

JAN 21 2022

---

# A BILL FOR AN ACT

RELATING TO ELECTRONIC EAVESDROPPING.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that House Concurrent  
2 Resolution No. 225, Senate Draft 1, Regular Session of 2019,  
3 established the twenty-first century privacy law task force,  
4 whose membership consisted of individuals in government and the  
5 private sector having an interest or expertise in privacy law in  
6 the digital era. The concurrent resolution found that public  
7 use of the internet and related technologies has significantly  
8 expanded in recent years and that a lack of meaningful  
9 government regulation has resulted in personal privacy being  
10 compromised. Accordingly, the legislature requested that the  
11 task force examine and make recommendations regarding existing  
12 privacy laws and regulations to protect the privacy interests of  
13 the people of Hawaii.

14           The legislature also finds that, following significant  
15 inquiry and discussion, the task force recommended that, in  
16 order to align state law with the holding by the Supreme Court  
17 of the United States in *Carpenter v. United States*, 138 S. Ct.



1 2206 (2018), and current law enforcement practice, the Hawaii

2 Revised Statutes should be amended to:

3 (1) Require law enforcement entities to obtain a search  
4 warrant before accessing a person's electronic  
5 communications in non-exigent or non-consensual  
6 circumstances; and

7 (2) Authorize governmental entities to request, and  
8 authorize courts to approve, the delay of notification  
9 of law enforcement access to electronic communications  
10 up to the deadline to provide discovery in criminal  
11 cases.

12 Accordingly, the purpose of this Act is to implement the  
13 foregoing recommendations of the twenty-first century privacy  
14 law task force.

15 SECTION 2. Section 803-41, Hawaii Revised Statutes, is  
16 amended by adding a new definition to be appropriately inserted  
17 and to read as follows:

18 "Electronically stored data" means any information that is  
19 recorded, stored, or maintained in electronic form by an  
20 electronic communication service or a remote computing service.

21 "Electronically stored data" includes the contents of



1 communications, transactional records about communications, and  
2 records and information that relate to a subscriber, customer,  
3 or user of an electronic communication service or a remote  
4 computing service."

5 SECTION 3. Section 803-47.6, Hawaii Revised Statutes, is  
6 amended to read as follows:

7 "**§803-47.6 Requirements for governmental access.** (a) [A]  
8 Except as otherwise provided by law, a governmental entity may  
9 require [the disclosure by] a provider of an electronic  
10 communication service [of the contents of an electronic  
11 communication] and a provider of a remote computing service to  
12 disclose electronically stored data pursuant to a search warrant  
13 [only.] or written consent from the customer, subscriber, or  
14 user of the service.

15 [~~(b) A governmental entity may require a provider of~~  
16 ~~remote computing services to disclose the contents of any~~  
17 ~~electronic communication pursuant to a search warrant only.~~

18 [~~(c) Subsection (b) of this section is applicable to any~~  
19 ~~electronic communication held or maintained on a remote~~  
20 ~~computing service.~~



1       ~~(1) On behalf of, and received by electronic transmission~~  
2       ~~from (or created by computer processing of~~  
3       ~~communications received by electronic transmission~~  
4       ~~from), a subscriber or customer of the remote~~  
5       ~~computing service; and~~

6       ~~(2) Solely for the purpose of providing storage or~~  
7       ~~computer processing services to the subscriber or~~  
8       ~~customer, if the provider is not authorized to access~~  
9       ~~the contents of those communications for any purpose~~  
10      ~~other than storage or computer processing.~~

11      ~~(d) (1) A provider of electronic communication service or~~  
12      ~~remote computing service may disclose a record or~~  
13      ~~other information pertaining to a subscriber to, or~~  
14      ~~customer of, the service (other than the contents of~~  
15      ~~any electronic communication) to any person other than~~  
16      ~~a governmental entity.~~

17      ~~(2) A provider of electronic communication service or~~  
18      ~~remote computing service shall disclose a record or~~  
19      ~~other information pertaining to a subscriber to, or~~  
20      ~~customer of, the service (other than the contents of~~



1 ~~an electronic communication) to a governmental entity~~

2 ~~only when:~~

3 ~~(A) Presented with a search warrant;~~

4 ~~(B) Presented with a court order, which seeks the~~  
5 ~~disclosure of transactional records, other than~~  
6 ~~real-time transactional records;~~

7 ~~(C) The consent of the subscriber or customer to the~~  
8 ~~disclosure has been obtained; or~~

9 ~~(D) Presented with an administrative subpoena~~  
10 ~~authorized by statute, an attorney general~~  
11 ~~subpoena, or a grand jury or trial subpoena,~~  
12 ~~which seeks the disclosure of information~~  
13 ~~concerning electronic communication, including~~  
14 ~~but not limited to the name, address, local and~~  
15 ~~long distance telephone billing records,~~  
16 ~~telephone number or other subscriber number or~~  
17 ~~identity, and length of service of a subscriber~~  
18 ~~to or customer of the service, and the types of~~  
19 ~~services the subscriber or customer utilized.~~



~~(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.~~

~~(c) A court order for disclosure under subsection (d) shall issue only if the governmental entity demonstrates probable cause that the records or other information sought, constitute or relate to the fruits, implements, or existence of a crime or are relevant to a legitimate law enforcement inquiry. An order may be quashed or modified if, upon a motion promptly made, the service provider shows that compliance would be unduly burdensome because of the voluminous nature of the information or records requested, or some other stated reason establishing such a hardship.]~~

(b) Unless otherwise authorized by the court, a governmental entity receiving records or information under this section shall provide notice to the subscriber, customer, or user of the service.

~~[+f)]~~ (c) No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in



1 accordance with the terms of a court order, warrant, or  
2 subpoena.

3       ~~[-g-]~~ (d) A provider of wire or electronic communication  
4 services or a remote computing service, upon the request of a  
5 governmental entity, shall take all necessary steps to preserve  
6 records and other evidence in its possession pending the  
7 issuance of a ~~[court order or other process.]~~ search warrant.

8 Records shall be retained for a period of ninety days, which  
9 shall be extended for an additional ninety-day period upon a  
10 renewed request by the governmental entity."

11       SECTION 4. Section 803-47.7, Hawaii Revised Statutes, is  
12 amended as follows:

13       1. By amending subsection (a) to read:

14       "(a) A governmental entity may include in its ~~[court~~  
15 ~~order]~~ search warrant a requirement that the service provider  
16 create a backup copy of the contents of the electronic  
17 communication without notifying the subscriber or customer. The  
18 service provider shall create the backup copy as soon as  
19 practicable, consistent with its regular business practices, and  
20 shall confirm to the governmental entity that the backup copy  
21 has been made. The backup copy shall be created within two



1 business days after receipt by the service provider of the  
2 [~~subpoena or court order.~~] warrant."

3 2. By amending subsection (e) to read:

4 "(e) Within fourteen days after notice by the governmental  
5 entity to the subscriber or customer under subsection (b) of  
6 this section, the subscriber or customer may file a motion to  
7 vacate the [~~court order,~~] search warrant, with written notice  
8 and a copy of the motion being served on both the governmental  
9 entity and the service provider. The motion to vacate a [~~court~~  
10 ~~order~~] search warrant shall be filed with the designated judge  
11 who issued the [~~order.~~] warrant. The motion or application  
12 shall contain an affidavit or sworn statement:

13 (1) Stating that the applicant is a customer or subscriber  
14 to the service from which the contents of electronic  
15 communications are sought; and

16 (2) Setting forth the applicant's reasons for believing  
17 that the records sought does not constitute probable  
18 cause or there has not been substantial compliance  
19 with some aspect of the provisions of this part."

20 3. By amending subsection (g) to read:





1           "(g) If the court finds that the applicant is not the  
2 subscriber or customer whose communications are sought, or that  
3 there is reason to believe that the law enforcement inquiry is  
4 legitimate and the justification for the communications sought  
5 is supported by probable cause, the application or motion shall  
6 be denied, and the court shall order the release of the backup  
7 copy to the government entity. A court order denying a motion  
8 or application shall not be deemed a final order, and no  
9 interlocutory appeal may be taken therefrom by the customer. If  
10 the court finds that the applicant is a proper subscriber or  
11 customer and the justification for the communication sought is  
12 not supported by probable cause or that there has not been  
13 substantial compliance with the provisions of this part, it  
14 shall order vacation of the ~~[order]~~ warrant previously issued."

15           SECTION 5. Section 803-47.8, Hawaii Revised Statutes, is  
16 amended as follows:

17           1. By amending subsection (a) to read:

18           "(a) A governmental entity may as part of a request for a  
19 ~~[court order]~~ search warrant to include a provision that  
20 notification be delayed for a period not exceeding ninety days  
21 or, at the discretion of the court, no later than the deadline



1 to provide discovery in a criminal case, if the court determines  
2 that notification of the existence of the court order may have  
3 an adverse result."

4 2. By amending subsection (c) to read:

5 "(c) Extensions of delays in notification may be granted  
6 up to ninety days per application to a court[+] or, at the  
7 discretion of the court, up to the deadline to provide discovery  
8 in a criminal case. Each application for an extension must  
9 comply with subsection (e) of this section."

10 3. By amending subsection (e) to read:

11 "(e) A governmental entity may apply to the designated  
12 judge or any other circuit judge or district court judge, if a  
13 circuit court judge has not yet been designated by the chief  
14 justice of the Hawaii supreme court, or is otherwise  
15 unavailable, for an order commanding a provider of an electronic  
16 communication service or remote computing service to whom a  
17 search warrant, or court order is directed, not to notify any  
18 other person of the existence of the search warrant[, ~~or court~~  
19 ~~order~~] for such period as the court deems appropriate not to  
20 exceed ninety days[+] or, at the discretion of the court, no  
21 later than the deadline to provide discovery in a criminal case.



1 The court shall enter the order if it determines that there is  
2 reason to believe that notification of the existence of the  
3 search warrant[, ~~or court order~~] will result in:

- 4 (1) Endangering the life or physical safety of an  
5 individual;  
6 (2) Flight from prosecution;  
7 (3) Destruction of or tampering with evidence;  
8 (4) Intimidation of potential witnesses; or  
9 (5) Otherwise seriously jeopardizing an investigation or  
10 unduly delaying a trial."

11 SECTION 6. This Act does not affect rights and duties that  
12 matured, penalties that were incurred, and proceedings that were  
13 begun before its effective date.

14 SECTION 7. Statutory material to be repealed is bracketed  
15 and stricken. New statutory material is underscored.

16 SECTION 8. This Act shall take effect upon its approval.

17  
INTRODUCED BY: 



# S.B. NO. 2291

**Report Title:**

Electronic Data; Government Access; Personal Information; Search Warrants

**Description:**

Amends provisions relating to electronic eavesdropping. Requires law enforcement entities to obtain a search warrant before accessing a person's electronic communications in certain circumstances. Amends notification requirements of a law enforcement entity's access to electronic communications to allow for discovery in criminal cases.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

