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State of Minnesota

HOUSE OF REPRESENTATIVES

EIGHTY-NINTH SESSION

H. F. No. 2668

03/08/2016

Authored by Lesch, Lucero, Davnie and Newton

The bill was read for the first time and referred to the Committee on Public Safety and Crime Prevention Policy and Finance

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A bill for an act

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relating to data privacy; prohibiting access by a government entity to electronic

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communication held by a service provider or other third party unless certain

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procedures are followed; providing certain limits on data retention; providing

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remedies; requiring a report; proposing coding for new law in Minnesota

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Statutes, chapter 626A.

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

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Section 1. **SHORT TITLE.**

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Minnesota Statutes, sections 626A.45 to 626A.49, may be cited as the "Minnesota

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Electronic Communications Privacy Act."

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Sec. 2. **[626A.45] DEFINITIONS.**

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Subdivision 1. **Scope.** For purposes of sections 626A.45 to 626A.49, the definitions

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in this section have the meanings given them.

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Subd. 2. **Adverse result.** "Adverse result" means any of the following:

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

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(2) flight from prosecution;

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(3) destruction of or tampering with evidence;

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(4) intimidation of potential witnesses; or

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(5) serious jeopardy to an investigation.

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Subd. 3. **Authorized possessor.** "Authorized possessor" means the person in

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possession of an electronic device when that person is the owner of the device or has been

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authorized to possess the device by the owner of the device.

2.1 Subd. 4. **Electronic communication.** "Electronic communication" means the
2.2 transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in
2.3 whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system.

2.4 Subd. 5. **Electronic communication information.** "Electronic communication
2.5 information" means any information about an electronic communication or the use of
2.6 an electronic communication service, including but not limited to the contents; sender;
2.7 recipients; format; precise or approximate location of the sender or recipients at any
2.8 point during the communication; time or date the communication was created, sent, or
2.9 received; or any information pertaining to any individual or device participating in the
2.10 communication, including, but not limited to, an IP address. Electronic communication
2.11 information does not include subscriber information under subdivision 13.

2.12 Subd. 6. **Electronic communication service.** "Electronic communication service"
2.13 has the meaning given in section 626A.42, subdivision 1, paragraph (b).

2.14 Subd. 7. **Electronic device.** "Electronic device" has the meaning given in section
2.15 626A.42, subdivision 1, paragraph (c).

2.16 Subd. 8. **Electronic device information.** "Electronic device information" means
2.17 any information stored on or generated through the operation of an electronic device,
2.18 including the current and prior locations of the device.

2.19 Subd. 9. **Electronic information.** "Electronic information" means electronic
2.20 communication information or electronic device information.

2.21 Subd. 10. **Government entity.** "Government entity" has the meaning given in
2.22 section 626A.42, subdivision 1, paragraph (d).

2.23 Subd. 11. **Service provider.** "Service provider" means a person or entity offering an
2.24 electronic communication service.

2.25 Subd. 12. **Specific consent.** "Specific consent" means consent provided directly
2.26 to the government entity seeking information, including, but not limited to, when the
2.27 government entity is the addressee or intended recipient or a member of the intended
2.28 audience of an electronic communication. Specific consent does not require that the
2.29 originator of the communication have actual knowledge that an addressee, intended
2.30 recipient, or member of the specific audience is a government entity, except where a
2.31 government employee or agent has taken deliberate steps to hide the employee's or agent's
2.32 government association.

2.33 Subd. 13. **Subscriber information.** "Subscriber information" means the name,
2.34 street address, telephone number, e-mail address, or similar contact information provided
2.35 by the subscriber to the provider to establish or maintain an account or communication

channel, a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.

Sec. 3. **[626A.46] GOVERNMENT ENTITY PROHIBITIONS; EXCEPTIONS.**

Subdivision 1. **Prohibitions.** Except as provided in this section, a government entity shall not:

(1) compel or incentivize the production of or access to electronic communication information from a service provider;

(2) compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device; or

(3) access electronic device information by means of physical interaction or electronic communication with the electronic device.

Subd. 2. **Exceptions.** A government entity may:

(1) compel the production of or access to electronic communication information from a service provider, or compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device only:

(i) pursuant to a search warrant issued under section 626.18 and subject to subdivision 4; or

(ii) pursuant to a wiretap order issued under sections 626A.05 and 626A.06; and

(2) access electronic device information by means of physical interaction or electronic communication with the device only:

(i) pursuant to a search warrant issued pursuant to section 626.18 and subject to subdivision 4;

(ii) pursuant to a wiretap order issued pursuant to sections 626A.05 and 626A.06;

(iii) with the specific consent of the authorized possessor of the device;

(iv) with the specific consent of the owner of the device, only when the device has been reported as lost or stolen; or

(v) if the government entity, in good faith, believes the device to be lost, stolen, or abandoned, provided that the entity shall only access electronic device information in order to attempt to identify, verify, or contact the owner or authorized possessor of the device.

Subd. 3. **Warrant.** (a) A warrant for electronic communication information shall:

(1) describe with particularity the information to be seized by specifying the time periods covered and, as appropriate and reasonable, the target individuals or accounts, the applications or services covered, and the types of information sought;

(2) require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant be destroyed within 30 days and not subject

to further review, use, or disclosure. This clause shall not apply when the information obtained is exculpatory with respect to the targeted individual; and

(3) comply with all other provisions of Minnesota and federal law, including any provisions prohibiting, limiting, or imposing additional requirements on the use of search warrants.

(b) When issuing any warrant or order for electronic information, or upon the petition from the target or recipient of the warrant or order, a court may, at its discretion, appoint a special master charged with ensuring that only information necessary to achieve the objective of the warrant or order is produced or accessed.

Subd. 4. Service provider; voluntary disclosure. (a) A service provider may voluntarily disclose electronic communication information or subscriber information when that disclosure is not otherwise prohibited by state or federal law.

(b) If a government entity receives electronic communication information voluntarily provided under subdivision 7, the government entity shall destroy that information within 90 days unless one or more of the following apply:

(1) the entity has or obtains the specific consent of the sender or recipient of the electronic communications about which information was disclosed; or

(2) the entity obtains a court order authorizing the retention of the information.

(c) A court shall issue a retention order upon a finding that the conditions justifying the initial voluntary disclosure persist and the court shall authorize the retention of the information only for so long as those conditions persist, or there is probable cause to believe that the information constitutes evidence that a crime has been committed.

Information retained subject to this provision shall not be shared with:

(1) any persons or entities that do not agree to limit their use of the provided information to those purposes contained in the court authorization; and

(2) any persons or entities that:

(i) are not legally obligated to destroy the provided information upon the expiration or rescindment of the court's retention order; or

(ii) do not voluntarily agree to destroy the provided information upon the expiration or rescindment of the court's retention order.

Subd. 5. Emergency. If a government entity obtains electronic communication information relating to an emergency involving danger of death or serious physical injury to a person, that requires access to the electronic information without delay, the entity shall, within three days after obtaining the electronic information, file with the appropriate court an application for a warrant or order authorizing obtaining the electronic information or a motion seeking approval of the emergency disclosures that shall set forth the facts giving

rise to the emergency and, if applicable, a request supported by a sworn affidavit for an order delaying notification under section 13.173, subdivision 2, paragraph (a). The court shall promptly rule on the application or motion and shall order the immediate destruction of all information obtained, and immediate notification under section 13.173, subdivision 1, if the notice has not already been given, upon a finding that the facts did not give rise to an emergency or upon rejecting the warrant or order application on any other ground.

Subd. 6. **Subpoena.** This section does not limit the authority of a government entity to use an administrative, grand jury, trial, or civil discovery subpoena to require:

(1) an originator, addressee, or intended recipient of an electronic communication to disclose any electronic communication information associated with that communication;

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

(3) a service provider to provide subscriber information.

Subd. 7. **Recipient voluntary disclosure.** This section does not prohibit the intended recipient of an electronic communication from voluntarily disclosing electronic communication information concerning that communication to a government entity.

Subd. 8. **Construction.** Nothing in this section shall be construed to expand any authority under Minnesota law to compel the production of or access to electronic information.

Sec. 4. **[626A.47] NOTICES REQUIRED.**

Subdivision 1. **Notice.** Except as otherwise provided in this section, a government entity that executes a warrant, or obtains electronic communication information in an emergency under section 626A.46, subdivision 5, shall serve upon, or deliver to by registered or first class mail, electronic mail, or other means reasonably calculated to be effective, the identified targets of the warrant or emergency request, a notice that informs the recipient that information about the recipient has been compelled or requested, and states with reasonable specificity the nature of the government investigation under which the information is sought. The notice shall include a copy of the warrant or a written statement setting forth facts giving rise to the emergency. The notice shall be provided contemporaneously with the execution of a warrant, or, in the case of an emergency, within three days after obtaining the electronic information.

Subd. 2. **Emergency; delay of notice.** (a) When a warrant is sought or electronic communication information is obtained in an emergency under section 626A.46,

subdivision 5, the government entity may submit a request supported by a sworn affidavit for an order delaying notification and prohibiting any party providing information from notifying any other party that information has been sought. The court shall issue the order if the court determines that there is reason to believe that notification may have an adverse result, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and not to exceed 90 days. The court may grant extensions of the delay of up to 90 days each.

(b) Upon expiration of the period of delay of the notification, the government entity shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective as specified by the court issuing the order authorizing delayed notification, the identified targets of the warrant, a document that includes the information described in subdivision 1, a copy of all electronic information obtained or a summary of that information, including, at a minimum, the number and types of records disclosed, the date and time when the earliest and latest records were created, and a statement of the grounds for the court's determination to grant a delay in notifying the individual.

Subd. 3. **No identified target.** (a) If there is no identified target of a warrant or emergency request at the time of issuance, the government entity shall submit to the Supreme Court all of the information required in subdivision 1 within three days of the execution of the warrant or issuance of the request. If an order delaying notice is obtained under subdivision 2, the government entity shall submit to the Supreme Court all of the information required in subdivision 2, paragraph (b), upon the expiration of the period of delay of the notification.

(b) The Supreme Court shall publish the reports on its Web site within 90 days of receipt. The Supreme Court shall redact names or other personal identifying information from the reports.

Subd. 4. **Service provider.** Except as otherwise provided in this section, nothing in sections 626A.45 to 626A.49 shall prohibit or limit a service provider or any other party from disclosing information about any request or demand for electronic information.

Sec. 5. **[626A.48] REMEDIES.**

Subdivision 1. **Suppression.** Any person in a trial, hearing, or proceeding may move to suppress any electronic communication information obtained or retained in violation of the United States Constitution, Minnesota Constitution, or of sections 626A.45 to 626A.49. The motion shall be made, determined, and subject to review according to section 626.21 or 626A.12.

7.1 Subd. 2. **Attorney general.** The attorney general may commence a civil action to
7.2 compel any government entity to comply with the provisions of sections 626A.45 to
7.3 626A.49.

7.4 Subd. 3. **Petition.** An individual whose information is targeted by a warrant,
7.5 order, or other legal process that is inconsistent with sections 626A.45 to 626A.49, the
7.6 Minnesota Constitution, the United States Constitution, or a service provider or any other
7.7 recipient of the warrant, order, or other legal process, may petition the issuing court to void
7.8 or modify the warrant, order, or process, or to order the destruction of any information
7.9 obtained in violation of sections 626A.45 to 626A.49, the Minnesota Constitution, or
7.10 the United States Constitution.

7.11 Subd. 4. **No cause of action.** A Minnesota or foreign corporation, and its officers,
7.12 employees, and agents, are not subject to any cause of action for providing records,
7.13 information, facilities, or assistance according to the terms of a warrant, court order,
7.14 statutory authorization, emergency certification, or wiretap order issued under sections
7.15 626A.45 to 626A.49.

7.16 Sec. 6. **[626A.49] REPORTS.**

7.17 (a) At the same time as notice is provided under section 626A.47, the issuing or
7.18 denying judge shall report to the state court administrator:

7.19 (1) the fact that a warrant or extension was applied for under section 626A.46;

7.20 (2) the fact that the warrant or extension was granted as applied for, was modified,
7.21 or was denied;

7.22 (3) the period of collection of electronic communication information authorized by
7.23 the warrant, and the number and duration of any extensions of the warrant;

7.24 (4) the offense specified in the warrant or application, or extension of a warrant;

7.25 (5) whether the collection required contemporaneous monitoring of an electronic
7.26 device's location; and

7.27 (6) the identity of the applying investigative or peace officer and agency making
7.28 the application and the person authorizing the application.

7.29 (b) On or before November 15 of each even-numbered year, the state court
7.30 administrator shall transmit to the legislature a report concerning: (1) all warrants
7.31 authorizing the collection of electronic communication information during the two
7.32 previous calendar years; and (2) all applications that were denied during the two previous
7.33 calendar years. Each report shall include a summary and analysis of the data required to
7.34 be filed under this section. The report is public and must be available for public inspection
7.35 at the Legislative Reference Library and the state court administrator's office and Web site.

- 8.1 (c) Nothing in sections 626A.45 to 626A.49 shall prohibit or restrict a service
8.2 provider from producing an annual report summarizing the demands or requests it receives
8.3 under those sections.