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HOUSE BILL NO. 1904

Offered January 9, 2013

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A BILL to amend and reenact §§ 18.2-152.17 and 19.2-70.3 of the Code of Virginia, relating to warrant requirement for certain telecommunications records.

 Patron—Carr

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-152.17 and 19.2-70.3 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-152.17. Fraudulent procurement, sale, or receipt of telephone records.

A. Whoever (i) knowingly procures, attempts to procure, solicits, or conspires with another to procure a telephone record by fraudulent means; (ii) knowingly sells, or attempts to sell, a telephone record without the authorization of the customer to whom the record pertains; or (iii) receives a telephone record knowing that such record has been obtained by fraudulent means is guilty of a Class 1 misdemeanor.

B. As used in this section:

"Procure" in regard to such a telephone record means to obtain by any means, whether electronically, in writing, or in oral form, with or without consideration.

"Telecommunications carrier" means any person that provides commercial telephone services to a customer, irrespective of the communications technology used to provide such service, including, but not limited to, traditional wireline or cable telephone service; cellular, broadband PCS, or other wireless telephone service; microwave, satellite, or other terrestrial telephone service; and voice over Internet telephone service.

"Telephone record" means information retained by a telecommunications carrier that relates to the telephone number dialed by the customer or the incoming number of a call directed to a customer, or other data related to such calls typically contained on a customer telephone bill such as the time the call started and ended, the duration of the call, the time of day the call was made, and any charges applied. For purposes of this section, any information collected and retained by customers utilizing Caller I.D., or other similar technology, does not constitute a telephone record.

C. Nothing in this section shall be construed to prevent any action by a law-enforcement agency, or any officer or employee of such agency, from obtaining telephone records in connection with the performance of the official duties of the agency *when such records are obtained pursuant to § 19.2-70.3.*

D. Nothing in this section shall be construed to prohibit a telecommunications carrier from obtaining, using, disclosing, or permitting access to any telephone record, either directly or indirectly through its agents (i) in compliance with a subpoena ~~or subpoena duces tecum or as otherwise~~ authorized by law § 19.2-70.3; (ii) with the lawful consent of the customer or subscriber; (iii) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, subscription to, such services; (iv) to a governmental entity, if the telecommunications carrier reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; or (v) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under the Victims of Child Abuse Act of 1990.

E. Venue for the trial of any person charged with an offense under this section may be in the locality in which:

1. Any act was performed in furtherance of any course of conduct in violation of this section;

2. The accused has his principal place of business in the Commonwealth;

3. Any accused had control or possession of any proceeds of the violation or of any books, records, documents, property, financial instrument, telephone record, or other material or objects that were used in furtherance of the violation;

4. From which, to which, or through which any access to a telecommunication carrier was made whether by wires, electromagnetic waves, microwaves, optics or any other means of communication; or

5. The accused resides, or resided at the time of the offense.

§ 19.2-70.3. Obtaining records concerning electronic communication service or remote

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59 computing service.

60 A. A provider of electronic communication service or remote computing service, which, for purposes
61 of subdivisions A 2 through A 4, includes a foreign corporation that provides such services, shall
62 disclose a record or other information pertaining to a subscriber to or customer of such service,
63 excluding the contents of electronic communications *and location data*, to an investigative or
64 law-enforcement officer only pursuant to:

- 65 1. A subpoena issued by a grand jury of a court of this Commonwealth;
- 66 2. A search warrant issued by a magistrate, general district court or a circuit court;
- 67 3. A court order for such disclosure issued as provided in ~~this section~~ *subsection B*; or
- 68 4. *An administrative subpoena issued pursuant to § 19.2-10.2.*

69 ~~The consent of the~~ *However, a subscriber or customer to such may consent to disclosure of a record*
70 *or other information pertaining to him, including the contents of electronic communications or location*
71 *data, or both.*

72 B. A court shall issue an order for disclosure under this section only if the investigative or
73 law-enforcement officer shows that there is reason to believe the records or other information sought are
74 relevant and material to an ongoing criminal investigation, or the investigation of any missing child as
75 defined in § 52-32, missing senior adult as defined in § 52-34.4, or an incapacitated person as defined
76 in § 64.2-2000 who meets the definition of a missing senior adult except for the age requirement. Upon
77 issuance of an order for disclosure under this section, the order and any written application or statement
78 of facts may be sealed by the court for 90 days for good cause shown upon application of the attorney
79 for the Commonwealth in an ex parte proceeding. The order and any written application or statement of
80 facts may be sealed for additional 90-day periods for good cause shown upon subsequent application of
81 the attorney for the Commonwealth in an ex parte proceeding. A court issuing an order pursuant to this
82 section, on a motion made promptly by the service provider, may quash or modify the order, if the
83 information or records requested are unusually voluminous in nature or compliance with such order
84 would otherwise cause an undue burden on such provider.

85 C. A provider of electronic communication service or remote computing service, including a foreign
86 corporation that provides such services, shall disclose the contents of electronic communications *or*
87 *location data* to an investigative or law-enforcement officer only pursuant to a search warrant issued by
88 a magistrate, a juvenile and domestic relations district court, a general district court, or a circuit court,
89 based upon complaint on oath supported by an affidavit as required in § 19.2-54, or judicial officer or
90 court of any of the several states of the United States or its territories, or the District of Columbia when
91 the warrant issued by such officer or such court complies with the provisions of subsection E. In the
92 case of a search warrant directed to a foreign corporation the affidavit shall state that the complainant
93 believes that the records requested are actually or constructively possessed by a foreign corporation that
94 provides electronic communication service or remote computing service within the Commonwealth of
95 Virginia. If satisfied that probable cause has been established for such belief and as required by Chapter
96 5 (§ 19.2-52 et seq.), the magistrate, the juvenile and domestic relations district court, the general district
97 court, or the circuit court shall issue a warrant identifying those records to be searched for and
98 commanding the person seeking such warrant to properly serve the warrant upon the foreign corporation.

99 D. In order to comply with the requirements of § 19.2-54, any search of the records of a foreign
100 corporation shall be deemed to have been made in the same place wherein the search warrant was
101 issued.

102 E. A Virginia corporation or other entity that provides electronic communication services or remote
103 computing services to the general public, when properly served with a search warrant and affidavit in
104 support of the warrant, issued by a judicial officer or court of any of the several states of the United
105 States or its territories, or the District of Columbia with jurisdiction over the matter, to produce a record
106 or other information pertaining to a subscriber to or customer of such service, *including location data*,
107 or the contents of electronic communications, or both, shall produce the record or other information,
108 *including location data*, or the contents of electronic communications as if that warrant had been issued
109 by a Virginia court. The provisions of this subsection shall only apply to a record or other information,
110 *including location data*, or contents of electronic communications relating to the commission of a
111 criminal offense that is substantially similar to (i) a violent felony as defined in § 17.1-805, (ii) an act of
112 violence as defined in § 19.2-297.1, (iii) any offense for which registration is required pursuant to
113 § 9.1-902, (iv) computer fraud pursuant to § 18.2-152.3, or (v) identity theft pursuant to § 18.2-186.3.
114 The search warrant shall be enforced and executed in the Commonwealth as if it were a search warrant
115 described in subsection C.

116 F. The provider of electronic communication service or remote computing service may verify the
117 authenticity of the written reports or records that it discloses pursuant to this section, excluding the
118 contents of electronic communications, by providing an affidavit from the custodian of those written
119 reports or records or from a person to whom said custodian reports certifying that they are true and
120 complete and that they are prepared in the regular course of business. When so authenticated, the written

121 reports and records are admissible in evidence as a business records exception to the hearsay rule.

122 G. No cause of action shall lie in any court against a provider of a wire or electronic communication
123 service, its officers, employees, agents, or other specified persons for providing information, facilities, or
124 assistance in accordance with the terms of a court order, warrant or subpoena under this section.

125 H. For the purposes of this section:

126 "Foreign corporation" means any corporation or other entity, whose primary place of business is
127 located outside of the boundaries of the Commonwealth, that makes a contract or engages in a terms of
128 service agreement with a resident of the Commonwealth to be performed in whole or in part by either
129 party in the Commonwealth, or a corporation that has been issued a certificate of authority pursuant to
130 § 13.1-759 to transact business in the Commonwealth. The making of the contract or terms of service
131 agreement or the issuance of a certificate of authority shall be considered to be the agreement of the
132 foreign corporation or entity that a search warrant or subpoena, which has been properly served on it,
133 has the same legal force and effect as if served personally within the Commonwealth.

134 "Location data" means any data or information that tracks, at either a point in time or over a period
135 of time, the location of a subscriber to or customer of a provider of electronic communication service or
136 a remote computing service as determined by the location of an electronic device to which the
137 subscriber or customer has legal title, claim, right, custody or ultimate control.

138 "Properly served" means delivery of a search warrant or subpoena by hand, by United States mail, by
139 commercial delivery service, by facsimile or by any other manner to any officer of a corporation or its
140 general manager in the Commonwealth, to any natural person designated by it as agent for the service
141 of process, or if such corporation has designated a corporate agent, to any person named in the latest
142 annual report filed pursuant to § 13.1-775.