

HOUSE BILL NO. 148

INTRODUCED BY D. ZOLNIKOV, B. BENNETT

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4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO ELECTRONIC
5 COMMUNICATIONS; PROVIDING DEFINITIONS; REQUIRING A SEARCH WARRANT FOR DISCLOSURE OF
6 ELECTRONIC COMMUNICATIONS BY A PROVIDER OF AN ELECTRONIC COMMUNICATION SERVICE;
7 REQUIRING NOTICE BE GIVEN TO A CUSTOMER OF AN ELECTRONIC COMMUNICATION SERVICE IF
8 THE CONTENTS OF AN ELECTRONIC COMMUNICATION ARE GIVEN TO A GOVERNMENTAL ENTITY;
9 ALLOWING DELAYED NOTICE UNDER CERTAIN CIRCUMSTANCES; DISALLOWING CERTAIN EVIDENCE
10 IN CERTAIN PROCEEDINGS; ALLOWING THE ATTORNEY GENERAL TO COMMENCE CIVIL ACTIONS
11 AGAINST GOVERNMENTAL ENTITIES TO COMPEL COMPLIANCE; ALLOWING A PROVIDER OF AN
12 ELECTRONIC COMMUNICATION SERVICE STANDING TO CHALLENGE CERTAIN WARRANTS; AND
13 ALLOWING VOLUNTARY DISCLOSURE OF ELECTRONIC COMMUNICATION INFORMATION."

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15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
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17 NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 8], the following definitions
18 apply:

19 (1) "Contents" means any information concerning the substance, purport, or meaning of a
20 communication.

21 (2) "Electronic communication" means:

22 (a) any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted
23 in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system; or

24 (b) any aural transfer made in whole or in part through the use of facilities for the transmission of
25 communications by the aid of wire, cable, or other similar connection between the point of origin and the point
26 of reception, including but not limited to the use of the wire, cable, or other similar connection in a switching
27 station.

28 (c) The term does not include:

29 (i) an oral communication uttered by a person exhibiting an expectation that the communication is not
30 subject to interception under circumstances justifying the expectation;

- 1 (ii) a communication made through a tone-only paging device;
- 2 (iii) a communication from a tracking device, including an electronic or mechanical device that permits
- 3 the tracking of the movement of a person or object; or
- 4 (iv) electronic funds transfer information stored by a financial institution in a communications system used
- 5 for the electronic storage and transfer of funds.

6 (3) "Electronic communication service" means:

- 7 (a) a service that provides to users the ability to send or receive electronic communications;
- 8 (b) a service that provides to users computer storage or processing services; or
- 9 (c) a service that acts as an intermediary in the transmission of electronic communications.

10 (4) "Governmental entity" means a state or local agency, including but not limited to a law enforcement

11 entity or any other investigative entity, agency, department, division, bureau, board, or commission or an

12 individual acting or purporting to act for or on behalf of a state or local agency.

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14 **NEW SECTION. Section 2. Search warrant OR INVESTIGATIVE SUBPOENA required.** A governmental

15 entity may only require disclosure by a provider of an electronic communication service of the contents of an

16 electronic communication stored, held, or maintained by that service pursuant to a SEARCH warrant OR

17 INVESTIGATIVE SUBPOENA issued by a court ~~upon a finding of probable cause that:~~

18 ~~—— (1) a crime has been committed; and~~

19 ~~—— (2) evidence will be found in the place to be searched UNDER UPON A FINDING OF PROBABLE CAUSE~~

20 ~~PURSUANT TO TITLE 46, CHAPTER 5, PART 2, OR AN INVESTIGATIVE SUBPOENA ISSUED UNDER TITLE 46, CHAPTER 4, PART~~

21 3.

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23 **NEW SECTION. Section 3. Notice -- delayed notice.** (1) At or before the time that a governmental

24 entity receives the contents of an electronic communication of a subscriber or customer from a provider of an

25 electronic communication service pursuant to [section 2], the governmental entity shall serve upon or deliver to

26 the subscriber or customer by registered or first-class mail, electronic mail, or other means reasonably calculated

27 to be effective, as specified by the court issuing the warrant OR INVESTIGATIVE SUBPOENA:

28 (a) a copy of the warrant OR INVESTIGATIVE SUBPOENA; and

29 (b) notice that informs the customer or subscriber:

30 (i) of the nature of the government inquiry with reasonable specificity;

1 (ii) that information maintained for the customer or subscriber by the provider of the electronic
2 communication service named in the process or request was supplied to or requested by the governmental entity;
3 and

4 (iii) of the date on which the warrant OR INVESTIGATIVE SUBPOENA was served on the provider.

5 (2) (a) A governmental entity that is seeking a warrant OR INVESTIGATIVE SUBPOENA under [section 2] may
6 include in the application for the warrant OR INVESTIGATIVE SUBPOENA a request for an order delaying the
7 notification required under subsection (1) of this section for a period of not more than 1 year.

8 (b) A governmental entity that is obtaining the contents of an electronic communication may apply to a
9 court for an order directing the provider of an electronic communication service to which a warrant OR
10 INVESTIGATIVE SUBPOENA under [section 2] is directed not to notify any other person of the existence of the warrant
11 OR INVESTIGATIVE SUBPOENA for a period of not more than 1 year.

12 (c) A court shall grant a request for delayed notification made under subsection (2)(a) or (2)(b) if the court
13 determines that there is reason to believe that notification of the existence of the warrant OR INVESTIGATIVE
14 SUBPOENA may result in:

- 15 (i) endangering the life or physical safety of an individual;
- 16 (ii) flight from prosecution;
- 17 (iii) destruction or tampering with evidence;
- 18 (iv) intimidation of potential witnesses; or
- 19 (v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

20 (d) Upon request by a governmental entity, a court may grant one or more extensions of the delay of
21 notification granted under subsection (2)(c) of not more than 180 days each.

22 (e) Upon expiration of the period of delay under ~~subsections~~ SUBSECTION (2)(c) or (2)(d), the
23 governmental entity shall serve upon or deliver to the subscriber or customer by registered or first-class mail,
24 electronic mail, or other means reasonably calculated to be effective, as specified by the court issuing the warrant
25 OR INVESTIGATIVE SUBPOENA, a notice that:

- 26 (i) includes the information referred to in subsection (1); and
- 27 (ii) informs the customer or subscriber:
 - 28 (A) that notification of the customer or subscriber was delayed;
 - 29 (B) of the identity of the court authorizing the delay; and
 - 30 (C) of the provision of subsection (2)(c) under which the delay was authorized.

1 (3) (A) A WARRANT OR INVESTIGATIVE SUBPOENA UNDER [SECTION 2] MAY BE SERVED ONLY ON A PROVIDER OF
 2 AN ELECTRONIC COMMUNICATION THAT IS A DOMESTIC ENTITY OR A COMPANY OR ENTITY OTHERWISE DOING BUSINESS
 3 IN THIS STATE UNDER A CONTRACT OR A TERMS OF SERVICE AGREEMENT WITH A RESIDENT OF THIS STATE IF ANY PART
 4 OF THAT CONTRACT OR AGREEMENT IS TO BE PERFORMED IN THIS STATE.

5 (B) THE PROVIDER OF AN ELECTRONIC COMMUNICATION SHALL PRODUCE ALL ELECTRONIC CUSTOMER DATA,
 6 CONTENTS OF COMMUNICATIONS, AND OTHER INFORMATION SOUGHT BY THE GOVERNMENTAL ENTITY, REGARDLESS OF
 7 WHERE THE INFORMATION IS HELD PURSUANT TO A VALID WARRANT OR INVESTIGATIVE SUBPOENA.

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 9 NEW SECTION. Section 4. Rules of construction. (1) Except as expressly provided, nothing in
 10 [sections 1 through 8] may be construed to limit an electronic communication service or any other party from
 11 disclosing information about a request issued by a governmental entity for electronic communication information.

12 (2) Nothing in [sections 2 and 3] may be construed to limit the authority of a governmental entity to use
 13 a subpoena authorized under the laws of this state to require an entity that provides electronic communication
 14 services to its own officers, directors, employees, or agents for the purpose of carrying out their duties to disclose
 15 to the governmental entity the contents of an electronic communication to or from an officer, director, employee,
 16 or agent of the entity, if the electronic communication is held, stored, or maintained on an electronic
 17 communication service owned or operated by the entity.

18 (3) Nothing in [sections 1 through 8] may be construed to limit a governmental entity's ability to use,
 19 maintain, or store information on its own electronic communication service or to disseminate information stored
 20 on its own electronic communication service.

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 22 NEW SECTION. Section 5. Admissibility of proof -- violations. (1) Except as proof of a violation of
 23 [sections 1 through 8], evidence obtained in violation of [sections 1 through 8] is not admissible in a civil, criminal,
 24 or administrative proceeding and may not be used in an affidavit in an effort to obtain a search warrant or court
 25 order.

26 (2) The attorney general may apply for an injunction or commence a civil action against any
 27 governmental entity to compel compliance with the terms of [sections 1 through 8].

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 29 NEW SECTION. Section 6. Standing to challenge warrant OR INVESTIGATIVE SUBPOENA. Providers
 30 of electronic communications service subject to a warrant or other legal process under [sections 1 through 8] have

1 standing to challenge a warrant or other legal process that is inconsistent with [sections 1 through 8], any other
2 statute or law, or the state or federal constitution.

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4 **NEW SECTION. Section 7. No cause of action against providers.** No cause of action shall lie in any
5 court against any provider of an electronic communication service, its officers, employees, agents, or other
6 specified persons for providing information or assistance in accordance with the terms of [sections 1 through 8].

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8 **NEW SECTION. Section 8. Voluntary disclosure of electronic communications.** Nothing in [sections
9 1 through 8] prohibits the voluntary disclosure of electronic communication information by a provider of an
10 electronic communication service or any other entity when such disclosure is not otherwise prohibited by law,
11 including but not limited to when:

12 (1) the provider first obtains the lawful consent of the subscriber or customer, or originator, an addressee,
13 or intended recipient of the electronic communication; or

14 (2) the provider, in good faith, believes that an emergency involving danger, death, or serious physical
15 injury to a person requires disclosure without delay of communications relating to the emergency.

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17 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through 8] are intended to be codified
18 as an integral part of Title 46, chapter 5, and the provisions of Title 46, chapter 5, apply to [sections 1 through 8].

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