

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

House Bill 4402

BY DELEGATES SKINNER AND FAIRCLOTH

[Introduced February 4, 2016; referred to the
committee on the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §46A-6N-1, §46A-6N-2, §46A-6N-3 and §46A-6N-4, all relating to an e-mail
3 privacy act, confidentiality of electronic communications, search warrant requirement
4 required disclosure of customer records and delayed notice.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
2 article, designated §46A-6N-1, §46A-6N-2, §46A-6N-3 and §46A-6N-4, all to read as follows:

ARTICLE 6N. E-MAIL PRIVACY ACT.

§46A-6N-1. Short title.

1 This article may be cited as the E-mail Privacy Act.

§46A-6N-2. Confidentiality of electronic communications.

1 A provider of remote computing service or electronic communication service to the public
2 may not knowingly divulge to any governmental entity the contents of any communication or any
3 record or other information pertaining to a subscriber or customer of such service.

§46A-6N-3. Search warrant requirement; required disclosure of customer records.

1 (a) Contents of wire or electronic communications.

2 A governmental entity may require the disclosure by a provider of electronic
3 communication service or remote computing service of the contents of a wire or electronic
4 communication that is in electronic storage with or otherwise stored, held, or maintained by the
5 provider only if the governmental entity obtains a warrant.

6 (b) Notice.

7 Not later than ten business days in the case of a law-enforcement agency, or not later
8 than three business days in the case of any other governmental entity, after a governmental entity
9 receives the contents of a wire or electronic communication of a subscriber or customer from a
10 provider of electronic communication service or remote computing service under subsection (a),
11 the governmental entity shall serve upon, or deliver to by registered or first-class mail, electronic

12 mail, or other means reasonably calculated to be effective, as specified by the court issuing the
13 warrant, the subscriber or customer;

14 (1) A copy of the warrant; and

15 (2) A notice.

16 (c) Records concerning electronic communication service or remote computing service.

17 (1) In general.

18 Subject to subdivision (2), a governmental entity may require a provider of electronic
19 communication service or remote computing service to disclose a record or other information
20 pertaining to a subscriber or customer of the provider or service (not including the contents of
21 communications), only if the governmental entity:

22 (A) Obtains a warrant issued by a court of competent jurisdiction directing the disclosure;

23 (B) Obtains a court order directing the disclosure;

24 (C) Has the consent of the subscriber or customer to the disclosure; or

25 (D) Submits a formal written request relevant to a law enforcement investigation
26 concerning telemarketing fraud for the name, address, and place of business of a subscriber or
27 customer of the provider or service that is engaged in telemarketing.

28 (2) Information to be disclosed.

29 A provider of electronic communication service or remote computing service shall, in
30 response to an administrative subpoena authorized by federal or state statute, a grand jury, trial,
31 or civil discovery subpoena, or any means authorized under paragraph (1), disclose to a
32 governmental entity the:

33 (A) Name;

34 (B) Address;

35 (C) Local and long distance telephone connection records, or records of session times
36 and durations;

37 (D) Length of service (including start date) and types of service used;

38 (E) Telephone or instrument number or other subscriber number or identity, including any
39 temporarily assigned network address; and

40 (F) Means and source of payment for such service (including any credit card or bank
41 account number), of a subscriber or customer of such service.

42 (3) Notice not required.

43 A governmental entity that receives records or information under this subsection is not
44 required to provide notice to a subscriber or customer.

45 (d) Rule of construction.

46 Nothing in this section may be construed to limit the authority of a governmental entity to
47 use an administrative subpoena authorized under a federal or state statute or to use a federal or
48 state grand jury, trial, or civil discovery subpoena to:

49 (1) Require an originator, addressee, or intended recipient of an electronic communication
50 to disclose the contents of the electronic communication to the governmental entity; or

51 (2) Require an entity that provides electronic communication services to the officers,
52 directors, employees, or agents of the entity for the purpose of carrying out their duties to disclose
53 the contents of an electronic communication to or from an officer, director, employee, or agent of
54 the entity to a governmental entity, if the electronic communication is held, stored, or maintained
55 on an electronic communications system owned or operated by the entity.

§46A-6N-4. Delayed notice.

1 (a) Delay of notification.

2 (1) In general.

3 A governmental entity that is seeking a warrant under this article may include in the
4 application for the warrant a request for an order delaying the notification required under section
5 three for a period of not more than one hundred eighty days in the case of a law-enforcement
6 agency, or not more than ninety days in the case of any other governmental entity.

7 (2) Determination.

8 A court shall grant a request for delayed notification made under paragraph (1) if the court
9 determines that there is reason to believe that notification of the existence of the warrant may
10 result in:

11 (A) Endangering the life or physical safety of an individual;

12 (B) Flight from prosecution;

13 (C) Destruction of or tampering with evidence;

14 (D) Intimidation of potential witnesses; or

15 (E) Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

16 (3) Extension.

17 Upon request by a governmental entity, a court may grant one or more extensions of the
18 delay of notification granted under subdivision (2) of not more than one hundred eighty days in
19 the case of a law-enforcement agency, or not more than ninety days in the case of any other
20 governmental entity.

21 (4) Expiration of the delay of notification.

22 Upon expiration of the period of delay of notification under subdivisions (2) or (3), the
23 governmental entity shall serve upon, or deliver to by registered or first-class mail, electronic mail,
24 or other means reasonably calculated to be effective as specified by the court approving the
25 search warrant, the customer or subscriber:

26 (A) A copy of the warrant; and

27 (B) Notice that informs the customer or subscriber:

28 (i) Of the nature of the law enforcement inquiry with reasonable specificity;

29 (ii) That information maintained for the customer or subscriber by the provider of electronic
30 communication service or remote computing service named in the process or request was
31 supplied to, or requested by, the governmental entity;

32 (iii) Of the date on which the warrant was served on the provider and the date on which
33 the information was provided by the provider to the governmental entity;

- 34 (iv) That notification of the customer or subscriber was delayed;
35 (v) The identity of the court authorizing the delay; and
36 (vi) Of the provision of this article under which the delay was authorized.

37 (b) Preclusion of notice to subject of governmental access.

38 (1) In general.

39 A governmental entity that is obtaining the contents of a communication or information or
40 records under this article may apply to a court for an order directing a provider of electronic
41 communication service or remote computing service to which a warrant, order, subpoena, or other
42 directive is directed not to notify any other person of the existence of the warrant, order, subpoena,
43 or other directive for a period of not more than one hundred eighty days in the case of a law-
44 enforcement agency, or not more than ninety days in the case of any other governmental entity.

45 (2) Determination.

46 A court shall grant a request for an order made under subdivision (1) if the court
47 determines that there is reason to believe that notification of the existence of the warrant, order,
48 subpoena, or other directive may result in:

49 (A) Endangering the life or physical safety of an individual;

50 (B) Flight from prosecution;

51 (C) Destruction of or tampering with evidence;

52 (D) Intimidation of potential witnesses; or

53 (E) Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

54 (3) Extension.

55 Upon request by a governmental entity, a court may grant one or more extensions of an
56 order granted under subdivision (2) of not more than one hundred eighty days in the case of a
57 law- enforcement agency, or not more than ninety days in the case of any other governmental
58 entity.

59 (4) Prior notice to law enforcement.

60 Upon expiration of the period of delay of notice under this section, and not later than three
61 business days before providing notice to a customer or subscriber, a provider of electronic
62 communication service or remote computing service shall notify the governmental entity that
63 obtained the contents of a communication or information or records of the intent of the provider
64 of electronic communication service or remote computing service to notify the customer or
65 subscriber of the existence of the warrant, order, or subpoena seeking that information.

66 *(c) Definition.*

67 In this article the term "law-enforcement agency" means an agency of the United States,
68 a state, or a political subdivision of a state, authorized by law or by a government agency to
69 engage in or supervise the prevention, detection, investigation, or prosecution of any violation of
70 criminal law, or any other federal or state agency conducting a criminal investigation.

NOTE: The purpose of this bill is to enact the E-mail Privacy Act. The bill provides procedures which must be followed to release the contents of e-mails.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.