

HOUSE BILL 912

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4r1873
CF SB 924

By: **Delegates Smigiel, Carr, Rosenberg, and Waldstreicher**

Introduced and read first time: February 5, 2014

Assigned to: Judiciary

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 12, 2014

CHAPTER _____

1 AN ACT concerning

2 **Courts – Electronic Communications – Privacy**

3 FOR the purpose of ~~altering provisions of law governing the manner in which an~~
4 ~~investigative or law enforcement officer may require a wire or electronic~~
5 ~~communication service to disclose the contents of certain wire or electronic~~
6 ~~communications; requiring a certain probable cause for the issuance of a certain~~
7 ~~warrant under certain circumstances; requiring a court that issues a certain~~
8 ~~warrant to indicate a certain deadline to a certain service provider; authorizing~~
9 ~~service of the warrant on a certain service provider; requiring a certain service~~
10 ~~provider to produce certain information; authorizing a certain service provider~~
11 ~~to request a certain extension; authorizing the court to grant an extension~~
12 ~~under certain circumstances; authorizing a service provider to provide certain~~
13 ~~information on the request of an agent of this State or a political subdivision of~~
14 ~~this State in response to a certain request under certain circumstances;~~
15 ~~requiring a certain subscriber to be provided a certain notice; authorizing a~~
16 ~~certain subscriber to seek judicial review of a certain warrant, court order, or~~
17 ~~subpoena; requiring a certain agent to provide a certain notice under certain~~
18 ~~circumstances in a certain manner; authorizing a court to grant a certain~~
19 ~~application to direct a certain service provider not to make a certain notification~~
20 ~~under certain circumstances; authorizing a court to grant a certain application~~
21 ~~under certain circumstances; providing for the admissibility of certain~~
22 ~~communications content; requiring a certain court to annually submit a certain~~
23 ~~report to the Administrative Office of the Courts on a certain date; requiring the~~
24 ~~Administrative Office of the Courts to annually submit a certain report to the~~
25 ~~General Assembly on a certain date; providing for a certain cause of action;~~

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



~~defining certain terms; expanding the application of a provision of law that requires an investigative or law enforcement officer to obtain a certain search warrant in order to require a provider of wire or electronic communication service to disclose the contents of wire or electronic communication that is in electronic storage in a wire or electronic communications system for 180 days or less to a wire or electronic communication that is in electronic storage for any amount of time; making certain stylistic and conforming changes; and generally relating to the privacy of electronic communications.~~

BY repealing and reenacting, with amendments,
 Article – Courts and Judicial Proceedings
 Section 10-4A-04 and 10-4A-06
 Annotated Code of Maryland
 (2013 Replacement Volume and 2013 Supplement)

~~BY adding to
 Article – Courts and Judicial Proceedings
 Section 10-4A-09 and 10-4A-10
 Annotated Code of Maryland
 (2013 Replacement Volume and 2013 Supplement)~~

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Courts and Judicial Proceedings

10-4A-04.

(a) ~~(1)~~ An investigative or law enforcement officer may require a provider of wire or electronic communication service to disclose the contents of wire or electronic communication that is in electronic storage in a wire or electronic communications system [for 180 days or less,] only in accordance with a search warrant issued by a court of competent jurisdiction ~~BASED ON PROBABLE CAUSE THAT:~~

~~(i) A SPECIFIC MISDEMEANOR OR FELONY HAS BEEN OR IS BEING COMMITTED; AND~~

~~(ii) THE ELECTRONIC CUSTOMER DATA OR COMMUNICATIONS CONTENT BEING SOUGHT CONSTITUTES EVIDENCE OF THE MISDEMEANOR OR FELONY.~~

~~(b) (1) A COURT THAT ISSUES A WARRANT UNDER SUBSECTION (A) OF THIS SECTION SHALL INDICATE IN THE WARRANT THE DEADLINE FOR COMPLIANCE BY THE SERVICE PROVIDER.~~

1 ~~(2) (i) A WARRANT UNDER SUBSECTION (A) OF THIS SECTION~~
2 ~~MAY BE SERVED ON A SERVICE PROVIDER THAT IS A DOMESTIC ENTITY OR A~~
3 ~~COMPANY OR ENTITY OTHERWISE DOING BUSINESS IN THE STATE UNDER A~~
4 ~~CONTRACT OR A TERMS OF SERVICE AGREEMENT WITH A RESIDENT OF THE~~
5 ~~STATE ONLY IF PART OF THAT CONTRACT OR AGREEMENT IS TO BE PERFORMED~~
6 ~~IN THE STATE.~~

7 ~~(H) THE SERVICE PROVIDER DESCRIBED IN~~
8 ~~SUBPARAGRAPH (I) OF THIS PARAGRAPH SHALL PRODUCE ALL INFORMATION~~
9 ~~SOUGHT;~~

10 ~~1. REGARDLESS OF WHETHER THE INFORMATION IS~~
11 ~~HELD AT A LOCATION IN THIS STATE OR AT A LOCATION IN ANOTHER STATE;~~
12 ~~AND~~

13 ~~2. WITHIN THE PERIOD ALLOWED FOR COMPLIANCE~~
14 ~~WITH THE WARRANT.~~

15 ~~(3) (i) A SERVICE PROVIDER RESPONDING TO A WARRANT~~
16 ~~ISSUED UNDER SUBSECTION (A) OF THIS SECTION MAY REQUEST AN EXTENSION~~
17 ~~OF THE PERIOD FOR COMPLIANCE WITH THE WARRANT IF EXTENUATING~~
18 ~~CIRCUMSTANCES EXIST TO JUSTIFY THE EXTENSION.~~

19 ~~(H) THE COURT SHALL GRANT A REQUEST FOR AN~~
20 ~~EXTENSION BASED ON THE CIRCUMSTANCES DESCRIBED IN SUBPARAGRAPH (I)~~
21 ~~OF THIS PARAGRAPH IF:~~

22 ~~1. THE LAW ENFORCEMENT OFFICER AUTHORIZED~~
23 ~~TO APPLY FOR THE WARRANT OR ANOTHER APPROPRIATE AUTHORIZED LAW~~
24 ~~ENFORCEMENT OFFICER AGREES TO THE EXTENSION; OR~~

25 ~~2. THE COURT FINDS THAT THE NEED FOR THE~~
26 ~~EXTENSION OUTWEIGHS THE LIKELIHOOD THAT THE EXTENSION COULD~~
27 ~~RESULT IN:~~

28 ~~A. DANGER TO THE LIFE OR PHYSICAL SAFETY OF AN~~
29 ~~INDIVIDUAL;~~

30 ~~B. A FLIGHT FROM PROSECUTION BY AN ALLEGED~~
31 ~~OFFENDER;~~

32 ~~C. THE DESTRUCTION OF OR TAMPERING WITH~~
33 ~~EVIDENCE;~~

~~D. THE INTIMIDATION OF A POTENTIAL WITNESS; OR~~

~~E. SERIOUS JEOPARDY TO AN INVESTIGATION OR
UNDUE DELAY OF A TRIAL.~~

~~(4) ONLY THE COMMUNICATIONS CONTENT DESCRIBED IN THE
WARRANT APPLICATION MAY BE SEIZED UNDER THE WARRANT.~~

[(2) An investigative or law enforcement officer may require a provider of wire or electronic communications services to disclose the contents of wire or electronic communication that has been in electronic storage in an electronic communications system for more than 180 days in accordance with the procedures provided under subsection (b) of this section.

(b) (1) An investigative or law enforcement officer may require a provider of remote computing service to disclose the contents of wire or electronic communication to which this paragraph applies under paragraph (2) of this subsection:

(i) Without notice to the subscriber or customer, if the officer obtains a search warrant issued by a court of competent jurisdiction; or

(ii) With prior notice from the officer to the subscriber or customer, if the officer:

1. Uses a grand jury subpoena; or

2. Obtains a court order requiring the disclosure under subsection (d) of this section.

(2) Paragraph (1) of this subsection applies to any wire or electronic communication that is held or maintained on a remote computing service:

(i) On behalf of, and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of the remote computing service; and

(ii) Solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communication for purposes of providing any services other than storage or computer processing.]

~~(C) A SERVICE PROVIDER MAY DIVULGE THE CONTENTS OF A
COMMUNICATION TO AN AGENT OF THE STATE OR A POLITICAL SUBDIVISION OF
THE STATE IN RESPONSE TO A REQUEST IF:~~

1 ~~(1) THE SERVICE PROVIDER REASONABLY BELIEVES THAT AN~~
 2 ~~EMERGENCY INVOLVING IMMEDIATE DANGER OF THE DEATH OF OR SERIOUS~~
 3 ~~PHYSICAL INJURY TO AN INDIVIDUAL REQUIRES DISCLOSURE WITHOUT DELAY~~
 4 ~~OF COMMUNICATIONS RELATING TO THE EMERGENCY;~~

5 ~~(2) THE REQUEST DOCUMENTS THE FACTUAL BASIS FOR~~
 6 ~~BELIEVING THAT THE EMERGENCY REQUIRES OBTAINING WITHOUT DELAY THE~~
 7 ~~INFORMATION RELATING TO THE EMERGENCY; AND~~

8 ~~(3) NOT LATER THAN 48 HOURS AFTER THE AGENT OBTAINS~~
 9 ~~ACCESS TO RECORDS, THE AGENT FILES WITH THE APPROPRIATE COURT A~~
 10 ~~SIGNED, SWORN STATEMENT BY A SUPERVISORY OFFICIAL PROVIDING THE~~
 11 ~~GROUND FOR THE EMERGENCY ACCESS AND SEEKING RETROACTIVE~~
 12 ~~APPROVAL.~~

13 [(c)] ~~(D)~~ (B) (1) (i) In this subsection, “record or other information”
 14 includes name, address, local and long distance telephone connection records, or
 15 records of session times and durations, length of service (including start date) and
 16 types of service utilized, telephone or instrument number or other subscriber number
 17 or identity, including any temporarily assigned network address, and means and
 18 source of payment for such service, including any credit card or bank account number.

19 (ii) “Record or other information” does not include the contents
 20 of communications to which [subsections (a) and (b)] **SUBSECTION (A)** of this section
 21 [apply] **APPLIES**.

22 (2) (i) ~~[Except as provided in]~~ ~~SUBJECT TO~~ subparagraph (ii) of
 23 this paragraph, a provider of electronic communications service or remote computing
 24 service may disclose a record or other information pertaining to a subscriber to or a
 25 customer of the service to ~~[any person other than]~~ an investigative or law enforcement
 26 officer.

27 (ii) A provider of electronic communications service or remote
 28 computing service shall disclose a record or other information pertaining to a
 29 subscriber to or a customer of the service to an investigative or law enforcement officer
 30 only if the officer:

31 ~~1. OBTAINS A SEARCH WARRANT ISSUED BY A COURT~~
 32 ~~OF COMPETENT JURISDICTION WITHOUT NOTICE TO THE SUBSCRIBER OR~~
 33 ~~CUSTOMER; OR~~

34 ~~2. WITH PRIOR NOTICE FROM THE OFFICER TO THE~~
 35 ~~SUBSCRIBER OR CUSTOMER;~~

1 ~~1.] A.~~ Uses a subpoena issued by a court of competent
2 jurisdiction, a State grand jury subpoena, or a subpoena authorized under § 15–108 of
3 the Criminal Procedure Article;

4 ~~2.~~ Obtains a warrant from a court of competent
5 jurisdiction;

6 ~~3.] B.~~ Obtains a court order requiring the disclosure
7 under [subsection (d)] ~~SUBSECTION (F)~~ (C) of this section; or

8 ~~4.] C.~~ Has the consent of the subscriber or customer
9 to the disclosure.

10 ~~[(3) An investigative or law enforcement officer receiving records or~~
11 ~~information under this subsection is not required to provide notice to a subscriber or~~
12 ~~customer.]~~

13 ~~(E) A SUBSCRIBER WHOSE COMMUNICATIONS CONTENT OR~~
14 ~~SUBSCRIBER INFORMATION IS SOUGHT IN ACCORDANCE WITH A WARRANT,~~
15 ~~COURT ORDER, OR SUBPOENA ISSUED UNDER THIS SUBTITLE MAY SEEK~~
16 ~~JUDICIAL REVIEW OF THE WARRANT, COURT ORDER, OR SUBPOENA.~~

17 [(d)] ~~(F)~~ (C) (1) A court of competent jurisdiction may issue an order
18 requiring disclosure under [subsection (b) or (c)] ~~SUBSECTION (D)~~ (B) of this section
19 only if the investigative or law enforcement officer shows that there is reason to
20 believe the ~~contents of a wire or electronic communication, or the~~ records or other
21 information sought, are relevant to a legitimate law enforcement inquiry.

22 (2) A court issuing an order under this section may quash or modify
23 the order, on a motion made promptly by the service provider, if the information or
24 records requested are unusually voluminous in nature or if compliance with the order
25 otherwise would cause an undue burden on the provider.

26 [(e)] ~~(G)~~ (D) Nothing in this subtitle may be construed as creating a cause of
27 action against any provider of wire or electronic communication service, its officers,
28 employees, agents, or other specified persons for providing information, facilities, or
29 assistance in accordance with the terms of a court order, warrant, subpoena, or
30 certification under this subtitle.

31 ~~10-4A-06.~~

32 (a) (1) ~~In this section the following words have the meanings indicated.~~

33 ~~(2) “Adverse result” means:~~

34 ~~(i) Endangering the life or physical safety of an individual;~~

- 1 (ii) ~~Flight from prosecution;~~
 2 (iii) ~~Destruction of or tampering with evidence;~~
 3 (iv) ~~Intimidation of potential witnesses; or~~
 4 (v) ~~Otherwise seriously jeopardizing an investigation or unduly~~
 5 ~~delaying a trial.~~

6 (3) ~~“Supervisory official” means:~~

- 7 (i) ~~The Secretary or Deputy Secretary of State Police;~~
 8 (ii) ~~The chief of police, deputy chief of police, or equivalent~~
 9 ~~official of a law enforcement agency of any political subdivision of the State;~~
 10 (iii) ~~The Attorney General of the State or a Deputy Attorney~~
 11 ~~General;~~
 12 (iv) ~~The State Prosecutor or Deputy State Prosecutor; or~~
 13 (v) ~~A State’s Attorney or Deputy State’s Attorney.~~

14 (b) (1) (i) ~~EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS~~
 15 ~~SUBSECTION, NOT LATER THAN 3 BUSINESS DAYS AFTER AN AGENT OF THE~~
 16 ~~STATE OR A POLITICAL SUBDIVISION OF THE STATE RECEIVES~~
 17 ~~COMMUNICATIONS CONTENT FROM A SERVICE PROVIDER IN ACCORDANCE WITH~~
 18 ~~§ 10 4A 04 OF THIS SUBTITLE, THE AGENT SHALL SERVE ON OR DELIVER TO~~
 19 ~~THE SUBSCRIBER OR CUSTOMER A NOTICE AS DESCRIBED IN SUBSECTION (E)~~
 20 ~~OF THIS SECTION.~~

21 (ii) ~~THE NOTICE REQUIRED IN SUBPARAGRAPH (I) OF THIS~~
 22 ~~PARAGRAPH MAY BE SERVED OR DELIVERED BY REGISTERED OR FIRST CLASS~~
 23 ~~MAIL, ELECTRONIC MAIL, OR OTHER MEANS REASONABLY CALCULATED TO BE~~
 24 ~~EFFECTIVE AS SPECIFIED BY THE COURT ISSUING THE WARRANT.~~

25 (2) ~~An investigative or law enforcement officer [acting under §~~
 26 ~~10 4A 04 of this subtitle] may:~~

27 (1) (i) ~~If a [court order] WARRANT is sought, include in the~~
 28 ~~application a request for an order delaying the notification required under [§~~
 29 ~~10 4A 05 of] this subtitle for a period not to exceed 90 days, which the court shall~~
 30 ~~grant, if the court determines that there is reason to believe that notification of the~~
 31 ~~existence of the court order may have an adverse result; or~~

~~[(2)] (H) If a subpoena issued by a court of competent jurisdiction or a grand jury subpoena is obtained UNDER § 10 4A 04(D) OF THIS SUBTITLE, delay the notification required under [§ 10 4A 05 of] this subtitle for a period not to exceed 90 days, upon the execution of a written certification to a court of competent jurisdiction by a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result.~~

~~(e) The investigative or law enforcement officer shall maintain a true copy of a certification executed under [subsection (b)(2)] SUBSECTION (B)(2)(H) of this section.~~

~~(d) (1) Extensions of a delay in notification may be granted by the court upon application or by certification by a supervisory official under subsection (b) of this section.~~

~~(2) An extension DESCRIBED IN SUBSECTION (B)(1) OF THIS SECTION may not exceed 90 days.~~

~~(e) [Upon] IN ACCORDANCE WITH SUBSECTION (B)(1) OF THIS SECTION, OR ON expiration of the period of a delay of notification under [subsection (b) or (d)] SUBSECTION (B)(2) OR (D) of this section, the investigative or law enforcement officer shall serve upon, or deliver by registered or first class mail, to the customer or subscriber a copy of the process or request together with a notice that:~~

~~(1) States with reasonable specificity the nature of the law enforcement inquiry; and~~

~~(2) Informs the customer or subscriber:~~

~~(i) That information maintained for the customer or subscriber by the service provider named in the process or request was supplied to or requested by that investigative or law enforcement officer and the date on which the information was supplied or the request was made;~~

~~(ii) That notification of the customer or subscriber was delayed;~~

~~(iii) Of the identity of the investigative or law enforcement officer or court that made the certification or determination authorizing the delay; and~~

~~(iv) Of the statutory authority for the delay.~~

~~(f) (1) (H) If notice to the subscriber is [not required under § 10 4A 04(b)(1) of this subtitle or if notice is] delayed under subsection (b) or (d) of this section, an investigative or law enforcement officer acting under § 10 4A 04 of this subtitle may apply to a court for an order requiring a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or~~

1 ~~court order is directed, for such period as the court deems appropriate, not to notify~~
2 ~~any other person of the existence of the warrant, subpoena, or court order.~~

3 ~~(H) The court shall enter an order under this subsection if the~~
4 ~~court determines that there is reason to believe that notification of the existence of the~~
5 ~~warrant, subpoena, or court order will have an adverse result.~~

6 ~~(2) THE COURT MAY, ON APPLICATION, GRANT ONE OR MORE~~
7 ~~EXTENSIONS OF AN ORDER GRANTED UNDER PARAGRAPH (1) OF THIS~~
8 ~~SUBSECTION FOR AN ADDITIONAL 15 DAYS.~~

9 ~~(C) (1) EXCEPT IN A JUDICIAL OR AN ADMINISTRATIVE PROCEEDING~~
10 ~~ALLEGING A VIOLATION OF THIS SECTION, NO COMMUNICATIONS CONTENT~~
11 ~~OBTAINED IN VIOLATION OF THIS SECTION SHALL BE ADMISSIBLE IN A~~
12 ~~CRIMINAL, A CIVIL, AN ADMINISTRATIVE OR ANY OTHER PROCEEDING.~~

13 ~~(2) DISCOVERY OF THE LOCATION INFORMATION APPLICATION,~~
14 ~~AFFIDAVIT, WARRANT, AND ADDITIONAL RELATED DOCUMENTS, IF ANY, IS~~
15 ~~SUBJECT TO THE PROVISIONS OF MARYLAND RULES 4-262 AND 4-263.~~

16 ~~10-4A-09.~~

17 ~~(A) ON THE SECOND FRIDAY IN JANUARY OF EACH CALENDAR YEAR, A~~
18 ~~COURT THAT ISSUED OR DENIED A WARRANT UNDER THIS SECTION DURING THE~~
19 ~~PRECEDING CALENDAR YEAR SHALL SUBMIT A REPORT TO THE~~
20 ~~ADMINISTRATIVE OFFICE OF THE COURTS SPECIFYING WITH REGARD TO EACH~~
21 ~~WARRANT APPLICATION RECEIVED BY THE COURT:~~

22 ~~(1) THE IDENTITY OF THE AGENT OF THE STATE OR A POLITICAL~~
23 ~~SUBDIVISION OF THE STATE MAKING THE APPLICATION;~~

24 ~~(2) THE OFFENSE SPECIFIED IN THE WARRANT OR APPLICATION~~
25 ~~FOR THE WARRANT;~~

26 ~~(3) THE NATURE OF THE FACILITIES FROM WHICH OR THE PLACE~~
27 ~~WHERE THE INFORMATION WAS TO BE OBTAINED;~~

28 ~~(4) WHETHER THE WARRANT WAS GRANTED AS APPLIED FOR,~~
29 ~~WAS MODIFIED, OR WAS DENIED; AND~~

30 ~~(5) THE PERIOD OF DISCLOSURES AUTHORIZED BY THE WARRANT~~
31 ~~AND THE NUMBER AND DURATION OF EXTENSIONS OF THE WARRANT.~~

32 ~~(B) (1) IN JUNE OF EACH YEAR, BEGINNING IN 2015, THE~~
33 ~~ADMINISTRATIVE OFFICE OF THE COURTS SHALL TRANSMIT TO THE GENERAL~~

1 ~~ASSEMBLY, IN ACCORDANCE WITH § 2-1254 OF THE STATE GOVERNMENT~~
2 ~~ARTICLE, AND MAKE AVAILABLE ON THE ADMINISTRATIVE OFFICE OF THE~~
3 ~~COURTS' PUBLIC WEB SITE A FULL AND COMPLETE REPORT CONCERNING THE~~
4 ~~NUMBER OF APPLICATIONS FOR WARRANTS AUTHORIZING OR REQUIRING THE~~
5 ~~DISCLOSURE OF INFORMATION DESCRIBED IN SUBSECTION (A) OF THIS~~
6 ~~SECTION.~~

7 ~~(2) (i) A REPORT DESCRIBED IN PARAGRAPH (1) OF THIS~~
8 ~~SUBSECTION SHALL INCLUDE A SUMMARY AND ANALYSIS OF THE DATA~~
9 ~~REQUIRED TO BE FILED WITH THAT OFFICE.~~

10 ~~(ii) THE ADMINISTRATIVE OFFICE OF THE COURTS MAY~~
11 ~~ISSUE GUIDANCE REGARDING THE FORM OF A REPORT UNDER THIS~~
12 ~~SUBSECTION.~~

13 ~~10-4A-10.~~

14 ~~(A) A SERVICE PROVIDER OR A SUBSCRIBER OR CUSTOMER OF THAT~~
15 ~~PROVIDER THAT IS AGGRIEVED BY A VIOLATION OF THIS SUBTITLE HAS A CIVIL~~
16 ~~CAUSE OF ACTION IF THE CONDUCT CONSTITUTING THE VIOLATION WAS~~
17 ~~COMMITTED KNOWINGLY OR INTENTIONALLY.~~

18 ~~(B) AN AGGRIEVED PERSON UNDER SUBSECTION (A) OF THIS SECTION~~
19 ~~IS ENTITLED TO:~~

20 ~~(1) INJUNCTIVE RELIEF;~~

21 ~~(2) REASONABLE ATTORNEY'S FEES AND OTHER LITIGATION~~
22 ~~COSTS REASONABLY INCURRED; AND~~

23 ~~(3) THE SUM OF THE ACTUAL DAMAGES SUFFERED AND ALL~~
24 ~~PROFITS MADE BY THE VIOLATOR AS A RESULT OF THE VIOLATION OR \$1,000,~~
25 ~~WHICHEVER IS GREATER.~~

26 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
27 October 1, 2014.