



The Judiciary, State of Hawaii

Testimony to the House Committee on Judiciary
Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair

Friday, February 3, 2012 at 2:00 p.m.
State Capitol, Conference Room 325

by
Judge Glenn Kim, Chair
Supreme Court Standing Committee on the Rules of Evidence (Evidence Committee)

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1777, Relating to Production of Records

Purpose: Adds a new chapter to HRS, allowing district court and circuit court judges to order the production of records by persons or entities located outside of the State of Hawaii, in all criminal cases. Requires that anyone in Hawaii served with criminal process from another state must comply with the criminal process.

Judiciary's Position:

The Evidence Committee respectfully requests that this measure be deferred and referred to it for interim study and a report to the 2013 Legislature.

In order to assist the Legislature in its evaluation of new evidence proposals and to enable the Judiciary to fulfill its constitutional responsibility to assert primacy in matters "relating to process, practice, procedure and appeals," the chief justice created the Evidence Committee in 1993 with a mandate "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence.

To assure the Judiciary a fair opportunity to exercise its constitutional function, the Evidence Committee respectfully requests that House Bill No. 1777 be deferred and referred to it for study and a written report to the very next session of the Legislature, because it is a new measure that has just come to our attention.

Thank you for the opportunity to testify on this measure

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HOUSE COMMITTEE ON JUDICIARY
Twenty-sixth State Legislature
Regular Session of 2012
State of Hawai'i

February 3, 2012

RE: H.B. 1777; RELATING TO PRODUCTION OF RECORDS.

Chair Keith-Agaran, Vice Chair Rhoads and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in support of House Bill 1777.

The purpose of this bill is to enact a "criminal long arm statute" that would authorize district and circuit court judges to order the production of records held by entities located outside the State of Hawaii. The new law would apply equally to requests made by defense attorneys and prosecutors. The bill would also require that an entity in located in Hawaii comply with the legal process issued by another State. The bill, therefore, seeks to make access to records a "two-way street".

It is important to note that the proposal does not alter any of the legal requirements that attorneys must meet to compel production of records. Thus, attorneys seeking to compel production of records from a mainland entity will still have to comply with Hawaii's existing legal standards, for example, the requirement that the government establish probable cause for the issuance of a search warrant. This bill does not change the legal standards required to issue legal process; instead, it merely provides that, if that standard is met, the entity in possession of the records must either disclose the records or ask the issuing court to quash the legal process.

The proposed language of H.B. 1777 is patterned after four recently-enacted statutes in Washington State, Minnesota, Florida, and California. Those statutes are attached to this written testimony. The Department of the Prosecuting Attorney's research has revealed no negative legal reaction to the statutes adopted in those four states.

Why do we need a criminal long arm statute in Hawaii? First, existing law does not expressly authorize state court judges to issue legal processes for records held by out-of-state entities, such as financial institutions and internet service providers, web-based e-mail providers, web site hosting companies, social networking providers, cellular telephone providers, and other entities. Moreover, nothing compels an out-of-state entity to comply with a legal process issued by a Hawaii state court judge. It's not uncommon for out-of-state entities to refuse to honor a legal process issued by Hawaii state courts. This proposal seeks to fix that problem. As noted, Washington State, Minnesota, Florida, and California have recently adopted nearly identical language to overcome this problem.

Most defense attorneys and prosecutors understand that records held by third party entities can represent critical evidence in a criminal case. Indeed, with the proliferation of computers and cell phones, electronic records in particular will be increasingly relied upon to establish the guilt or innocence of a suspect.¹ Accordingly, it is important that attorneys be able to access those records. The problem they face, however, is that most of the records they need are located outside the State of Hawaii. For example, most major service providers keep and maintain their records on the mainland. With the exception of Hawaiian Tel, all of the major service providers, and their records, are located outside the State of Hawaii. For example, the custodian of records for Oceanic Time Warner Cable, AOL, Google, Yahoo, Hotmail, Verizon, Sprint, Facebook, eBay, Paypal, Skype, Amazon, and many others are located on the mainland and their records are physically located on the mainland as well. In addition, with the exception of the relatively small number of local banks, most financial institutions and their records are located on the mainland.

The purpose of this proposal is to authorize State district and circuit court judge to issue legal process for records held by entities located in another State. Further, as the cost of doing business in Hawaii, those States would be required to honor a legal process issued by a Hawaii judge. Lastly, when an entity located in Hawaii is properly served with process from another State that entity would have to comply. This proposal, therefore, provides for reciprocal discovery and fairness to all parties.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports H.B. 1777. Thank for you the opportunity to testify on this matter.

¹ . Over the past decade, law enforcement has seen a steady increase in the rate of Cybercrimes. In 2009, for example, the Internet Crime Complaint Center (ICCC), which is a partnership between the FBI and National White Collar Crime Center reported, a 22% increase in online complaints. The problem, however, is getting worse. Why? Because of (1) the proliferation of mobile devices like laptops, tablets, and smart phones, (2) widespread Internet connectivity, and (3) the ease of creating and obtaining malware means that today, anyone anywhere at any time can engage in online criminal activity. In addition, organized criminal groups are increasingly turning to the Internet to commit crime. They've figured out that the Internet provides anonymity, it makes the traceability and attribution of the suspect difficult for law enforcement, and, quite frankly, they know that there are a lot of rich targets on the Internet. In addition, the problem is going to continue to get worse as long as the odds of getting caught and prosecuted remain low, and as long as the consequences remain relatively light.

WASHINGTON

RCW 10.96.005

Findings.

The legislature finds that many businesses, associations, and organizations providing goods and services to the public, conducting other activity in Washington, or otherwise affecting residents of Washington now operate nationally or globally and often maintain their business records in a location outside the state of Washington. The legislature further finds that bringing persons or organizations committing crimes in Washington to justice is a matter of great public interest because crimes have a significant effect on businesses, associations, and other organizations that conduct business in Washington, as well as on Washington citizens. Crimes result in significant harm and losses to persons, businesses, associations, and other organizations victimized, as well as persons not directly victimized when businesses or others more directly affected by the crimes must raise prices to cover crime losses. The ability of law enforcement and the criminal justice system to effectively perform their duties to the public often depends upon law enforcement agencies, prosecutors, and criminal defense attorneys being able to obtain and use records relevant to crimes that affect Washington's citizens, businesses, associations, organizations, and others who provide goods or services, or conduct other activity in Washington. In the course of fulfilling their duties to the public, law enforcement agencies, prosecutors, and criminal defense attorneys must frequently obtain records from these entities, and be able to use the records in court. The ability to obtain and use these records has an impact on Washington citizens because it affects the ability to enforce Washington's criminal laws and affects the deterrence value arising from criminal prosecution. Effectively combating crime requires laws facilitating and requiring that all those who possess records relevant to a criminal investigation comply with the legal process issued in connection with criminal investigations or litigation.

RCW 10.96.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Adverse result" includes one or more of the following possible consequences:
 - (a) Danger to the life or physical safety of an individual;
 - (b) A flight from prosecution;
 - (c) The destruction of, potential loss of, or tampering with evidence;
 - (d) The intimidation of potential witnesses;
 - (e) Jeopardy to an investigation or undue delay of a trial.
- (2) "Applicant" means a law enforcement officer, prosecuting attorney, deputy or special deputy prosecuting attorney, or defense attorney who is seeking criminal process under RCW 10.96.020.
- (3) "Criminal process" means a search warrant or legal process issued pursuant to RCW 10.79.015 and CrR 2.3; any process issued pursuant to chapter 9.73, 9A.82, 10.27, or 10.29 RCW; and any other legal process signed by a judge of the superior court and issued in a criminal matter which allows the search for or commands production of records that are in the actual or constructive possession of the recipient, regardless of whether the recipient or the records are physically located within the state.
- (4) "Defense attorney" means an attorney of record for a person charged with a crime when the attorney is seeking the issuance of criminal process for the defense of the criminal case.
- (5) "Properly served" means delivery by hand or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to the recipient addressee of criminal process.
- (6) "Recipient" means a person, as defined in RCW 9A.04.110, or a business, as defined in RCW 5.45.010, that has conducted business or engaged in transactions occurring at least in part in this state upon whom criminal process issued under this chapter is properly served.

RCW 10.96.020

Production of records.

This section shall apply to any criminal process allowing for search of or commanding production of records that are in the actual or constructive possession of a recipient who receives service outside Washington, regardless of whether the recipient or the records are physically located within the state.

(1) When properly served with criminal process issued under this section, the recipient shall provide the applicant all records sought pursuant to the criminal process. The records shall be produced within twenty business days of receipt of the criminal process, unless the process requires earlier production. An applicant may consent to a recipient's request for additional time to comply with the criminal process.

(2) Criminal process issued under this section must contain the following language in bold type on the first page of the document: "This [warrant, subpoena, order] is issued pursuant to RCW [insert citation to this statute]. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply."

(3) If the judge finds reason to suspect that failure to produce records within twenty business days would cause an adverse result, the criminal process may require production of records within less than twenty business days. A court may reasonably extend the time required for production of the records upon finding that the recipient has shown good cause for that extension and that an extension of time would not cause an adverse result.

(4) When properly served with criminal process issued under this section, a recipient who seeks to quash the criminal process must seek relief from the court where the criminal process was issued, within the time originally required for production of records. The court shall hear and decide the motion no later than five court days after the motion is filed. An applicant's consent, under subsection (1) of this section, to a recipient's request for additional time to comply with the criminal process does not extend the date by which a recipient must seek the relief designated in this section.

RCW 10.96.030

Authenticity of records — Verification — Affidavit, declaration, or certification.

(1) Upon written request from the applicant, or if ordered by the court, the recipient of criminal process shall verify the authenticity of records that it produces by providing an affidavit, declaration, or certification that complies with subsection (2) of this section. The requirements of RCW 5.45.020 regarding business records as evidence may be satisfied by an affidavit, declaration, or certification that complies with subsection (2) of this section, without the need for testimony from the custodian of records, regardless of whether the business records were produced by a foreign or Washington state entity.

(2) To be admissible without testimony from the custodian of records, business records must be accompanied by an affidavit, declaration, or certification by its record custodian or other qualified person that includes contact information for the witness completing the document and attests to the following:

(a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;

(b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of those matters;

(c) The record was made in the regular course of business;

(d) The identity of the record and the mode of its preparation; and

(e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

(3) A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make the record and affidavit, declaration, or certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. A motion opposing admission in evidence of the record shall be made and determined by the court before trial and with sufficient time to allow the party offering the record time, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating hardship on the party or on the custodian or other qualified person.

(4) Failure by a party to timely file a motion under subsection (4) of this section shall constitute a waiver of objection to admission of the evidence, but the court for good cause shown may grant relief from the waiver. When the court grants relief from the waiver, and thereafter determines the custodian of the record shall appear, a continuance of the trial may be granted to provide the proponent of the record sufficient time to arrange for the necessary witness to appear.

(5) Nothing in this section precludes either party from calling the custodian of record of the record or other witness to testify regarding the record.

RCW 10.96.040

Service of process issued by or in another state.

A Washington recipient, when served with process that was issued by or in another state that on its face purports to be valid criminal process shall comply with that process as if that process had been issued by a Washington court.

RCW 10.96.050

Recipients' immunity from liability.

A recipient of criminal process or process under RCW 10.96.010 and 10.96.040, and any other person that responds to such process is immune from civil and criminal liability for complying with the process, and for any failure to provide notice of any disclosure to the person who is the subject of or identified in the disclosure.

RCW 10.96.060

Issuance of criminal process.

A judge of the superior court may issue any criminal process to any recipient at any address, within or without the state, for any matter over which the court has criminal jurisdiction pursuant to RCW 9A.04.030. This section does not limit a court's authority to issue warrants or legal process under other provisions of state law.

Minnesota Statutes Annotated Currentness
Criminal Procedure (Ch. 625-634)

Chapter 626. Training; Investigation, Apprehension; Reports

Search Warrants

→ 626.18. Search warrants relating to electronic communication services and remote computing services

Subdivision 1. Definitions. The definitions in this subdivision apply to this section.

(a) The terms "electronic communication services" and "remote computing services" shall be construed in accordance with United States Code, title 18, sections 2701 to 2711, as amended through March 1, 2001. This section does not apply to corporations that do not provide those services to the general public.

(b) An "adverse result" occurs when notification of the existence of a search warrant results in:

- (1) danger to the life or physical safety of an individual;
- (2) a flight from prosecution;
- (3) the destruction of or tampering with evidence;
- (4) the intimidation of potential witnesses; or
- (5) serious jeopardy to an investigation or undue delay of a trial.

(c) "Applicant" means a peace officer as defined in section 626.05, to whom a search warrant is issued pursuant to this chapter.

(d) "Minnesota corporation" refers to any corporation or other entity that is subject to section 5.25, excluding foreign corporations.

(e) A "foreign corporation" is considered to be doing business in Minnesota if it makes a contract or engages in a terms of service agreement with a resident of Minnesota to be performed in whole or in part by either party in Minnesota. The making of the contract or terms of service agreement is considered to be the agreement of the foreign corporation that any administrative subpoena or search warrant properly served on it has the same legal force and effect as if served personally on it within the state of Minnesota.

(f) "Properly served" means that a search warrant has been 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 person or entity listed in section 5.25 or covered by this statute.

Subd. 2. Application. (a) The following provisions shall apply to any search warrant issued under this chapter allowing a search for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where those records would reveal the identity of the customers using those services; data stored by, or on behalf of, the customer; the customer's usage of those services; the recipient or destination of communications sent to or from those customers; or the content of those communications.

(b) When properly served with a search warrant issued by the Minnesota court, a foreign corporation subject to this section shall provide to the applicant all records sought pursuant to that warrant within eight business days of receipt, including those records maintained or located outside this state.

(c) Where the applicant makes a showing and the judge finds that failure to produce records within less than eight

business days would cause an adverse result, the warrant may require production of records within less than eight business days. A court may reasonably extend the time required for production of the records upon finding that the foreign corporation has shown good cause for that extension and that an extension of time would not cause an adverse result.

(d) A foreign corporation seeking to quash the warrant must seek relief from the court that issued the warrant within the time required for production of records under this section. The issuing court shall hear and decide that motion no later than eight court days after the motion is filed.

(e) The foreign corporation shall verify the authenticity of records that it produces by providing a written affidavit or statement to that effect.

Subd. 3. Warrant of another state. A Minnesota corporation that provides electronic communication services or remote computing services to the general public, when served with a **warrant issued by another state** to produce records that would reveal the identity of the customers using those services; data stored by, or on behalf of, the customer; the customer's usage of those services; the recipient or destination of communications sent to or from those customers; or the content of those communications, shall produce those records as if that warrant had been issued by a Minnesota court.

Subd. 4. Immunity. No cause of action shall lie against any foreign or Minnesota corporation subject to this section, its officers, employees, agents, or other specified persons for providing records, information, facilities, or assistance in accordance with the terms of a warrant issued pursuant to this chapter.


CREDIT(S)

Laws 2001, c. 197, § 6, eff. Aug. 1, 2001.

RULES OF CRIMINAL PROCEDURE

<Section 480.059, subd. 7, provides in part that statutes which relate to training, investigation, apprehension, and reports found in chapter 626 remain in full force and effect notwithstanding the Rules of Criminal Procedure.>

LIBRARY REFERENCES

Searches and Seizures  102.

Westlaw Topic No. 349.

C.J.S. Searches and Seizures §§ 132 to 134.

RESEARCH REFERENCES

2008 Electronic Update

Treatises and Practice Aids

7 Minnesota Practice Series § 5.45.1, Search Warrants Relating to Computer Services.

12 Minnesota Practice Series R 4, Warrants.

M. S. A. § 626.18, MN ST § 626.18

Current with laws of the 2008 Regular Session through Chapter 151

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Effective: July 01, 2003

**WEST'S FLORIDA
STATUTES ANNOTATED**

<http://www.westlaw.com/TOC/Default.wl?rs=dfa1.0&vr=2.0&DB=FLCJ-ST&DocName=FL&FindType=V>

TITLE VII. EVIDENCE (CHAPTERS 90-92)

CHAPTER 92. WITNESSES, RECORDS, AND DOCUMENTS

92.605. Production of certain records by Florida businesses and out-of-state corporations

(1) For the purposes of this section, the term:

(a) "Adverse result" includes one of the following consequences to notification of the existence of a court order, a subpoena, or a search warrant:

1. Danger to the life or physical safety of an individual.
2. A flight from prosecution.
3. The destruction of or tampering with evidence.
4. The intimidation of potential witnesses.
5. Serious jeopardy to an investigation or undue delay of a trial.

(b) "Applicant" means a law enforcement officer who is seeking a court order or subpoena under s. 16.56, s. 27.04, s. 905.185, or s. 914.04 or who is issued a search warrant under s. 933.01, or anyone who is authorized to issue a subpoena under the Florida Rules of Criminal Procedure.

(c) "Business" means any business, institution, association, profession, occupation, or calling of any kind, whether or not conducted for profit.

(d) "Electronic communication services" and "remote computing services" have the same meaning as provided in the Electronic Communications Privacy Act in chapter 121 (commencing with s. 2701) of part I of Title 18 of the United States Code Annotated. This section does not apply to corporations that do not provide those services to the public.

(e) "Out-of-state corporation" means any corporation that is qualified to do business in this state under s. 607.1501.

(f) "Out-of-state record of regularly conducted business activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in another state or country.

(g) "Out-of-state certification" means a written declaration made and signed in another state or country by the custodian of an out-of-state record of regularly conducted business activity or another qualified person that, if falsely made, would subject the declarant to criminal penalty under the laws of another state or country.

(h) "Properly served" means delivery 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 person or entity properly registered to do business in any state. In order for an out-of-state corporation to be properly served, the service described in this paragraph must be effected on the corporation's registered agent.

(2) The following provisions apply to any subpoena, court order, or search warrant issued in compliance with the Electronic Communications Privacy Act in chapter 121 (commencing with s. 2701) of part I of Title 18 of the United States Code and that is subject to this chapter, which allows a search for records that are in the actual or

constructive possession of an out-of-state corporation that provides electronic communication services or remote computing services to the public, when those records would reveal the identity of the customers using those services; data stored by, or on behalf of, the customers; the customers' usage of those services; or the recipients or destinations of communications sent to or from those customers.

(a) Any subpoena, court order, or warrant issued under this subsection must contain the following language in bold type on the first page of the document: "This (subpoena, order, warrant) is issued pursuant to Florida Statute s. 92.605. A response is due within 20 business days of receipt of this (subpoena, order, warrant) unless a longer time period is stated herein."

(b) When properly served with a subpoena, court order, or search warrant issued by a Florida court or other applicant, an out-of-state corporation subject to this section shall provide to the applicant all records sought pursuant to such subpoena, court order, or warrant within 20 business days after receipt, or the date indicated within the subpoena, if later, including those records maintained or located outside the State of Florida. If the records cannot be produced within the 20-day time period, the out-of-state corporation shall notify the applicant within the 20-day time period and agree to produce the documents at the earliest possible time. The applicant shall pay the out-of-state corporation the reasonable expenses associated with compliance.

(c) When the applicant makes a showing and the court finds that failure to produce records within 20 business days would cause an adverse result, the subpoena, court order, or warrant may require production of records within less than 20 business days. A court may reasonably extend the time required for production of the records upon finding that the out-of-state corporation needs the extension and that an extension of time would not cause an adverse result.

(d) An out-of-state corporation seeking to quash or object to the subpoena, court order, or warrant must seek relief from the court issuing such subpoena, court order, or warrant within the time required for production of records under this section. The issuing court shall hear and decide that motion within 5 court days after the motion is filed.

(e) Upon written request from the applicant or if ordered by the court, the out-of-state corporation shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in this section. Records produced in compliance with this section are admissible in evidence as set forth in subsection (5).

(3) A Florida business that provides electronic communication services or remote computing services to the public, when served with a subpoena, court order, or **warrant issued by another state** to produce records that would reveal the identity of the customers using those services; data stored by, or on behalf of, the customers; the customers' usage of those services; or the recipients or destinations of communications sent to or from those customers shall produce those records as if that subpoena, court order, or warrant had been issued by a Florida court.

(4) A cause of action does not arise against any out-of-state corporation or Florida business subject to this section, or its officers, employees, agents, or other specified persons, for providing records, information, facilities, or assistance in accordance with the terms of a subpoena, court order, or warrant subject to this section.

(5) In a criminal proceeding in a court of this state, an out-of-state record of regularly conducted business activity, or a copy of such record, shall not be excluded as hearsay evidence by s. 90.802, if an out-of-state certification attests that:

(a) Such record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

(b) Such record was kept in the course of a regularly conducted business activity.

(c) The business activity made such a record as a regular practice.

(d) If such record is not the original, it is a duplicate of the original, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(6) An out-of-state certification under this section shall authenticate such record or duplicate.

(7) No evidence in such records in the form of opinion or diagnosis is admissible under subsection (5) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(8) As soon after the arraignment as practicable, or 60 days prior to trial, a party intending to offer in evidence under this section an out-of-state record of regularly conducted business activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(9) In any criminal case, the content of any electronic communication may be obtained under this section only by court order or by the issuance of a search warrant, unless otherwise provided under the Electronic Communications Privacy Act or other provision of law.

CREDIT(S)

Added by Laws 2003, c. 2003-71, § 3, eff. July 1, 2003.

<General Materials (GM) - References, Annotations, or Tables>

RESEARCH REFERENCES

Encyclopedias

Evidence on Which Revocation Based, FL Jur. 2d Alcoholic Beverages § 89.

Disclosure of Contents of Stored Electronic Communication, FL Jur. 2d Criminal Law § 916.

Disclosure of Record or Other Information Pertaining to Subscriber or Customer, FL Jur. 2d Criminal Law § 917.

Treatises and Practice Aids

1 Florida Practice Series App. B, Chapter 92 of Florida Statutes Annotated Witnesses, Records, and Documents.
West's F. S. A. § 92.605, FL ST § 92.605

Current through Chapter 339 and S.J.R. 2D (End) of the 2007 Special 'D' Session
of the Twentieth Legislature

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Effective: January 01, 2000

West's Annotated California Codes Currentness

Penal Code (Refs & Annos)

Part 2. Of Criminal Procedure (Refs & Annos)

¶ Title 12. Special Proceedings of a Criminal Nature

¶ Chapter 3. Search Warrants (Refs & Annos)

→ § 1524.2. Search warrants; foreign corporations providing electronic communication services or remote computing services

(a) As used in this section, the following terms have the following meanings:

(1) The terms "electronic communication services" and "remote computing services" shall be construed in accordance with the Electronic Communications Privacy Act in Chapter 121 (commencing with Section 2701) of Part I of Title 18 of the United State Code Annotated. This section shall not apply to corporations that do not provide those services to the general public.

(2) An "adverse result" occurs when notification of the existence of a search warrant results in:

(A) Danger to the life or physical safety of an individual.

(B) A flight from prosecution.

(C) The destruction of or tampering with evidence.

(D) The intimidation of potential witnesses.

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

(3) "Applicant" refers to the peace officer to whom a search warrant is issued pursuant to subdivision (a) of Section 1528.

(4) "California corporation" refers to any corporation or other entity that is subject to Section 102 of the Corporations Code, excluding foreign corporations.

(5) "Foreign corporation" refers to any corporation that is qualified to do business in this state pursuant to Section 2105 of the Corporations Code.

(6) "Properly served" means that a search warrant has been 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 person or entity listed in Section 2110 of the Corporations Code.

(b) The following provisions shall apply to any search warrant issued pursuant to this chapter allowing a search for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where those records would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications.

(1) When properly served with a search warrant issued by the California court, a foreign corporation subject to this section shall provide to the applicant, all records sought pursuant to that warrant within five business days of receipt, including those records maintained or located outside this state.

(2) Where the applicant makes a showing and the magistrate finds that failure to produce records within less than five business days would cause an adverse result, the warrant may require production of records within less than five business days. A court may reasonably extend the time required for production of the records upon finding that the foreign corporation has shown good cause for that extension and that an extension of time would not cause an adverse result.

(3) A foreign corporation seeking to quash the warrant must seek relief from the court that issued the warrant within the time required for production of records pursuant to this section. The issuing court shall hear and decide that motion no later than five court days after the motion is filed.

(4) The foreign corporation shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in Section 1561 of the Evidence Code. Those records shall be admissible in evidence as set forth in Section 1562 of the Evidence Code.

(c) A California corporation that provides electronic communication services or remote computing services to the general public, when served with a **warrant issued by another state** to produce records that would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, shall produce those records as if that warrant had been issued by a California court.

(d) No cause of action shall lie against any foreign or California corporation subject to this section, its officers, employees, agents, or other specified persons for providing records, information, facilities, or assistance in accordance with the terms of a warrant issued pursuant to this chapter.

CREDIT(S)

(Added by Stats.1999, c. 896 (S.B.662), § 2.)

LAW REVIEW AND JOURNAL COMMENTARIES

Electronic evidence compliance--a guide for internet service providers. U.S.Internet Service Provider Association, 18 Berkeley Tech.L.J. 945 (2003).

LIBRARY REFERENCES

2000 Main Volume

Searches and Seizures  102, 147.

Westlaw Topic No. 349.

C.J.S. Searches and Seizures §§ 132 to 134, 205 to 206, 211.

RESEARCH REFERENCES

Encyclopedias

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Cal. Jur. 3d Criminal Law: Pretrial Proceedings § 382, Foreign Corporations Providing Electronic Communication Services or Remote Computing Services.

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Forms

California Transactions Forms--Business Entities § 14:8, Agent for Service of Process.

Treatises and Practice Aids

2 California Affirmative Defenses 2d § 38:38, Duty to Inform Immunities -- in General.

4 Witkin Cal. Crim. L. 3d Illegally Obtained Evidence § 87, (S 87) Records of Corporations Providing Electronic Communication or Remote Computing Services.

1 Witkin Cal. Crim. L. 3d Introduction to Crimes § 118, Investigatory and Procedural Issues.

9 Witkin, California Summary 10th Corporations § 231, (S 231) Service of Process.

West's Ann. Cal. Penal Code § 1524.2, CA PENAL § 1524.2

Current with all 2007 laws and through Ch. 6 of 2008 Third Ex.Sess.
urgency legislation

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