

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

S. 356

To improve the provisions relating to the privacy of electronic communications.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by _____

Viz:

1 Strike all after the enacting clause and insert the fol-

2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Email Privacy Act”.

5 **SEC. 2. VOLUNTARY DISCLOSURE CORRECTIONS.**

6 Section 2702 of title 18, United States Code, is

7 amended—

8 (1) in subsection (a)—

9 (A) in paragraph (1)—

10 (i) by striking “divulge” and inserting

11 “disclose”; and

1 (ii) by striking “while in electronic
2 storage by that service” and inserting
3 “that is in electronic storage with or other-
4 wise stored, held, or maintained by that
5 service”;

6 (B) in paragraph (2)—

7 (i) by striking “to the public”;

8 (ii) by striking “divulge” and insert-
9 ing “disclose”; and

10 (iii) by striking “which is carried or
11 maintained on that service” and inserting
12 “that is stored, held, or maintained by that
13 service”; and

14 (C) in paragraph (3)—

15 (i) by striking “divulge” and inserting
16 “disclose”; and

17 (ii) by striking “a provider of” and in-
18 serting “a person or entity providing”;

19 (2) in subsection (b)—

20 (A) in the matter preceding paragraph (1),
21 by inserting “wire or electronic” before “com-
22 munication”;

23 (B) by amending paragraph (1) to read as
24 follows:

1 “(1) to an originator, addressee, or intended re-
2 cipient of such communication, to the subscriber or
3 customer on whose behalf the provider stores, holds,
4 or maintains such communication, or to an agent of
5 such addressee, intended recipient, subscriber, or
6 customer;”; and

7 (C) by amending paragraph (3) to read as
8 follows:

9 “(3) with the lawful consent of the originator,
10 addressee, or intended recipient of such communica-
11 tion, or of the subscriber or customer on whose be-
12 half the provider stores, holds, or maintains such
13 communication;”;

14 (3) in subsection (c) by inserting “wire or elec-
15 tronic” before “communications”;

16 (4) in each of subsections (b) and (c), by strik-
17 ing “divulge” and inserting “disclose”; and

18 (5) in subsection (c), by amending paragraph
19 (2) to read as follows:

20 “(2) with the lawful consent of the subscriber
21 or customer;”.

22 **SEC. 3. AMENDMENTS TO REQUIRED DISCLOSURE SEC-**
23 **TION.**

24 Section 2703 of title 18, United States Code, is
25 amended—

1 (1) by striking subsections (a) through (c) and
2 inserting the following:

3 “(a) CONTENTS OF WIRE OR ELECTRONIC COMMU-
4 NICATIONS IN ELECTRONIC STORAGE.—

5 “(1) WARRANT.—Except as provided in sub-
6 sections (i) and (j), a governmental entity may re-
7 quire the disclosure by a provider of electronic com-
8 munication service of the contents of a wire or elec-
9 tronic communication that is in electronic storage
10 with or otherwise stored, held, or maintained by that
11 service only if the governmental entity obtains a
12 warrant issued using the procedures described in the
13 Federal Rules of Criminal Procedure (or, in the case
14 of a State court, issued using State warrant proce-
15 dures) that—

16 “(A) is issued by a court of competent ju-
17 risdiction; and

18 “(B) may indicate the date by which the
19 provider shall make the disclosure to the gov-
20 ernmental entity.

21 “(2) PROMPT RESPONSE.—In the absence of a
22 date on the warrant indicating the date by which the
23 provider shall make disclosure to the governmental
24 entity, the provider shall promptly respond to the
25 warrant.

1 “(b) CONTENTS OF WIRE OR ELECTRONIC COMMU-
2 NICATIONS IN A REMOTE COMPUTING SERVICE.—

3 “(1) IN GENERAL.—

4 “(A) WARRANT.—Except as provided in
5 subsections (i) and (j), a governmental entity
6 may require the disclosure by a provider of re-
7 mote computing service of the contents of a
8 wire or electronic communication that is stored,
9 held, or maintained by that service only if the
10 governmental entity obtains a warrant issued
11 using the procedures described in the Federal
12 Rules of Criminal Procedure (or, in the case of
13 a State court, issued using State warrant proce-
14 dures) that—

15 “(i) is issued by a court of competent
16 jurisdiction; and

17 “(ii) may indicate the date by which
18 the provider shall make the disclosure to
19 the governmental entity.

20 “(B) PROMPT RESPONSE.—In the absence
21 of a date on the warrant indicating the date by
22 which the provider shall make disclosure to the
23 governmental entity, the provider shall promptly
24 respond to the warrant.

1 “(2) APPLICABILITY.—Paragraph (1) is appli-
2 cable with respect to any wire or electronic commu-
3 nication that is stored, held, or maintained by the
4 provider—

5 “(A) on behalf of, and received by means
6 of electronic transmission from (or created by
7 means of computer processing of communica-
8 tion received by means of electronic trans-
9 mission from), a subscriber or customer of such
10 remote computing service; and

11 “(B) solely for the purpose of providing
12 storage or computer processing services to such
13 subscriber or customer, if the provider is not
14 authorized to access the contents of any such
15 communications for purposes of providing any
16 services other than storage or computer proc-
17 essing.

18 “(c) RECORDS CONCERNING ELECTRONIC COMMU-
19 NICATION SERVICE OR REMOTE COMPUTING SERVICE.—

20 “(1) IN GENERAL.—Except as provided in sub-
21 sections (i) and (j), a governmental entity may re-
22 quire the disclosure by a provider of electronic com-
23 munication service or remote computing service of a
24 record or other information pertaining to a sub-
25 scriber to or customer of such service (not including

1 the contents of a wire or electronic communication),
2 only—

3 “(A) if a governmental entity obtains a
4 warrant issued using the procedures described
5 in the Federal Rules of Criminal Procedure (or,
6 in the case of a State court, issued using State
7 warrant procedures) that—

8 “(i) is issued by a court of competent
9 jurisdiction directing the disclosure; and

10 “(ii) may indicate the date by which
11 the provider shall make the disclosure to
12 the governmental entity;

13 “(B) if a governmental entity obtains a
14 court order directing the disclosure under sub-
15 section (d);

16 “(C) with the lawful consent of the sub-
17 scriber or customer;

18 “(D) if a governmental entity submits a
19 formal written request relevant to a law en-
20 forcement investigation concerning tele-
21 marketing fraud for the name, address, and
22 place of business of a subscriber or customer of
23 the provider, which subscriber or customer is
24 engaged in telemarketing (as defined in section
25 2325); or

1 “(E) as otherwise authorized in paragraph
2 (2).

3 “(2) SUBSCRIBER OR CUSTOMER INFORMA-
4 TION.—A provider of electronic communication serv-
5 ice or remote computing service shall, in response to
6 an administrative subpoena authorized by Federal or
7 State statute, a grand jury, trial, or civil discovery
8 subpoena, or any means available under paragraph
9 (1), disclose to a governmental entity the—

10 “(A) name;

11 “(B) address;

12 “(C) local and long distance telephone con-
13 nection records, or records of session times and
14 durations;

15 “(D) length of service (including start
16 date) and types of service used;

17 “(E) telephone or instrument number or
18 other subscriber or customer number or iden-
19 tity, including any temporarily assigned net-
20 work address; and

21 “(F) means and source of payment for
22 such service (including any credit card or bank
23 account number);

24 of a subscriber or customer of such service.

1 “(3) NOTICE NOT REQUIRED.—A governmental
2 entity that receives records or information under
3 this subsection is not required to provide notice to
4 a subscriber or customer.”;

5 (2) in subsection (d)—

6 (A) by striking “(b) or”;

7 (B) by striking “the contents of a wire or
8 electronic communication, or”;

9 (C) by striking “sought,” and inserting
10 “sought”; and

11 (D) by striking “section” and inserting
12 “subsection”; and

13 (3) by adding at the end the following:

14 “(h) NOTICE.—Except as provided in section 2705,
15 a provider of electronic communication service or remote
16 computing service may notify a subscriber or customer of
17 a receipt of a warrant, court order, subpoena, or request
18 under subsection (a), (b), (c), or (d) of this section.

19 “(i) RULE OF CONSTRUCTION RELATED TO LEGAL
20 PROCESS.—Nothing in this section or in section 2702
21 shall limit the authority of a governmental entity to use
22 an administrative subpoena authorized by Federal or
23 State statute, a grand jury, trial, or civil discovery sub-
24 poena, or a warrant issued using the procedures described
25 in the Federal Rules of Criminal Procedure (or, in the

1 case of a State court, issued using State warrant proce-
2 dures) by a court of competent jurisdiction to—

3 “(1) require an originator, addressee, or in-
4 tended recipient of a wire or electronic communica-
5 tion to disclose a wire or electronic communication
6 (including the contents of that communication) to
7 the governmental entity;

8 “(2) require a person or entity that provides an
9 electronic communication service to the officers, di-
10 rectors, employees, or agents of the person or entity
11 (for the purpose of carrying out their duties) to dis-
12 close a wire or electronic communication (including
13 the contents of that communication) to or from the
14 person or entity itself or to or from an officer, direc-
15 tor, employee, or agent of the entity to a govern-
16 mental entity, if the wire or electronic communica-
17 tion is stored, held, or maintained on an electronic
18 communications system owned, operated, or con-
19 trolled by the person or entity; or

20 “(3) require a person or entity that provides a
21 remote computing service or electronic communica-
22 tion service to disclose a wire or electronic commu-
23 nication (including the contents of that communica-
24 tion) that advertises or promotes a product or serv-

1 ice and that has been made readily accessible to the
2 general public.

3 “(j) **RULE OF CONSTRUCTION RELATED TO CON-**
4 **GRESSIONAL SUBPOENAS.**—Nothing in this section or in
5 section 2702 shall limit the power of inquiry vested in the
6 Congress by Article I of the Constitution of the United
7 States, including the authority to compel the production
8 of a wire or electronic communication (including the con-
9 tents of a wire or electronic communication) that is stored,
10 held, or maintained by a person or entity that provides
11 remote computing service or electronic communication
12 service.”.

13 **SEC. 4. DELAYED NOTICE.**

14 Section 2705 of title 18, United States Code, is
15 amended to read as follows:

16 **“§ 2705. Delayed notice**

17 “(a) **IN GENERAL.**—A governmental entity acting
18 under section 2703 may apply to a court for an order di-
19 recting a provider of electronic communication service or
20 remote computing service to which a warrant, order, sub-
21 poena, or other directive under section 2703 is directed
22 not to notify any other person of the existence of the war-
23 rant, order, subpoena, or other directive.

24 “(b) **DETERMINATION.**—A court shall grant a re-
25 quest for an order made under subsection (a) for delayed

1 notification of up to 180 days if the court determines that
2 there is reason to believe that notification of the existence
3 of the warrant, order, subpoena, or other directive will
4 likely result in—

5 “(1) endangering the life or physical safety of
6 an individual;

7 “(2) flight from prosecution;

8 “(3) destruction of or tampering with evidence;

9 “(4) intimidation of potential witnesses; or

10 “(5) otherwise seriously jeopardizing an inves-
11 tigation or unduly delaying a trial.

12 “(c) EXTENSION.—Upon request by a governmental
13 entity, a court may grant one or more extensions, for peri-
14 ods of up to 180 days each, of an order granted in accord-
15 ance with subsection (b).”.

16 **SEC. 5. RULE OF CONSTRUCTION.**

17 Nothing in this Act or an amendment made by this
18 Act shall be construed to preclude the acquisition by the
19 United States Government of—

20 (1) the contents of a wire or electronic commu-
21 nication pursuant to other lawful authorities, includ-
22 ing the authorities under chapter 119 of title 18
23 (commonly known as the “Wiretap Act”), the For-
24 eign Intelligence Surveillance Act of 1978 (50

1 U.S.C. 1801 et seq.), or any other provision of Fed-
2 eral law not specifically amended by this Act; or
3 (2) records or other information relating to a
4 subscriber or customer of any electronic communica-
5 tion service or remote computing service (not includ-
6 ing the content of such communications) pursuant to
7 the Foreign Intelligence Surveillance Act of 1978
8 (50 U.S.C. 1801 et seq.), chapter 119 of title 18
9 (commonly known as the “Wiretap Act”), or any
10 other provision of Federal law not specifically
11 amended by this Act.