

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Judiciary to which was referred Senate Bill No. 155  
3 entitled “An act relating to privacy protection” respectfully reports that it has  
4 considered the same and recommends that the bill be amended by striking out  
5 all after the enacting clause and inserting in lieu thereof the following:

6 \* \* \* Vermont Electronic Communication Privacy Act \* \* \*

7 Sec. 5. 13 V.S.A. chapter 232 is added to read:

8 CHAPTER 232. VERMONT ELECTRONIC COMMUNICATION

9 PRIVACY ACT

10 § 8101. DEFINITIONS

11 As used in this chapter:

12 (1) “Adverse result” means:

13 (A) danger to the life or physical safety of an individual;

14 (B) flight from prosecution;

15 (C) destruction of or tampering with evidence;

16 (D) intimidation of potential witnesses; or

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

18 (2) “Authorized possessor” means the possessor of an electronic device

19 when that person is the owner of the device or has been authorized to possess

20 the device by the owner of the device.

1           (3) “Electronic communication” means the transfer of signs, signals,  
2           writings, images, sounds, data, or intelligence of any nature in whole or in part  
3           by a wire, a radio, electromagnetic, photoelectric, or photo-optical system.

4           (4) “Electronic communication service” means a service that provides to  
5           its subscribers or users the ability to send or receive electronic  
6           communications, including a service that acts as an intermediary in the  
7           transmission of electronic communications, or stores protected user  
8           information.

9           (5) “Electronic device” means a device that stores, generates, or  
10           transmits information in electronic form.

11           (6) “Government entity” means a department or agency of the State or a  
12           political subdivision thereof, or an individual acting for or on behalf of the  
13           State or a political subdivision thereof.

14           (7) “Law enforcement officer” means:

15           (A) a law enforcement officer certified at Level II or Level III  
16           pursuant to 20 V.S.A. § 2358;

17           (B) the Attorney General;

18           (C) an assistant attorney general;

19           (D) a State’s Attorney; or

20           (E) a deputy State’s attorney

1           (8) “Lawful user” means a person or entity who lawfully subscribes to  
2           or uses an electronic communication service, whether or not a fee is charged.

3           (9) “Protected user information” means electronic communication  
4           content, including the subject line of e-mails, cellular tower-based location  
5           data, GPS or GPS-derived location data, the contents of files entrusted by a  
6           user to an electronic communication service pursuant to a contractual  
7           relationship for the storage of the files whether or not a fee is charged, and data  
8           memorializing the content of information accessed or viewed by a user, and  
9           any other data for which a reasonable expectation of privacy exists.

10           (10) “Service provider” means a person or entity offering an electronic  
11           communication service.

12           (11) “Specific consent” means consent provided directly to the  
13           government entity seeking information, including when the government entity  
14           is the addressee or intended recipient or a member of the intended audience of  
15           an electronic communication. Specific consent does not require that the  
16           originator of a communication have actual knowledge that an addressee,  
17           intended recipient, or member of the specific audience is a government entity.

18           (12) “Subscriber information” means the name, names of additional  
19           account users, account number, billing address, physical address, e-mail  
20           address, telephone number, payment method, record of services used, and

1 record of duration of service provided, and I.P. address kept by a service  
2 provider regarding a user or account.

3 § 8102. LIMITATIONS ON COMPELLED PRODUCTION OF  
4 ELECTRONIC INFORMATION

5 (a) Except as provided in this section, a law enforcement officer shall not  
6 compel the production of or access to protected user information from a  
7 service provider.

8 (b) A law enforcement officer may compel the production of or access to  
9 protected user information from a service provider:

10 (1) pursuant to a warrant;

11 (2) pursuant to an existing, judicially recognized exception to the  
12 warrant requirement;

13 (3) with the specific consent of a lawful user of the electronic  
14 communication service;

15 (4) if a law enforcement officer, in good faith, believes that an  
16 emergency involving danger of death or serious bodily injury to any person  
17 requires access to the electronic device information without delay; or

18 (5) except where prohibited by State or federal law, if the device is  
19 seized from an inmate's possession or found in an area of a correctional  
20 facility, jail, or lock-up under the jurisdiction of the Department of  
21 Corrections, a sheriff, or a court to which inmates have access and the device is

1 not in the possession of an individual and the device is not known or believed  
2 to be the possession of an authorized visitor.

3 (c) A law enforcement officer may compel the production of or access to  
4 information kept by a service provider other than protected user information:

5 (1) pursuant to a subpoena issued by a judicial officer, who shall issue  
6 the subpoena upon a finding that:

7 (A) there is reasonable cause to believe that an offense has been  
8 committed; and

9 (B) the information sought is relevant to the offense or appears  
10 reasonably calculated to lead to discovery of evidence of the alleged offense;

11 (2) pursuant to a subpoena issued by a grand jury;

12 (3) pursuant to a court order issued by a judicial officer upon a finding  
13 that the information sought is reasonably related to a pending investigation or  
14 pending case; or

15 (4) for any of the reasons listed in subdivisions (b)(2)–(4) of this section.

16 (d) A warrant issued for protected user information shall comply with the  
17 following requirements:

18 (1) The warrant shall describe with particularity the information to be  
19 seized by specifying the time periods covered and, as appropriate and  
20 reasonable, the target individuals or accounts, the applications or services  
21 covered, and the types of information sought.

1           (2)(A) The warrant shall require that any information obtained through  
2           execution of the warrant that is unrelated to the warrant’s objective not be  
3           subject to further review, use, or disclosure without a court order.

4           (B) A court shall issue an order for review, use, or disclosure of  
5           information obtained pursuant to subdivision (A) of this subdivision (2) if it  
6           finds there is probable cause to believe that:

7                   (i) the information is relevant to an active investigation;

8                   (ii) the information constitutes evidence of a criminal offense; or

9                   (iii) review, use, or disclosure of the information is required by

10           State or federal law.

11           (e) A warrant or subpoena directed to a service provider shall be  
12           accompanied by an order requiring the service provider to verify the  
13           authenticity of electronic information that it produces by providing an affidavit  
14           that complies with the requirements of Rule 902(11) or 902(12) of the  
15           Vermont Rules of Evidence.

16           (f) A service provider may voluntarily disclose information other than  
17           protected user information when that disclosure is not otherwise prohibited by  
18           State or federal law.

19           (g) If a law enforcement officer receives information voluntarily provided  
20           pursuant to subsection (f) of this section, the officer shall destroy the  
21           information within 90 days unless any of the following circumstances apply:

1           (1) A law enforcement officer has or obtains the specific consent of the  
2           sender or recipient of the electronic communications about which information  
3           was disclosed.

4           (2) A law enforcement officer obtains a court order authorizing the  
5           retention of the information. A court shall issue a retention order upon a  
6           finding that the conditions justifying the initial voluntary disclosure persist.  
7           The order shall authorize the retention of the information only for as long as:

8                   (A) the conditions justifying the initial voluntary disclosure  
9                   persist; or

10                   (B) there is probable cause to believe that the information constitutes  
11                   evidence of the commission of a crime.

12           (3) A law enforcement officer reasonably believes that the information  
13           relates to an investigation into child exploitation and the information is  
14           retained as part of a multiagency database used in the investigation of similar  
15           offenses and related crimes.

16           (h) If a law enforcement officer obtains electronic information without a  
17           warrant under subdivision (b)(4) of this section because of an emergency  
18           involving danger of death or serious bodily injury to a person that requires  
19           access to the electronic information without delay, the officer shall, within five  
20           days after obtaining the information, apply for a warrant or order authorizing  
21           obtaining the electronic information or a motion seeking approval of the

1 emergency disclosures. The application or motion shall set forth the facts  
2 giving rise to the emergency and shall, if applicable, include a request  
3 supported by a sworn affidavit for an order delaying notification under  
4 subdivision 8103(b)(1) of this section. The court shall promptly rule on the  
5 application or motion. If the court finds that the facts did not give rise to an  
6 emergency or denies the motion or application on any other ground, the court  
7 shall order the immediate destruction of all information obtained, and  
8 immediate notification pursuant to subsection 8103(a) if this title if it has not  
9 already been provided.

10 (i) This section does not limit the existing authority of a law enforcement  
11 officer to use legal process to do any of the following:

12 (1) require an originator, addressee, or intended recipient of an  
13 electronic communication to disclose any protected user information  
14 associated with that communication;

15 (2) require an entity that provides electronic communications services to  
16 its officers, directors, employees, or agents for the purpose of carrying out their  
17 duties to disclose protected user information associated with an electronic  
18 communication to or from an officer, director, employee, or agent of the  
19 entity; or

20 (3) require a service provider to provide subscriber information.



1       (j) A service provider shall not be subject to civil or criminal liability for  
2       producing or providing access to information in good faith reliance on the  
3       provisions of this section. This subsection shall not apply to gross negligence,  
4       recklessness, or intentional misconduct by the service provider.

5       § 8103. NOTICE TO USER OR SUBSCRIBER

6       (a) Except as otherwise provided in this section, a law enforcement officer  
7       who executes a warrant or obtains electronic information in an emergency  
8       pursuant to subdivision 8102(b)(4) of this section shall serve upon, or deliver  
9       to by registered or first class mail, electronic mail, or other means reasonably  
10       calculated to be effective, the identified targets of the warrant or emergency  
11       request a notice that informs the recipient that information about the recipient  
12       has been compelled or requested, and, if there was an emergency request,  
13       states with reasonable specificity the nature of the government action relative  
14       to which the information is sought. The notice shall include a copy of the  
15       warrant if a warrant was obtained. The notice shall be served, mailed, or  
16       delivered by reliable electronic means contemporaneously with the execution  
17       of the warrant, or, in the case of an emergency, within three days after  
18       obtaining the electronic information.

19       (b)(1) When a warrant is sought or electronic information is obtained in an  
20       emergency under subdivision 8102(b)(4) of this title, the law enforcement  
21       officer may submit a request supported by a sworn affidavit for an order

1 ~~delaying the notification required by subsection (a) of this section and~~  
2 ~~prohibiting any party providing information from notifying any other party that~~  
3 ~~information has been sought. The court shall issue the order if it determines~~  
4 ~~that there is reason to believe that notification may have an adverse result. The~~  
5 ~~delay shall not exceed the period of time for which the court finds there is~~  
6 ~~reason to believe that the notification may have the adverse result, and in no~~  
7 ~~event shall the delay exceed 90 days.~~

8 ~~(2) The court may grant additional extensions of the delay for periods of~~  
9 ~~up to 90 days each on the same grounds as provided for in subdivision (1) of~~  
10 ~~this subsection.~~

11 ~~(3) When the delayed notification period expires, a law enforcement~~  
12 ~~officer shall serve upon, or deliver to by registered or first class mail,~~  
13 ~~electronic mail, or reliable electronic means the order for delayed notification,~~  
14 ~~the identified targets of the warrant:~~

15 ~~(A) a document that includes the information described in subsection~~  
16 ~~(a) of this section; and~~

17 ~~(B) a copy of all electronic information obtained or a summary of~~  
18 ~~that information, including, at a minimum:~~

19 ~~(i) the number and types of records disclosed;~~

20 ~~(ii) the date and time when the earliest and latest records were~~  
21 ~~created; and~~

1 ~~(iii) a copy of the motion seeking delayed notification.~~

2 ~~(c) If there is no identified target of a warrant or emergency request at the~~  
3 ~~time of its issuance, the government entity shall submit to the Department of~~  
4 ~~Public Safety within three days of the execution of the warrant or issuance of~~  
5 ~~the request all of the information required by subsection (a) of this section. If~~  
6 ~~an order delaying notice is issued pursuant to subsection (b) of this section, the~~  
7 ~~law enforcement officer shall submit to the Department upon the expiration of~~  
8 ~~the delayed notification period all of the information required in subdivision~~  
9 ~~(b)(3) of this section. The Department shall publish all reports required by this~~  
10 ~~subsection on its Internet website within 90 days of receipt. The Department~~  
11 ~~shall redact names and other identifying information from the reports.~~

12 ~~(d) Except as otherwise provided in this section, nothing in this chapter~~  
13 ~~shall prohibit or limit a service provider or any other party from disclosing~~  
14 ~~information about any request or demand for electronic information.~~

15 ~~(e) For purposes of this chapter, a warrant served upon a service provider is~~  
16 ~~deemed to have been executed no later than five days after the information or~~  
17 ~~data compelled by the warrant has been produced by the service provider to a~~  
18 ~~law enforcement officer.~~

19 § 8103. RETURNS AND SERVICE

20 (a) Returns.

1           (1) If a warrant issued pursuant to section 8102 of this title is executed or  
2           electronic information is obtained in an emergency under subdivision  
3           8102(b)(4) of this title, a return shall be made within 90 days. Upon  
4           certification by a law enforcement officer, an attorney for the State, or any  
5           other person authorized by law that an investigation related to the warrant or  
6           the emergency is ongoing, a judicial officer may extend the 90-day period for  
7           making the return for an additional period that the judicial officer deems  
8           reasonable.

9           (2) A return made pursuant to this subsection shall identify:

10           (A) the date the response was received from the service provider;

11           (B) the quantity of information or data provided; and

12           (C) the type of information or data provided.

13           (b) Service.

14           (1) At the time the return is made, the law enforcement officer who  
15           executed the warrant under section 8102 of this section or obtained electronic  
16           information under subdivision 8102(b)(4) of this section shall serve a copy of  
17           the warrant on the subscriber to the service provider, if known. Service need  
18           not be made upon any person against whom criminal charges have been filed  
19           related to the execution of the warrant or to the obtaining of electronic  
20           information under subdivision 8102(b)(4) of this section.

1           (2) Upon certification by a law enforcement officer, an attorney for the  
2           State, or any other person authorized by law that an investigation related to the  
3           warrant is ongoing, a judicial officer may extend the time for serving the return  
4           for an additional period that the judicial officer deems reasonable.

5           (3) Service pursuant to this subsection may be accomplished by:

6           (A) delivering a copy to the known person;

7           (B) leaving a copy at the person's residence or usual place of abode  
8           with an individual of suitable age and discretion who resides at that location;

9           (C) delivering a copy by reliable electronic means; or

10          (D) mailing a copy to the person's last known address.

11          (c) Except as otherwise provided in this section, nothing in this chapter  
12          shall prohibit or limit a service provider or any other party from disclosing  
13          information about any request or demand for electronic information.

14          § 8104. EXCLUSIVE REMEDIES FOR A VIOLATION OF THIS

15                   CHAPTER

16          (a) A defendant in a trial, hearing, or proceeding may move to  
17          suppress electronic information obtained or retained in violation of the  
18          U.S. Constitution, the Vermont Constitution, or this chapter.

19          (b) A defendant in a trial, hearing, or proceeding shall not move to suppress  
20          electronic information on the ground that Vermont lacks personal jurisdiction

1 over a service provider, or on the ground that the constitutional or statutory  
2 privacy rights of an individual other than the defendant were violated.

3 (c) A service provider who receives a subpoena issued pursuant to this  
4 chapter may file a motion to quash the subpoena. The motion shall be filed in  
5 the court that issued the subpoena before the expiration of the time period for  
6 production of the information. The court shall hear and decide the motion as  
7 soon as practicable. Consent to additional time to comply with process under  
8 section 806 of this title does not extend the date by which a service provider  
9 shall seek relief under this subsection.

10 § 8105. EXECUTION OF WARRANT FOR INFORMATION KEPT BY  
11 SERVICE PROVIDER

12 A warrant issued under this chapter may be addressed to any Vermont law  
13 enforcement officer. The officer shall serve the warrant upon the service  
14 provider, the service provider's registered agent, or, if the service provider has  
15 no registered agent in the State, upon the Office of Secretary of State in  
16 accordance with 12 V.S.A. §§ 851–858. If the service provider consents, the  
17 warrant may be served via U.S. mail, courier service, express delivery service,  
18 facsimile, electronic mail, an Internet-based portal maintained by the service  
19 provider, or other reliable electronic means. The physical presence of the law  
20 enforcement officer at the place of service or at the service provider's  
21 repository of data shall not be required.

1        § 8106. SERVICE PROVIDER’S RESPONSE TO WARRANT

2            (a) The service provider shall produce the items listed in the warrant within  
3        20 30 days unless the court orders a shorter period for good cause shown, in  
4        which case the court may order the service provider to produce the items listed  
5        in the warrant within 72 hours. The items shall be produced in a manner and  
6        format that permits them to be searched by the law enforcement officer. The  
7        court may, for good cause shown, shorten or lengthen the 20 day deadline.

8            (b) This section shall not be construed to limit the authority of a law  
9        enforcement officer under existing law to search personally for and locate  
10       items or data on the premises of a Vermont service provider.

11           (c) As used in this section, “good cause” includes an investigation into a  
12        homicide, kidnapping, unlawful restraint, custodial interference, felony  
13        punishable by life imprisonment, or offense related to child exploitation.

14        § 8107. CRIMINAL PROCESS ISSUED BY VERMONT COURT;

15            RECIPROCITY

16           (a) Criminal process, including subpoenas, search warrants, and other court  
17        orders issued pursuant to this chapter, may be served and executed upon any  
18        service provider within or outside the State, provided the service provider has  
19        contact with Vermont sufficient to support personal jurisdiction over it by this  
20        State. Notwithstanding any other provision in this chapter, only a service

1 provider may challenge legal process, or the admissibility of evidence obtained  
2 pursuant to it, on the ground that Vermont lacks personal jurisdiction over it.

3 (b) This section shall not be construed to limit the authority of a court to  
4 issue criminal process under any other provision of law.

5 (c) A service provider incorporated, domiciled, or with a principal place of  
6 business in Vermont that has been properly served with criminal process issued  
7 by a court of competent jurisdiction in another state, commonwealth, territory,  
8 or political subdivision thereof shall comply with the legal process as though it  
9 had been issued by a court of competent jurisdiction in this State.

10 § 8108. REAL TIME INTERCEPTION OF INFORMATION PROHIBITED

11 A law enforcement officer shall not use a device which via radio or other  
12 electromagnetic wireless signal intercepts in real time from a user's device a  
13 transmission of communication content, real time cellular tower-derived  
14 location information, or real time GPS-derived location information, except for  
15 purposes of locating and apprehending a fugitive for whom an arrest warrant  
16 has been issued. This section shall not be construed to prevent a law  
17 enforcement officer from obtaining information from an electronic  
18 communication service as otherwise permitted by law.

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1 (Committee vote: \_\_\_\_\_)

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\_\_\_\_\_

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Representative \_\_\_\_\_

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FOR THE COMMITTEE