

ECPA NSL Definitions Proposal

Section 1. Counterintelligence and counterterrorism access to electronic communication service and remote computing service records.

Section 2709 of Title 18 is amended—

- (a) by striking the title and inserting “Counterintelligence and counterterrorism access to electronic communication service and remote computing service records”;
- (b) in subsection (a) by striking “A wire or electronic communication service provider” and inserting “A provider of electronic communication service or remote computing service” before “shall comply with a request for”;
- (c) in subsection (a) by striking “subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession” and inserting “records in its possession, custody, or control” before “made by the Director of the Federal Bureau of Investigation”;
- (d) striking subsection (b) and inserting the following:

“(b) **Required certification.**--The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may request the records described below if the Director (or his designee) certifies in writing to the provider of electronic communication service or remote computing service to which the request is made that the records pertaining to the subscriber to or customer of such service are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States:

- (1) name;
- (2) address;
- (3) local and long distance telephone connection records, or records of session times and durations;
- (4) length of service (including start date) and types of service utilized;
- (5) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address;

(6) means and source of payment for such service (including any credit card or bank account number); and,

(7) records identifying the origin, routing or destination of electronic communications.”;

- (e) in subsection (c)(1) by striking “no wire or electronic communications service provider,” and inserting “no provider of electronic communication service or remote computing service,” after “danger to the life or physical safety of any person,”;
- (f) in subsection (f) by striking “is not a wire or electronic communication service provider for purposes of this section,” and inserting “is not a provider of electronic communication service or remote computing service for purposes of this section,” after “for their use, review, examination, or circulation,”; and
- (g) in subsection (f) by inserting “or section 2711(2) (‘remote computing service’)” after “section 2510(15) (‘electronic communication service’)”.

Section 2. Technical and Conforming Changes

- (a) The table of sections for chapter 121 of title 18, United States Code, is amended by striking “Counterintelligence access to telephone toll and transactional records.” and inserting “Counterintelligence and counterterrorism access to electronic communication service and remote computing service records.”

Analysis

Section 1. Counterintelligence and counterterrorism access to electronic communications service and remote communications service records

This proposed revision clarifies the scope of the Electronic Communications Privacy Act's national security letter provision, 18 U.S.C. § 2709, by specifically listing the types of records and information that the FBI may obtain pursuant to an ECPA national security letter (NSL).

The list of items contained in this proposal parallels that in 18 U.S.C. § 2703(c)(2) – which identifies the records and information that may be obtained by administrative or grand jury subpoenas – with one exception. In addition to the records and information that may be obtained under section 2703(c)(2), the proposed revision would permit the FBI to obtain “records identifying the origin, routing or destination of electronic communications” using an ECPA NSL. This change would not expand the categories of records and information that may be obtained by an ECPA NSL, but rather would clarify what records or information are obtainable – a change that was suggested by the Department of Justice's Inspector General in his recent report on the use of NSLs by the FBI.

The proposed revision also clarifies the types of providers covered by the ECPA NSL statute by using the language of § 2703(c)(1) to indicate that providers of electronic communication services (which, under the definition contained in § 2510(15), also includes providers of wire communications services) and remote computing services are covered by this provision.

Section 2. Technical and Conforming Changes

The proposed revision changes the table of sections for chapter 121 of title 18 of the United States Code to account for the new title of section 2709.