

**HOUSE . . . . . No. 1572**

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By Mr. Linsky of Natick, petition of David Paul Linsky and others relative to the issuance of subpoenas for records of providers of electronic communication services. The Judiciary.

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**The Commonwealth of Massachusetts**

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PETITION OF:

David Paul Linsky  
Michael E. Festa  
Cory Atkins

Michael F. Rush  
J. James Marzilli, Jr.

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In the Year Two Thousand and Seven.

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AN ACT TO MODERNIZE THE ADMINISTRATIVE SUBPOENA STATUTE.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 271 of the General Laws is hereby  
2 amended by striking out section 17B, as appearing in the 2000  
3 Official Edition, and inserting in place thereof following  
4 section:—  
5 Section 17B. Except as otherwise prohibited under  
6 section 2703 of Title 18 of the United States Code, whenever the  
7 attorney general or a district attorney has reasonable grounds to  
8 believe that records in the possession of (i) a common carrier sub-  
9 ject to the jurisdiction of the department of telecommunications  
10 and energy, as defined in paragraph (d) of section 12 of  
11 chapter 159; or (ii) a provider of electronic communication  
12 service as defined in subparagraph (15) of section 2510 of Title 18  
13 of the United States Code; or (iii) a provider of remote computing  
14 service as defined in section 2711 of Title 18 of the United States  
15 Code, are relevant and material to an ongoing criminal investiga-  
16 tion, the attorney general or district attorney may issue an admin-  
17 istrative subpoena demanding all such records in the possession of  
18 such common carrier or service, and such records forthwith shall

19 be delivered to the attorney general or district attorney. No such  
20 common carrier or service, or employee thereof shall be civilly or  
21 criminally responsible for furnishing any records or information in  
22 compliance with such demand. Nothing in this section shall limit  
23 the right of the attorney general or a district attorney otherwise to  
24 obtain records from such a common carrier or service pursuant to  
25 a search warrant issued pursuant to sections 1 to 3, inclusive, a  
26 court order or a grand jury or trial subpoena.

27 Notwithstanding the provisions of this section, a subpoena  
28 issued pursuant to this section shall not be used to obtain records  
29 disclosing the content of electronic communications, or subscriber  
30 account records disclosing Internet locations which have been  
31 accessed including, but not limited to, websites, chat channels and  
32 newsgroups, but excluding servers used to initially access the  
33 Internet.

1 SECTION 2. Chapter 276 of the General Laws is hereby  
2 amended by inserting after section 1A, as so appearing, the  
3 following section:—

4 Section 1B. (a) As used in this section, the following terms  
5 shall have the following meanings:

6 “Adverse result,” occurs when notification of the existence of a  
7 search warrant results in:

8 danger to the life or physical safety of an individual;

9 a flight from prosecution;

10 the destruction of or tampering with evidence;

11 the intimidation of a potential witness or witnesses; or

12 serious jeopardy to an investigation or undue delay of a  
13 trial.

14 “Electronic communication services”, shall be construed in  
15 accordance with Title 18, sections 2701 to 2711 of the United  
16 States Code. This definition shall not apply to corporations that do  
17 not provide those services to the general public.

18 “Foreign corporation”, any corporation or other entity that  
19 makes a contract or engages in a terms of service agreement with  
20 a resident of the commonwealth to be performed in whole or in  
21 part by either party in the commonwealth. The making of the con-  
22 tract or terms of service agreement is considered to be the agree-  
23 ment of the foreign corporation that a search warrant or subpoena

24 properly served on it has the same legal force and effect as if  
25 served personally within the commonwealth.

26 “Massachusetts corporation”, any corporation or other entity  
27 that is subject to chapter 155 or chapter 156B.

28 “Properly served”, that a search warrant or subpoena has been  
29 delivered by hand, by United States mail, by commercial delivery  
30 service, by facsimile or by any other manner to any officer of the  
31 corporation or its general manager in the commonwealth, to any  
32 natural person designated by it as agent for the service of process,  
33 or if the corporation has designated a corporate agent, to any  
34 person named in the latest certificate filed pursuant to section 4 of  
35 chapter 181.

36 “Remote computing services” shall be construed in accordance  
37 with Title 18, sections 2701 to 2711, inclusive, of the United  
38 States Code. This definition shall not apply to corporations that do  
39 not provide those services to the general public.

40 “Subpoena”, a grand jury or trial subpoena issued in the course  
41 of a criminal proceeding or an administrative subpoena issued  
42 pursuant to section 17B.

43 (b) A court or justice authorized to issue warrants in criminal  
44 cases may, upon complaint on oath that the complainant believes  
45 that any of the records hereinafter named are actually or construc-  
46 tively possessed by a foreign corporation that provides electronic  
47 communication services or remote computing services, if satisfied  
48 that probable cause has been established for such belief, issue a  
49 warrant identifying those records to be searched for and com-  
50 manding the person seeking such warrant to properly serve the  
51 warrant upon the foreign corporation:

52 (1) those records which would reveal the identity of a customer  
53 using those services;

54 (2) data stored by or on behalf of a customer;

55 (3) records of a customer’s usage of those services;

56 (4) records of the source of communications sent to or the  
57 recipient or destination of communications sent from a customer;  
58 or

59 (5) the content of those communications stored by an electronic  
60 communication or remote commuting service.

61 (c) The following provisions shall apply to any search warrant  
62 issued pursuant to this section and to any subpoena issued in the

63 course of a criminal investigation or proceeding directed to a for-  
64 eign corporation that provides electronic communication services  
65 or remote computing services:

66 (1) When properly served with a search warrant issued by a  
67 Massachusetts court or justice pursuant to this section or a sub-  
68 poena, a foreign corporation subject to this section shall provide  
69 all records sought pursuant to that warrant or subpoena within 5  
70 business days of receipt, including those records maintained or  
71 located outside the commonwealth.

72 (2) If an the applicant makes a showing and the court or justice  
73 finds that failure to produce records within less than 5 business  
74 days would cause an adverse result, a warrant may require produc-  
75 tion of records within less than 5 business days;

76 (3) A court or justice may reasonably extend the time required  
77 for production of the records upon finding that the foreign corpo-  
78 ration has shown good cause for that extension and that an exten-  
79 sion of time would not cause an adverse result;

80 (4) A foreign corporation seeking to quash a warrant or sub-  
81 poena served on it pursuant to this section must seek relief from  
82 the court that issued the warrant or the court, which has jurisdic-  
83 tion over the subpoena within the time required for production of  
84 records pursuant to this section. The court shall hear and decide  
85 that motion no later than 5 court days after the motion is filed;

86 (5) In the case of an administrative subpoena issued by the  
87 attorney general, the superior court of Suffolk county shall have  
88 jurisdiction; in the case of an administrative subpoena issued by a  
89 district attorney, the superior court in any county in which the dis-  
90 trict attorney maintains an office shall have jurisdiction; and

91 (6) The foreign corporation shall verify the authenticity of  
92 records that it produces by providing an affidavit from the person  
93 in custody of those records certifying that they are true and com-  
94 plete.

95 (d) A Massachusetts corporation that provides electronic com-  
96 munication services or remote computing services, when served  
97 with a warrant or subpoena issued by another state to produce  
98 records that would reveal the identity of the customers using those  
99 services, data stored by, or on behalf of the customer, the cus-  
100 tomer's usage of those services, the recipient or destination of  
101 communications sent to or from those customers, or the content of

102 those communications, shall produce those records as if that war-  
103 rant or subpoena had been issued under Massachusetts law.

104 (e) No cause of action shall lie against any foreign or Massa-  
105 chusetts corporation subject to this section, its officers,  
106 employees, agents or other specified persons for providing  
107 records, information, facilities or assistance in accordance with  
108 the terms of a warrant or subpoena issued pursuant to this section.

1 SECTION 3. Section 58 ½ of chapter 277 of the General Laws,  
2 as so appearing, is hereby amended by striking out, in line 7, the  
3 word “or”.

1 SECTION 4. Said section 58 ½ of said chapter 277, as so  
2 appearing, is hereby further amended by inserting after the word  
3 “violation”, in line 8, the following words:— or where any sort of  
4 remote access device used by the defendant was physically  
5 located at the time of the violation.