

SENATE
STATE OF MINNESOTA
NINETY-FIRST SESSION

S.F. No. 3071

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DATE	D-PG	OFFICIAL STATUS
02/13/2020	4745	Introduction and first reading Referred to Judiciary and Public Safety Finance and Policy
02/24/2020	4907	Comm report: To pass
	4908	Second reading

1.1 A bill for an act

1.2 relating to public safety; requiring a government entity to obtain a search warrant

1.3 before accessing electronic communication information; amending Minnesota

1.4 Statutes 2018, sections 626A.26, subdivision 3; 626A.27, subdivision 2; 626A.28,

1.5 subdivisions 3, 4, 5; 626A.31, subdivision 1; proposing coding for new law in

1.6 Minnesota Statutes, chapter 626; repealing Minnesota Statutes 2018, sections

1.7 626A.28, subdivisions 1, 2; 626A.29; 626A.30.

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

1.9 Section 1. **[626.085] SEARCH WARRANT REQUIRED FOR ELECTRONIC**

1.10 **COMMUNICATION INFORMATION.**

1.11 Subdivision 1. Definitions. As used in this section, the following terms have the meanings

1.12 given them:

1.13 (1) "electronic communication" means the transfer of signs, signals, writings, images,

1.14 sounds, data, or intelligence of any nature in whole or in part by a wire, radio,

1.15 electromagnetic, photoelectric, or photo-optical system;

1.16 (2) "electronic communication information" means any information about an electronic

1.17 communication or the use of an electronic communication service, limited to the contents

1.18 of electronic communications and precise or approximate location of the sender or recipients

1.19 at any point during the communication;

1.20 (3) "electronic communication service" has the meaning given in section 626A.01,

1.21 subdivision 17; and

1.22 (4) "government entity" has the meaning given in section 626A.42, subdivision 1,

1.23 paragraph (d).

2.1 Subd. 2. **Warrant required; exceptions.** (a) Except as provided in paragraph (b), a
2.2 government entity must obtain a search warrant to require disclosure of electronic
2.3 communication information.

2.4 (b) A government entity may request disclosure of electronic communication information
2.5 without a search warrant if the agency has valid consent from one authorized to give it, or
2.6 exigent circumstances exist where there is a danger to the life or physical safety of an
2.7 individual.

2.8 Subd. 3. **Notice to subject.** A government entity accessing electronic communication
2.9 information under subdivision 2 must provide notice to the subject of the information
2.10 consistent with the requirements of subdivision 4 and section 626.16.

2.11 Subd. 4. **Notice; temporary nondisclosure of search warrant.** (a) Within a reasonable
2.12 time but not later than 90 days after the court unseals the search warrant under this
2.13 subdivision, the issuing or denying judge shall cause to be served on the persons named in
2.14 the warrant and the application an inventory which shall include notice of:

2.15 (1) the issuance of the warrant or the application;

2.16 (2) the date of issuance and the period of authorized, approved, or disapproved collection
2.17 of electronic communication information, or the denial of the application; and

2.18 (3) whether electronic communication information was or was not collected during the
2.19 period.

2.20 (b) A search warrant authorizing collection of electronic communication information
2.21 must direct that:

2.22 (1) the warrant be sealed for a period of 90 days or until the objective of the warrant has
2.23 been accomplished, whichever is shorter; and

2.24 (2) the warrant be filed with the court administrator within ten days of the expiration of
2.25 the warrant.

2.26 (c) The prosecutor may request that the search warrant, supporting affidavits, and any
2.27 order granting the request not be filed. An order must be issued granting the request in whole
2.28 or in part if, from affidavits, sworn testimony, or other evidence, the court finds reasonable
2.29 grounds exist to believe that filing the warrant may cause the search or a related search to
2.30 be unsuccessful, create a substantial risk of injury to an innocent person, or severely hamper
2.31 an ongoing investigation.

3.1 (d) The search warrant must direct that following the commencement of any criminal
 3.2 proceeding utilizing evidence obtained in or as a result of the search, the supporting
 3.3 application or affidavit must be filed either immediately or at any other time as the court
 3.4 directs. Until the filing, the documents and materials ordered withheld from filing must be
 3.5 retained by the judge or the judge's designee.

3.6 Subd. 5. **Reports.** (a) At the same time as notice is provided according to the requirements
 3.7 of subdivision 4, the issuing or denying judge shall report to the state court administrator:

3.8 (1) that a warrant was applied for under this section;

3.9 (2) whether the warrant was granted as applied for, was modified, or was denied;

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

3.12 (4) the offense specified in the warrant or application or extension of a warrant; and

3.13 (5) the identity of the applying investigative or peace officer and agency making the
 3.14 application and the person authorizing the application.

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

3.22 (c) Nothing in this section prohibits or restricts a service provider from producing an
 3.23 annual report summarizing the demands or requests it receives under this section.

3.24 Sec. 2. Minnesota Statutes 2018, section 626A.26, subdivision 3, is amended to read:

3.25 Subd. 3. **Exceptions.** Subdivision 1 does not apply with respect to conduct authorized:

3.26 (1) by the person or entity providing a wire or electronic communications service;

3.27 (2) by a user of that service with respect to a communication of or intended for that user;

3.28 or

3.29 (3) in sections 626.085, 626A.05 to 626A.09, or 626A.28, ~~or 626A.29.~~

4.1 Sec. 3. Minnesota Statutes 2018, section 626A.27, subdivision 2, is amended to read:

4.2 Subd. 2. **Exceptions.** A person or entity may divulge the contents of a communication:

4.3 (1) to an addressee or intended recipient of the communication or an agent of the
4.4 addressee or intended recipient;

4.5 (2) as otherwise authorized in section 626.085, 626A.02, subdivision 2, paragraph (a);
4.6 626A.05; or section 626A.28;

4.7 (3) with the lawful consent of the originator or an addressee or intended recipient of the
4.8 communication, or the subscriber in the case of remote computing service;

4.9 (4) to a person employed or authorized or whose facilities are used to forward a
4.10 communication to its destination;

4.11 (5) as may be necessarily incident to the rendition of the service or to the protection of
4.12 the rights or property of the provider of that service; or

4.13 (6) to a law enforcement agency, if the contents:

4.14 (i) were inadvertently obtained by the service provider; and

4.15 (ii) appear to pertain to the commission of a crime.

4.16 Sec. 4. Minnesota Statutes 2018, section 626A.28, subdivision 3, is amended to read:

4.17 Subd. 3. **Records concerning electronic communication service or remote computing**
4.18 **service.** (a) Except as provided in paragraph (b) or chapter 325M, a provider of electronic
4.19 communication service or remote computing service may disclose a record or other
4.20 information pertaining to a subscriber to or customer of the service, not including the contents
4.21 of communications ~~covered by subdivision 1 or 2~~, to any person other than a governmental
4.22 entity.

4.23 (b) A provider of electronic communication service or remote computing service may
4.24 disclose a record or other information pertaining to a subscriber to or customer of the service,
4.25 not including the contents of communications ~~covered by subdivision 1 or 2~~, to a
4.26 governmental entity only when the governmental entity:

4.27 (1) uses an administrative subpoena authorized by statute, or a grand jury subpoena;

4.28 (2) obtains a warrant;

4.29 (3) obtains a court order for such disclosure under subdivision 4; or

4.30 (4) has the consent of the subscriber or customer to the disclosure.

5.1 (c) A governmental entity receiving records or information under this subdivision is not
5.2 required to provide notice to a subscriber or customer.

5.3 (d) Notwithstanding paragraph (b), a provider of electronic communication service or
5.4 remote computing service may not disclose location information covered by section 626A.42
5.5 to a government entity except as provided in that section.

5.6 Sec. 5. Minnesota Statutes 2018, section 626A.28, subdivision 4, is amended to read:

5.7 Subd. 4. **Requirements for court order.** A court order for disclosure under subdivision
5.8 ~~2 or 3~~ must issue only if the governmental entity shows that there is reason to believe the
5.9 ~~contents of a wire or electronic communication, or the~~ records or other information sought,
5.10 are relevant to a legitimate law enforcement inquiry. A court issuing an order pursuant to
5.11 this section, on a motion made promptly by the service provider, may quash or modify such
5.12 order, if the information or records requested are unusually voluminous in nature or
5.13 compliance with such order otherwise would cause an undue burden on such provider.

5.14 Sec. 6. Minnesota Statutes 2018, section 626A.28, subdivision 5, is amended to read:

5.15 Subd. 5. **No cause of action against a provider disclosing certain information.** No
5.16 cause of action lies in any court against any provider of wire or electronic communication
5.17 service, its officers, employees, agents, or other specified persons for providing information,
5.18 facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or
5.19 certification under ~~sections~~ section 626.085 or 626A.26 to 626A.34.

5.20 Sec. 7. Minnesota Statutes 2018, section 626A.31, subdivision 1, is amended to read:

5.21 Subdivision 1. **Payment.** Except as otherwise provided in subdivision 3, a governmental
5.22 entity obtaining ~~the contents of communications, records, or other information under sections~~
5.23 section 626A.27, or 626A.28, and 626A.29 shall pay to the person or entity assembling or
5.24 providing the information a fee for reimbursement for costs that are reasonably necessary
5.25 and that have been directly incurred in searching for, assembling, reproducing, or otherwise
5.26 providing the information. The reimbursable costs must include any costs due to necessary
5.27 disruption of normal operations of the electronic communication service or remote computing
5.28 service in which the information may be stored.

5.29 Sec. 8. **REPEALER.**

5.30 Minnesota Statutes 2018, sections 626A.28, subdivisions 1 and 2; 626A.29; and 626A.30,
5.31 are repealed.

626A.28 REQUIREMENTS FOR GOVERNMENTAL ACCESS.

Subdivision 1. **Contents of electronic communications in electronic storage.** A governmental entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication that is in electronic storage in an electronic communications system for 180 days or less only under a warrant. A government entity may require the disclosure by a provider of electronic communications services of the contents of an electronic communication that has been in electronic storage in an electronic communications system for more than 180 days by the means available under subdivision 2.

Subd. 2. **Contents of electronic communications in a remote computing service.** (a) A governmental entity may require a provider of remote computing service to disclose the contents of electronic communication to which this paragraph is made applicable by paragraph (b):

(1) without required notice to the subscriber or customer, if the governmental entity obtains a warrant; or

(2) with prior notice if the governmental entity:

(i) uses an administrative subpoena authorized by statute or a grand jury subpoena; or

(ii) obtains a court order for such disclosure under subdivision 4;

except that delayed notice may be given under section 626A.30.

(b) Paragraph (a) is applicable with respect to any electronic communication that is held or maintained on that service:

(1) on behalf of, and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of such remote computing service; and

(2) solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communications for purposes of providing any services other than storage or computer processing.

626A.29 BACKUP PRESERVATION.

Subdivision 1. **Backup copy.** (a) A governmental entity acting under section 626A.28, subdivision 2, paragraph (b), may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of the subpoena or court order, the service provider shall create a backup copy, as soon as practicable, consistent with its regular business practices and shall confirm to the governmental entity that the backup copy has been made. The backup copy must be created within two business days after receipt by the service provider of the subpoena or court order.

(b) Notice to the subscriber or customer must be made by the governmental entity within three days after receipt of the confirmation, unless notice is delayed under section 626A.30, subdivision 1.

(c) The service provider must not destroy a backup copy until the later of:

(1) the delivery of the information; or

(2) the resolution of any proceedings, including appeals of any proceeding, concerning the subpoena or court order.

(d) The service provider shall release the backup copy to the requesting governmental entity no sooner than 14 days after the governmental entity's notice to the subscriber or customer if the service provider:

(1) has not received notice from the subscriber or customer that the subscriber or customer has challenged the governmental entity's request; and

(2) has not initiated proceedings to challenge the request of the governmental entity.

(e) A governmental entity may seek to require the creation of a backup copy under paragraph (a) if in its sole discretion the entity determines that there is reason to believe that notification under section 626A.28 of the existence of the subpoena or court order may result in destruction of or

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tampering with evidence. This determination is not subject to challenge by the subscriber or customer or service provider.

Subd. 2. **Customer challenges.** (a) Within 14 days after notice by the governmental entity to the subscriber or customer under subdivision 1, paragraph (b), the subscriber or customer may file a motion to quash the subpoena or vacate the court order, with copies served upon the governmental entity and with written notice of the challenge to the service provider. A motion to vacate a court order must be filed in the court which issued the order. A motion to quash a subpoena must be filed in the district court of the county in which the governmental entity issuing the subpoena is located. The motion or application must contain an affidavit or sworn statement:

(1) stating that the applicant is a customer or subscriber to the service from which the contents of electronic communications maintained for the applicant have been sought; and

(2) stating the applicant's reasons for believing that the records sought are not relevant to a legitimate law enforcement inquiry or that there has not been substantial compliance with the provisions of this chapter in some other respect.

(b) Service must be made under this section upon a governmental entity by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received under sections 626A.26 to 626A.34. For the purposes of this section, the term "delivery" means handing it to the person specified in the notice or handing it to the person in charge of the office or department specified in the notice or the designee of the person in charge.

(c) If the court finds that the customer has complied with paragraphs (a) and (b), the court shall order the governmental entity to file a sworn response. The response may be filed in camera if the governmental entity includes in its response the reasons that make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct additional proceedings as it considers appropriate. Proceedings must be completed and the motion or application decided as soon as practicable after the filing of the governmental entity's response.

(d) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the governmental entity are maintained, or that there is a reason to believe that the law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order the process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is not a reason to believe that the communications sought are relevant to a legitimate law enforcement inquiry, or that there has not been substantial compliance with the provisions of sections 626A.26 to 626A.34, it shall order the process quashed.

(e) A court order denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer.

626A.30 DELAYED NOTICE.

Subdivision 1. **Delay of notification.** (a) A governmental entity acting under section 626A.28, subdivision 2, may:

(1) where a court order is sought, include in the application a request, which the court shall grant, for an order delaying the notification required under section 626A.28, subdivision 2, for a period not to exceed 90 days, if the court determines that there is reason to believe that notification of the existence of the court order may have an adverse result described in paragraph (b); or

(2) where an administrative subpoena or a grand jury subpoena is obtained, delay the notification required under section 626A.28 for a period not to exceed 90 days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in paragraph (b).

(b) An adverse result for the purposes of paragraph (a) is:

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

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of potential witnesses; or

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(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(c) The governmental entity shall maintain a true copy of certification under paragraph (a), clause (2).

(d) Extensions of the delay of notification provided in section 626A.28 of up to 90 days each may be granted by the court upon application, or by certification by a governmental entity, but only in accordance with subdivision 2.

(e) Upon expiration of the period of delay of notification under paragraph (a) or (d), the governmental entity shall serve upon, or deliver by registered or first-class mail to, the customer or subscriber a copy of the process or request together with notice that:

(1) states with reasonable specificity the nature of the law enforcement inquiry; and

(2) informs the customer or subscriber:

(i) that information maintained for the customer or subscriber by the service provider named in the process or request was supplied to or requested by that governmental authority and the date on which the supplying or request took place;

(ii) that notification of the customer or subscriber was delayed;

(iii) what governmental entity or court made the certification or determination under which that delay was made; and

(iv) which provision of sections 626A.26 to 626A.34 allowed such delay.

(f) As used in this subdivision, the term "supervisory official" means a peace officer with the rank of sergeant, or its equivalent, or above, a special agent in charge from the Bureau of Criminal Apprehension, the attorney general, the head of the attorney general's criminal division, a county attorney, or the head of a county attorney's criminal division.

Subd. 2. Preclusion of notice to subject of governmental access. A governmental entity acting under section 626A.28 when it is not required to notify the subscriber or customer under section 626A.28, subdivision 2, paragraph (a), or to the extent that it may delay notice under subdivision 1, may apply to a court for an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for a period as the court considers appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order. The court shall enter an order if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in:

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

(2) flight from prosecution;

(3) destruction of or tampering with evidence;

(4) intimidation of potential witnesses; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.