from criminal or civil liability for the release of the requested information to the court, attorney for the State or law enforcement agency involved in the investigation.

4. Application for expedited production of records. Notwithstanding the 14-day period specified in subsection 2 or 3 for production of the records, if an applicant for a search warrant believes that delaying production is reasonably likely to cause an adverse result, the applicant may request that the court require the production of the records sooner than 14 days after service pursuant to this subsection.

A. The applicant shall demonstrate to the court the specific adverse result or results, as specified in subsection 1, paragraph A, subparagraphs (1) to (7), that delaying production for 14 days is reasonably likely to cause.

B. If the court finds that the delay may cause an adverse result, the court shall state the adverse result specified in subsection 1, paragraph A, subparagraphs (1) to (7) and may require the provider to produce the records in a specified number of days.

C. If the court specifies that the provider has less than 14 days to produce the record and the adverse result finding is listed in subsection 1, paragraph A, subparagraphs (1) to (4), the provider must respond within the time specified by the court.

D. If the court specifies that the provider has less than 14 days to produce the record and the only adverse result findings are results listed in subsection 1, paragraph A, subparagraphs (5) to (7), the provider must notify the law enforcement officer serving the warrant that compliance within that period specified by the court is not practicable and must state the date within 14 days from service by which the provider will respond. The law enforcement officer shall file the provider's response with the court, and, upon a demonstration of good cause by the provider, the response period may be extended by the court to no more than 14 days from the date of service of the warrant. As used in this paragraph, good cause includes, but is not limited to, impracticability of timely response, difficulty of identifying and retrieving the data requested and the volume of data or number of sources sought.

Sec. 4. 16 MRSA §642, sub-§1, as amended by PL 2013, c. 519, §5, is further amended to read:

1. Authority to obtain. A government entity may obtain portable electronic device content information directly from a provider of electronic communication service or a provider of remote computing service only in accordance with a valid search warrant issued by a duly authorized justice, judge or justice of the peace using procedures established pursuant to Title 15, section 55 or 56 or as otherwise provided in this subchapter.

Sec. 5. 16 MRSA §648, as amended by PL 2013, c. 519, §6, is further amended to read:

§648. Search warrant needed for acquisition of location information

Except as provided in this subchapter, a government entity may not obtain location information without a valid warrant issued by a duly authorized justice, judge or justice of the peace using procedures established pursuant to Title 15, section 55 or 56.

A justice, judge or justice of the peace may issue a search warrant for the location information of an electronic device pursuant to this section for a period of time necessary to achieve the objective of the authorization, but in any case the warrant is not valid for more than ~~10~~ 14 days after the issuance. A justice, judge or justice of the peace may grant an extension of a warrant upon a finding of continuing probable cause and a finding that the extension is necessary to achieve the objective of the authorization. An extension may not exceed 30 days.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.