

## Stored Wire and Electronic Communication and Transactional Records Access

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# STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

## Introduction

Title II of the Electronic Communications Privacy Act of 1986, as previously outlined in Chapter I of this manual, is designed to protect the privacy of stored electronic communications. This includes storage prior to transmission to a recipient as well as any copy of the transmitted communications kept after delivery to a recipient.

Chapter 121 under Title 18 U. S. C. 2701 to 2712, governs these areas of communications. Criminal as well as civil sanctions may be applied to any violations of the provisions of Title II. Therefore, it is strongly recommended that early consultations be made with the appropriate United States Attorney's office in conjunction with the appropriate operational division when seeking disclosure in areas covered under Title II.

## Definitions

1. **Electronic storage** is defined in 18 U.S.C. 2510 (17) as "... any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and any storage of such communication by an electronic communication service for purposes of backup protection of such communication."

For example, if electronic mail has been sent, but not opened by the intended recipient, then it is in "electronic storage," incidental to transmission. Once the electronic mail has been opened by the recipient, it can be argued that the electronic mail is no longer in electronic storage incidental to transmission.

2. An "**electronic communication service**" provides its users the ability to send or receive wire or electronic communication.
3. **Remote computing service**: the provision to the public of computer storage or processing services by means of an electronic communications system. Remote Computing Service "allows persons to use the facilities of these services to process and store their own data." Subscriber to a remote computing service "transmits records to a third party for the purpose of computer processing."
4. **Transactional record**: any record showing business taking place between the provider of an electronic communications service and a subscriber/party (i.e., service agreements, toll records, subscriber information, etc.).



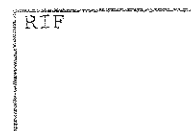
It should also be noted that other definitions concerning Titles I, II, and III of the Electronic Communications Privacy Act of 1986 may be found under related chapters/sections of the Federal Criminal Law Handbook

## Disclosure of Communications or Records

Generally, a person or an entity providing a public electronic communication service, or remote computing service, shall not knowingly divulge the contents of a communication held in electronic storage by the individual or company. The same holds true in relation to any communication carried on or maintained by any public remote computing service. Included in the foregoing are communications received by way of electronic transmission, created by means of computer processing, or held solely for the purposes of storage or computer processing.

Exceptions for disclosure of stored wire and electronic communications and transactional records, fall into the following eight categories (Title 18, U.S.C. 2702 (b)). The contents of such communications and records may be disclosed to:

1. Addressees, intended recipients or their agents;
2. Those individuals or entities as otherwise authorized in sections 2517, 2511 (2) (a) or 2703 of this title;
3. Others with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;
4. A person employed or authorized or whose facilities are used to forward such a communication to its destination;
5. Others 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;
6. To the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032);
7. A law enforcement agency, if such contents were inadvertently obtained by the service provider, and appear to pertain to the commission of a crime; and
8. To a Federal, State, or local government entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.



## Governmental Access Requirements

In this section, requirements for Federal law enforcement access shall be reviewed. However, it should be noted that access is also provided for State and/or local government entities. For additional information in this regard, reference is made to Chapter 121 of Federal Criminal Law Handbook.

The Secret Service may require a service provider to disclose the contents of an electronic communication that is in **electronic storage** in an **electronic communication system for one hundred and eighty (180) days or less, only with a warrant** issued by a court with jurisdiction over the offense under investigation as outlined in 18 U.S.C. 2703(a).

If the communication has been in **electronic storage in an electronic communications system for one hundred and eighty (180) days or more**, disclosure may be sought in several ways, as described in Title 18 U.S.C. 2703 (a) (b). These include:

1. A search warrant (**without** prior notice to the subscriber).
2. A court order (**with** prior notice to the subscriber, and may request seeking delayed notice to the subscriber.)
3. An administrative, grand jury, or trial subpoena (**with** prior notice to the subscriber, may request delayed notice up to 90 days with written certification by a supervisory official).

It should be noted, that in the obtaining of a court order, the relevancy of the material requested must be shown. Time limitations relating to the maximum duration of such orders or extensions thereof are not applicable.

Under Title 18 U.S.C. 2703 (b), the government may obtain the contents of any electronic communication held in remote computing services. If the electronic communication that is held on these services is on behalf of, and received by means of, electronic transmission from a subscriber and solely for the purpose of providing storage, the information may be obtained in the following ways:

1. A search warrant,
2. An administrative, grand jury, or trial subpoena,
3. A court order authorized by Section 2703 (d), with a request seeking delayed notice to the subscriber.

When a search warrant is contemplated to obtain the records, contact should be made with the Assistant United States Attorney and Computer Crimes and Intellectual Property Section of the Office of Enforcement Operation, DOJ, for proper language of the search warrant.



## Transactional Records

Under Title 18 U.S.C. 2703(c), transactional records, to include name, address, local and long distance telephone connection records, length of service, telephone or instrument number or identity including any temporarily assigned network address, and means and source of payment for such service (including any credit card or bank account number), may be obtained through following ways:

1. A search warrant issued by court of jurisdiction,
2. A court order issued by court of competent jurisdiction,
3. By a consent of the subscriber,
4. A formal written request relevant to an investigation concerning telemarketing fraud,

Unlike other sections, notice to a subscriber is not required under this section.

**Backup records** may be obtained by court order or subpoena (18 U.S.C. 2704). Time limitations relating to the maximum duration of such orders, etc. are again not applicable. As to notification, once a backup copy of an electronic communication has been created (within two days of the individual's or company's receipt of a court order or subpoena), notice shall be made to the subscriber or customer within three days of the receipt of confirmation that the backup copy has been created. Such notification shall be made by the Governmental entity unless such notice is delayed pursuant to section 2705 (a).

**"...the service provider shall release such backup copy to the requesting governmental entity no sooner than fourteen days after the governmental entity's notice to the subscriber or customer if such service provider-**

**...has not received notice from the subscriber or customer that the subscriber or customer has challenged the governmental entity's request; and**

**...has not initiated proceedings to challenge the request of the governmental entity ..." (18 U.S.C. 2704(4) (A) (B))**

Finally, **transactional records** may be obtained through consent, court order, subpoena, or warrant, with no time limit or notification requirements.

## Backup Preservation

Regarding backup record preservation (18 U.S.C. 2704), the Secret Service, acting under 18 U.S.C. 2703(b)(2), 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.



With no notification given to the subscriber or customer of such subpoena or court order, a service provider must create such a backup copy as soon as practicable consistent with its regular business practices, and shall confirm to the Secret Service that such a backup copy has been made. Such a backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order. Additional provisions under 18 U.S.C. 2704 cover the rights of a service provider to destroy a backup record copy and the rights of the subscriber or customer to quash such a subpoena or court order.

## Delayed Notice

Under Title II, the Secret Service may request a delay of up to ninety (90) days in the notification of a customer or subscriber of grand jury subpoena, or administrative subpoena as outlined in 18 U.S.C. 2705, upon written certification by a supervisory official that such notification as required by 18 U.S.C. 2703(b) may have an adverse result. Such an adverse result is defined in 18 U.S.C. 2705 as:

1. Endangering of 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.

It should be noted that a true copy of any such certification shall be maintained by the Secret Service. Extensions of the delay of notification up to ninety days each may be granted by the court upon application by this Service.

## Cost Reimbursement

Except as otherwise provided, the Secret Service, in obtaining communications, records, or other information under sections 2702, 2703 or 2704 of Title 18, shall pay to the person or entity assembling or providing such information a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, assembling, reproducing, or otherwise producing such information. Such reimbursable costs shall include any costs due to necessary disruption of normal operations of any electronic communication service or remote computing service in which such information might be stored.

The amount of the fee shall be mutually agreed upon by the Secret Service and the person or entity providing the information. In the absence of agreement, the fee shall be determined by the court which issued the order for production of such information. If no court order was issued, the fee shall be determined by the court before which a criminal prosecution relating to such information would be brought. This payment requirement does not apply with respect to records or other information maintained by a communications common carrier that relate to telephone toll records and telephone listings obtained under section 2703 of Title II. A court may,



however, order payment as previously described if the court determines the information required is unusually voluminous in nature or otherwise has caused an undue burden on the provider.

In conclusion, Title II (Chapter 121, Title 18, U.S.C. 2701 to 2712) represents a comprehensive tool to be used in investigations by the Secret Service. Where case law precedent is not firmly established in this area, care must be taken in its use. Timely consultations with the Office of the United States Attorney are recommended, as well as review and understanding of the terminology outlined in 18 U.S.C. 2510 and 18 U.S.C. 2711.

**Finally, all personnel, in dealing with any of the matters covered in this manual, should be fully aware of the range of civil and criminal sanctions incorporated under the Electronics Communications Privacy Act of 1986 (Titles I, II, and III).**

