

Ryan, Robin

From: Ludwig, Frederic
Sent: Monday, September 28, 2009 11:27 AM
To: Ryan, Robin
Cc: Latorraca, Donald V - DOJ; Schaefer, Michael G - DOJ
Subject: re: LRB 2789
Attachments: DOJ Search Warrant Draft 9.28.09.pdf

Hi Robin,

Attached is a draft we have worked on with the DOJ in response to your draft re: search warrants for electronic communications (LRB 2789). You may contact Don Latorraca (7-2797) or Mike Schaefer (7-2070) for further clarification or with any questions.

Thanks,
Fred

--

Fred Ludwig
Office of Representative Sandy Pasch
608.266.7671 (Office)
888.534.0022 (Toll-free)
608.282.3622 (Fax)

DOJ Draft – Bill to Expand Circuit Court Jurisdiction to Issue Search Warrants and Subpoenas to Entities Located Outside of the State of Wisconsin

This draft works from the template offered by the draft prepared by LRB for Representative Pasch and by statutes or bills with similar purposes in Minnesota, Massachusetts, and Oregon.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. 968. 27 (intro) of the statutes is amended to read:

✓ **968.27 Definitions.** (intro) In ss. 968.28 to ~~968.37~~ 968.375:

Section 2. 968.27(14m) of the statutes is created to read:

✓ **968.27(14m)** “Remote computing service” means the provision to the public of computer storage or processing services by means of an electronic communications system.

Section 3. 968.27(17) of the statutes is amended to read:

968.27(17) “Wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or other like connection between the point of origin and the point of reception, including the use of the connection in any switching station, furnished or operated by any person engaged as a public utility in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications. “Wire communication” includes the electronic storage of any such aural transfer, ~~but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.~~

Section 4. 968.30(10) is amended to read:

968.30(1) Nothing in ss. 968.28 to 968.375 shall be construed to allow the interception of any wire, electronic or oral communication between an attorney and a client.

Section 5. 968.375 of the statutes is created to read:

968.375 Subpoenas and warrants for records or communications of customers of electronic communication service or remote computing services providers. (1) In this section:

(a) "Adverse result" means

1. danger to the life or physical safety of an individual;
2. a flight from prosecution;
3. the destruction of or tampering with evidence;
4. the intimidations of potential witnesses; or
5. serious jeopardy to an investigation or undue delay of an investigation or trial.

(b) For purposes of this section, a "foreign corporation" is considered to be doing business in this state, and subject to service and execution of process from this state, if it makes a contract with or engages in a terms of service agreement with any person or entity, whether or not that person or entity is a resident of this state, and the performance of any such contract or provision of service takes place in whole or in part within the borders of this state on any occasion.

(2) A judge, including a judge acting under the authority of s. 968.26, may issue a subpoena that conforms to the requirements of Wis. Stat. § 968.135, requiring a

Wisconsin or foreign corporation, person or entity providing electronic communication service or remote computing services, to disclose a record or other information pertaining to a subscriber to or customer of such service (but not including the contents of communications) including the subscriber's:

1. Name.
2. Address.
3. Local and long distance telephone connection records, or records of session times and durations.
4. Length of service, including start date, and types of service utilized.
5. Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address.
6. Means and source of payment for the electronic communication service or remote computing service, including any credit card or bank account number.

(3) Notwithstanding s. 968.13(1)(d) and 968.135, upon request by a district attorney or the attorney general or their assistants, and upon a showing of probable cause under s. 968.12, a judge, including a judge acting under the authority of s. 968.26, may issue a warrant requiring a Wisconsin or foreign corporation, person or entity providing electronic communication service or remote computing services, to disclose the content of a wire or electronic communication that is in electronic storage in an electronic communications system or held or maintained by a provider of remote computing service. A warrant issued under this subsection may also order the disclosure of the records or other information otherwise available by subpoena pursuant to subsection (2).

✓ (3) (4) Section 968.12(2) and (3) applies to the basis and application for, and issuance of, a warrant under this section as it applies to the basis and application for, and issuance of, a search warrant under s. 968.12(2).

✓ (5) A provider of electronic communication services or remote computing services may disclose the information or content provided for in subsections (2) or (3) above without a subpoena or warrant either upon:

(a) the lawful consent of the customer or subscriber, or

(b) a good faith belief on the part of the provider that an emergency exists involving danger of death or serious physical injury to any person requires disclosure without delay of the information relating to the emergency.

✓ (4) (6) A subpoena or warrant issued under this section may be served in the manner provided for serving a summons under s. 801.11(5) or, if proof of delivery can reasonably be proved, by United States mail, delivery service, telephone facsimile, or electronic transmission.

✓ (7) A subpoena or warrant issued under this section shall be served not more than 5 days after the date of issuance and returned to the court not later than 5 ~~business~~ days from the date that the records are received from the provider by the law enforcement officer or agency.

✓ (8) The person or entity on whom a subpoena or warrant under this section is served shall provide the law enforcement officer named in the subpoena or warrant all records covered by the subpoena or warrant within 8 business days after service of the same unless the court sets a different date for compliance.

✓ (9) Notwithstanding any other provision of state law, the presence of a law enforcement officer shall not be required for service or execution of a subpoena or

warrant issued in accordance with this section. The subpoena or warrant shall be deemed executed when the law enforcement officer or agency named therein transmits the same to the provider by United States mail, delivery service, telephone facsimile, or electronic transmission or personally serves the same upon the provider or its agent.

part with
service

(10) Where the law enforcement agency seeking the subpoena or warrant makes a showing and the judge finds that failure to produce records within less than 8 business days from service would cause an adverse result, the subpoena or warrant may require production of records within less than 8 business days. The judge may reasonably extend the time required for production of the documents upon a finding that the person or entity to which the subpoena or warrant is directed, or the law enforcement agency, has shown good cause for that extension and that an extension would not cause an adverse result.

(11) The person or entity to which the subpoena or warrant is directed may seek to quash the subpoena or warrant by motion directed to the judge who issued the subpoena or warrant within the time required for production of the documents under this section. The judge shall hear and decide the motion to quash no later than 8 business days after the motion is filed.

(12) A subpoena or warrant issued under this section shall be issued with all practicable secrecy, and the request, complaint, affidavit, or testimony upon which it is based may not be filed with the clerk or made public in any way until the subpoena or warrant has been executed and returned to the court. The judge may issue an order sealing the subpoena or warrant and the request, complaint, affidavit, or testimony upon which it is based. Upon request of the state and upon a showing of good cause, the judge

may issue an order delaying any required notice to the subscriber or customer of the subpoena or warrant.

(13) No cause of action shall lie against any person or entity subject to this section or any officers, employees, or agents for providing documents or records, information, facilities, or assistance in accordance with the terms of a subpoena or warrant issued pursuant to this section.

(14) Evidence disclosed under a subpoena or warrant issued under this section shall not be suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant.



wanted ~~the report~~
TODAY

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RMR

Regu. Cat

subpoenas and warrants
requiring providers of electronic
communications services or of
remote computing services to
provide customer information
or disclose contents of wire
or electronic communications.

DAU

1 AN ACT to amend 968.27 (intro.); and to create 968.375 of the statutes; relating
2 to; warrant to compel disclosure of contents of, or certain customer information
3 relating to, wire or electronic communications.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

Inys Analysis

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 INSA

SECTION 1. 968.27 (intro.) of the statutes is amended to read:

968.27 Definitions. (intro.) In ss. 968.28 to 968.37 968.375:

SECTION 2. 968.375 of the statutes is created to read:

968.375 Warrant for disclosure of customer communications or records. (1) In this section:

(a) "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

1 (b) Notwithstanding s. 968.27 (17), "wire communication" means any aural
2 transfer made in whole or in part through the use of facilities for the transmission
3 of communications by the aid of wire, cable, microwave or other like connection
4 between the point of origin and the point of reception, including the use of the
5 connection in any switching station, furnished or operated by any person engaged
6 in providing or operating the facilities for the transmission of intrastate, interstate
7 or foreign communications. "Wire communication" includes the electronic storage of
8 any such aural transfer, but does not include the radio portion of a cordless telephone
9 communication that is transmitted between the cordless telephone handset and the
10 base unit.

11 (2) Upon request by a law enforcement officer investigating a crime, and upon
12 showing of probable cause under s. 968.12, a court in the county in which the criminal
13 action may be tried may issue a warrant requiring a provider of electronic
14 communication service or of remote computing service, regardless of whether the
15 provider is located within or without this state, to disclose any of the following to the
16 law enforcement officer:

17 (a) The content of a wire or electronic communication that is in electronic
18 storage in an electronic communications system or held or maintained by a provider
19 of remote computing service.

***Note: 18 USC 2703 (b) includes additional conditions for communications held
by a provider of remote computing services. I may need to add these conditions to this
draft.

20 (b) Any of the following of a subscriber to, or customer of, the electronic
21 communication service or remote computing service:

- 22 1. Name.
- 23 2. Address.

1 3. Local and long distance telephone connection records, or records of session
2 times and durations.

3 4. Length of service, including start date, and types of service utilized.

4 5. Telephone or instrument number or other subscriber number or identity,
5 including any temporarily assigned network address.

6 6. Means and source of payment for the electronic communication service or
7 remote computing service, including any credit card or bank account number.

8 ~~(3) Section 968.12 (2) and (3) (a), (b), (c), (d), and (e) applies to the basis and
9 application for, and issuance of, a warrant under this section as it applies to the basis
10 and application for, and issuance of, a search warrant under s. 968.12.~~

11 ~~(4) A warrant issued under this section may be served in the manner provided
12 for serving a summons under 801.11 (5) or, if proof of delivery can reasonably be
13 proved, by United State mail, overnight delivery service, or facsimile.~~

14 ~~(5) A warrant issued under this section shall be served not more than 5 days
15 after the date of issuance. A warrant that is not executed with 5 days shall be void
16 and shall be returned to the court that issued it.~~

~~****NOTE: This 5-day limit for service is based on s. 968.15. Do you want a different
time for serving warrants under this section.~~

17 ~~(6) The person on whom a warrant under this section is served shall provide
18 the law enforcement officer all records covered by the warrant within 8 days after
19 service.~~

~~****NOTE: The 8-day limit for production is based on the Minnesota statute. The
Minnesota statute also provides for a shorter time if necessary to avoid "adverse results,"
which is defined. Do you want to provide for a shorter time for production?~~

20 ~~(7) A warrant under this section shall be issued with all practicable secrecy,
21 and the complaint, affidavit, or testimony upon which it is based may not be filed
22 with the clerk or made public in any way until the search warrant is executed.~~

INS B

e

1

Analysis:

Under current law a judge may, upon a showing of probable cause, issue a search warrant authorizing the police to search a designated person, object, or place for the purpose of seizing specific property. A judge may issue a search warrant authorizing a search anywhere the state. In addition, a judge may, upon a showing of probable cause, issue a subpoena requiring a person to produce specified documents.

This bill authorizes a judge to issue a subpoena or warrant requiring a provider of electronic communication services or of remote computing services to produce certain records relating to a customer or the customer's wire or electronic communications. Under the bill, "remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system. Upon a showing of probable cause, a court may issue a subpoena requiring a provider of electronic communication services or of remote computing services to provide information related to a customer, including the customer's name, address, telephone number, network address, and bank or credit card account number used to pay the provider, as well as records of the services the customer utilized and records of session times and durations. The bill also authorizes a judge, upon a showing of probable cause, to issue a warrant requiring a provider of electronic communication services or of remote computing services to disclose the contents of a customer's wire or electronic communications as well as the customer information described above.

A judge may issue a subpoena or warrant authorized by the bill to any provider that enters into an agreement with a person, whether or not the person is a resident of this state, if any part of the performance of the agreement takes place within this state. Under the bill, a law enforcement officer need not be present for the service or execution of the subpoena or warrant. The bill requires that a subpoena or warrant be issued secretly and provides that a judge may seal the subpoena or warrant and the request, complaint, affidavit, or testimony upon which the subpoena or warrant is based. The bill grants a provider of electronic communication services or of remote computing services immunity from civil liability for acts or omissions in accordance with a subpoena or warrant.

The bill also allows a provider of electronic communication services or of remote computing services to disclose information relating to a customer or the contents of a customer's wire or electronic communications if the customer consents, or if the provider has a good faith belief that disclosure is required to prevent death or serious physical injury to a person or to mitigate serious physical injury to a person.

Finally, the bill modifies the definition of "wire communication" that is applicable to the requirement to obtain a warrant before intercepting a wire communication. Under current law, "wire communication" is defined, in part, as any aural transfer made through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or like connection that is furnished or operated by a person engaged as a public utility. "Wire communication"

provided to the public

the provision to the public of computer storage or processing services

of

Committee

belief

"Wire communication"

specifically excludes the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit. The bill deletes the reference to microwave, deletes the reference to public utility, and deletes the exclusion of communications transmitted between a cordless telephone handset and base unit.

The changes in the bill include deleting reference to microwave and to public utility.

Ins A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

SECTION 1. 968.27 (14g) of the statutes is created to read:

968.27 (14g) "Remote computing service" means ~~(the provision to the public of~~ computer storage or processing ~~services~~ by means of an electronic communications system. *that is provided to the public*

9

~~NOTE~~ **NOTE:** Please note changes to the definition of "remote computing service."

SECTION 2. 968.27 (17) of the statutes is amended to read:

968.27 (17) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, ~~microwave~~ or other like connection between the point of origin and the point of reception, including the use of the connection in any switching station, furnished or operated by any person ~~engaged as a public utility~~ in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications. "Wire communication" includes the electronic storage of any such aural transfer, ~~but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the~~ base unit.

History: 1971 c. 40 s. 93; 1987 a. 399; 1991 a. 39; 1997 a. 218.

****NOTE: The deletion of "engaged as a public utility" is necessary for the bill. The deletion of "microwave" and of the last sentence are not necessary for the bill, but were added by DOJ.

18

SECTION 3. 968.30 (10) of the statutes is amended to read:

1 968.30 (10) Nothing in ss. 968.28 to ~~968.37~~ 968.375 shall be construed to allow
 2 the interception of any wire, electronic, or oral communication between an attorney
 3 and a client.

4 History: 1971 c. 40 s. 93; 1981 c. 335 s. 26; 1987 a. 399; 1993 a. 486.

4 **SECTION 4.** 968.375 of the statutes is created to read:

5 **968.375 Subpoenas and warrants for records or communications of**
 6 **customers of an electronic communication service or remote computing**
 7 **service provider. (1) DEFINITION.** In this section, “adverse result” means any of
 8 the following:

9 (a) Danger to the life or physical safety of a person.

10 (b) Flight from prosecution.

11 (c) Destruction of or tampering with evidence.

12 (d) Intimidation of a potential witness.

13 (e) Serious jeopardy to an investigation by a law enforcement agency or undue
 14 delay of an investigation by a law enforcement agency or of a trial.

 ****NOTE: I narrowed the reference to investigations in par. (e).

15 (2) JURISDICTION. For purposes of this section, a person is considered to be doing
 16 business in this state and is subject to service and execution of process from this
 17 state, if the person makes a contract with or engages in a terms of service agreement
 18 with any other person, whether or not the other person is a resident of this state, and
 19 any part of the performance of the contract or provision of service takes place within
 20 this state on any occasion.

 ****NOTE: Rather than using the term “foreign corporation,” this draft relies on the
 definition of “person” s. 990.01 (26), which includes corporations, other forms of business
 associations, and individuals.

21 (3) SUBPOENA. (a) Upon the request of the attorney general or a district
 22 attorney and upon a showing of probable cause under s. 968.12, a judge may issue

1 a subpoena requiring a person who provides electronic communication services or
 2 remote computing services to disclose a record or other information pertaining to a
 3 subscriber or customer of the service, including all of the following relating to the
 4 subscriber or customer:

end INS A

5 **Ins B**

****NOTE: I didn't include a specification that a judge's authority to issue a subpoena under sub. (3) applies to John Doe proceedings. Such a specification is not included in the section on search warrants or subpoena for documents, so why is it necessary here?

6 (b) A subpoena under this subsection may not require disclosure of the contents
 7 of communications.

****NOTE: I didn't refer to a "subpoena that conforms to the requirements of s. 968.135." Are there any particular requirement that DOJ wants to incorporate that are not already covered in this draft?

8 (4) WARRANT. Upon the request of the attorney general or a district attorney
 9 and upon a showing of probable cause under s. 968.12, a judge may issue a warrant
 10 requiring a person who provides electronic communication services or remote
 11 computing services to disclose any of the following:

****NOTE: In subs. (3) and (4), I didn't specify that a judge may issue a subpoena or warrant upon the request of an assistant attorney general or assistant district attorney. Assistant attorney generals are not specified in provisions providing similar authority, and I don't want to create an implication that if assistants are not specified they cannot act. The authority of assistant district attorneys is covered under s. 967.03. ✓

****NOTE: I didn't include the phrase "notwithstanding s. 968.13 (1) (d)" in sub. (4), because 968.13 (1) (d) applies to a search warrant, which is described in s. 968.12 (1) as "an order directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property." The warrant under this subsection does not fit the description of "search warrant". I also did include "notwithstanding s. 968.135 because this subsection is not contrary to s. 968.135. ✓

12 (a) The content of a wire or electronic communication that is in electronic
 13 storage in an electronic communications system or held or maintained by a provider
 14 of remote computing service.

15 (b) A record or information described under sub. (3) (a).

1 (5) BASIS, APPLICATION FOR, AND ISSUANCE OF SUBPOENA OR WARRANT. Section
 2 968.12 (2) and (3) applies to the basis and application for, and issuance of, a subpoena
 3 under sub. (3) or a warrant under sub. (4) as it applies to the basis and application
 4 for, and issuance of, a search warrant under s. 968.12.

5 (6) MANNER OF SERVICE. A subpoena or warrant issued under this section may
 6 be served in the manner provided for serving a summons under s. 801.11 (5) or, if
 7 proof of delivery can reasonably be proved, by United States mail, delivery service,
 8 telephone facsimile, or electronic transmission. The subpoena or warrant is
 9 executed when served as provided in this subsection.

****NOTE: The second sentence substitutes for the DOJ provision stating that a subpoena or warrant shall be deemed executed when the law enforcement officer or agency transmits the same to the provider by US mail, etc. What is the purpose of specifying when a subpoena or warrant is executed?

10 (7) TIME FOR SERVICE. A subpoena or warrant issued under this section shall
 11 be served not more than 5 days after the date of issuance.

****NOTE: Consistent with the criminal procedure code, this draft refers to "days" as described under s. 990.001 (4) for computing time, rather than using the term "business days."

12 (8) TIME FOR PRODUCTION. (a) The person on whom a subpoena or warrant
 13 issued under this section is served shall provide the law enforcement officer or
 14 agency named in the subpoena or warrant all records or information described in the
 15 subpoena or warrant within 8 days after service unless the court sets a different date
 16 for compliance.

****NOTE: The draft provides that the AG or a DA may request a subpoena or warrant, but later portions of the draft provide that records described in the subpoena or warrant shall be delivered to a law enforcement officer or agency. Is "law enforcement officer or agency" intended to refer to the AG or DA only, or could the subpoena or warrant require delivery of the records directly to the police or sheriff?

17 (b) If attorney general or district attorney, whichever requests a subpoena or
 18 warrant under this section, makes a showing, and the judge finds that failure to

other general or district attorney

1 produce the records or information described in the subpoena or warrant within
 2 fewer than 8 days after service would cause an adverse result, the judge may require
 3 production within fewer than 8 days after service. The judge may reasonably extend
 4 the time required for production upon a finding that the person on whom the
 5 subpoena or warrant is served, or the law enforcement agency, has shown good cause
 6 for the extension and that the extension would not cause an adverse result.

****NOTE: Paragraph (a) allows a judge to establish a time for production that is different from the general 8 day time for any reason. Paragraph (b) allows the judge to set a shorter time to avoid an adverse result. Paragraph (b) doesn't provide any authority that is not already provided under par. (a), so why is it included? Should par. (b) require, rather than authorize, the judge to shorten the time for production upon showing of an adverse result?

7 (9) MOTION TO QUASH. The person on whom a subpoena or warrant issued under
 8 this section is served may file a motion to quash the subpoena or warrant with the
 9 the judge who issued the subpoena or warrant. If the person files the motion within
 10 the time for production of records or information under sub. (8), the judge shall hear
 11 and decide the motion within 8 days after the motion is filed. ✓

12 (10) LAW ENFORCEMENT PRESENCE NOT REQUIRED. The presence of a law
 13 enforcement officer is not required for service or execution of a subpoena or warrant
 14 issued under this section.

****NOTE: I didn't include "notwithstanding any other provision of state law." If there is a conflicting provision, the bill should identify it and address the conflict. ✓

15 (11) RETURN. A subpoena or warrant issued under this section shall be
 16 returned to the court not later than 5 days after the records or information described
 17 in the subpoena or warrant are received by the law enforcement officer or agency
 18 named in the subpoena or warrant.

19 (12) SECRECY. A subpoena or warrant issued under this section shall be issued
 20 with all practicable secrecy and the request, complaint, affidavit, or testimony upon

1 which it is based may not be filed with the clerk or made public until the subpoena
 2 or warrant has been executed and returned to the court. The judge may issue an
 3 order sealing the subpoena or warrant and the request, complaint, affidavit, or
 4 testimony upon which it is based. Upon the request of the state and upon a showing
 5 of good cause, the judge may issue an order delaying any required notice to the
 6 subscriber or customer of the subpoena or warrant.

****NOTE: This section does not require any notice to the subscriber or customer.
 What required notice does the last sentence refer to?

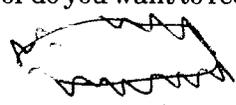
7 (13) IMMUNITY. A person on whom a subpoena or warrant issued under this
 8 section is served is immune from civil liability for acts or omissions in providing
 9 records or information, facilities, or assistance in accordance with the terms of the
 10 subpoena or warrant.

11 (14) TECHNICAL IRREGULARITIES. Evidence disclosed under a subpoena or
 12 warrant issued under this section shall not be suppressed because of technical
 13 irregularities or errors not affecting the substantial rights of the defendant.

14 (15) DISCLOSURE WITHOUT SUBPOENA OR WARRANT. A provider of electronic
 15 communication or remote computing service may disclose records or information
 16 described under sub. (3) (a) of a customer or subscriber or the content of
 17 communications of a customer or subscriber described under sub. (4) without a
 18 subpoena or warrant if any of the following applies:

19 (a) The customer or subscriber consents to the disclosure.

****NOTE: Does general consent for disclosure, for example a statement signed
 when a subscriber opens an account, suffice for consent, or do you want to require consent
 specific to each disclosure?



20 (b) The provider of electronic communication or remote computing service
 21 believes in good faith that an emergency involving the danger of death or serious

- 1 physical injury to any person exists and that disclosure of the information is required
- 2 to prevent the death or injury or to mitigate the injury.

****NOTE: Subsection (15) is not necessary to satisfy the original bill request. It is based on the DOJ draft.

end INS B

CORRESPONDENCE/MEMORANDUM**DEPARTMENT OF JUSTICE**

Date: December 23, 2009

To: Kevin St. John
Special Assistant Attorney General

From: Donald V. Latorraca 
Assistant Attorney General

Subject: *Warrants and Subpoenas for Records of Internet Service Providers and Telecommunications Providers (LRB-2789/P2)*

Assistant Attorney General Schaefer and I have reviewed the latest version of the legislative proposal to authorize the issuance of subpoenas and warrants for information in possession of telecommunications providers (LRB-2789/P2). We agree with many of the modifications that it has proposed. The drafter addressed our concerns, incorporated our suggestions, and improved upon them. With some minor modifications, we believe that this should go forward.

Section 3: Delete the last sentence and the word microwave. The drafter is correct. The last sentence is no longer needed because the definition of "wire communication" (18 U.S.C. § 2510(1)) no longer contains the last sentence or "microwave." By deleting this language, the state definition will be consistent with the federal definition of wire communication.

Section 5 [968.375(1)(e)]: We do not object to the LRB modification.

Section 5 [968.375(2)]: We agree with the LRB's choice of the word "person" as defined in § 990.01(26).

Section 5 [968.375(3)]: The Milwaukee County District Attorney raised a concern regarding the scope of a John Doe judge's authority. Under Wisconsin law, a John Doe judge does not sit as the "circuit court." See *In Matter of John Doe Proceeding*, 2003 WI 30, ¶ 23, 260 Wis. 2d 653, 660 N.W.2d 260 ("[I]t is well settled that a John Doe judge's actions are not directly appealable to the court of appeals because an order issued by a John Doe judge is not an order of a 'circuit court' or a 'court of record.'"). The Wisconsin Supreme Court also noted that:

¶ 54. A John Doe judge is also entitled to exercise the authority inherent in his or her judicial office. See *In re Wis. Family Counseling Serv. v. State*, 95 Wis. 2d 670, 675-76, 291 N.W.2d 631 (Ct. App. 1980). As such, a John Doe judge has authority to issue subpoenas, examine witnesses, adjourn the proceedings, take possession of subpoenaed records, adjudicate probable cause, and issue and seal warrants. See, e.g., *State v. Cummings*, 199 Wis. 2d 721, 735-36, 546 N.W.2d 406 (1996) (holding John Doe judge

has authority to seal search warrant despite lack of express statutory authority); *State v. Kielisch*, 123 Wis. 2d 125, 131, 365 N.W.2d 904 (Ct. App. 1985).

Id. (footnotes omitted). We believe that the LRB proposal would permit a John Doe judge to issue a subpoena under this provision.

On a related note, the draft should address another concern. Under federal law, the subpoenas and warrants that a provider must honor are those from a court of competent jurisdiction. 18 U.S.C. § 2703. 18 U.S.C. § 3127(2) defines a court of competent jurisdiction as:

(A) any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals having jurisdiction over the offense being investigated; or

(B) a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device;

* A circuit court judge falls under (B), but a court commissioner would not. Under Wisconsin law, a circuit court judge may authorize a court commissioner to issue search warrants. Wis. Stat. § 757.69(1)(b). However, we want to avoid any possibility that a circuit court will equate a "warrant" under the proposed section with a more general "search warrant" and inadvertently and improperly delegate this authority to court commissioners. Therefore, if LRB believes additional language is necessary to prevent delegation of the authority to court commissioners, it should be incorporated into the proposal itself or in Wis. Stat. § 757.69. Perhaps Wis. Stat. § 757.69(1)(b) could read as follows, "(b) In criminal matters issue summonses, arrest warrants or search warrants, *except orders issued pursuant to § 968.35*, determine probable cause to support a warrantless arrest . . ." We defer to LRB on how best to avoid this problem.

Section 5 [968.375(3)]: We agree with the drafter's observation that the assistant attorneys general and assistant district attorneys may act with the same authority as the attorney general and a district attorney.

Section 5 [968.375(3)]: The language in our draft "may issue a subpoena that conforms to the requirements of s. 968.135" was intended to make clear that this is a subpoena in form and procedure like § 968.135. The prefatory language offered by LRB essentially communicates that and is less clumsy ("Upon the request of the AG or a DA and upon PC").

Section 5 [968.375(4)]: We agree with the drafter's decision to delete the "notwithstanding 968.13(1)(d) and 968.135."

Section 5 [968.375(6)]: We agree with the drafter's observation and agree that the language regarding execution/service (the last sentence) may be deleted.

* Section 5 [968.375(8)]: The drafter asked why we referenced "law enforcement" agency rather than district attorney or attorney general. We included that language because in practice, records are typically returned to the investigating agency. We wanted to make sure that the courts had the authority to designate that a return may be to the agency rather than the court. Most courts do not want to deal with receiving this kind of material. Perhaps, the draft could contain the following language: "attorney general or district attorney or law enforcement agency named in the subpoena or warrant."

Section 5 [968.375(8)(b)]: The drafter asks if we really mean 968.375(8)(b) of their draft -- asking if we really mean that the court "shall" require a shorter period for production where the court finds an adverse result would occur if not (rather than "may"). The drafter's point is well taken. The answer is "yes."

Section 5 [968.375(10)]: We have no objection to removing the "Notwithstanding" language.

Section 5 [968.375(12)]: The drafter asks questions about delaying notice to the subscriber since the draft does not require notice. This is a valid question. The reference here is to the "required" notice in the ECPA. 18 U.S.C. §§ 2703(b) and 2705. The ECPA notification and delayed notification requirements apply to orders (subpoenas or warrants) seeking the contents of communications, not merely subscriber information, such as IP addresses, or call detail. However, because subpoenas and warrants are presumptively publicly filed documents, we do need some provision that would permit courts to seal documents. The proposed statute does that. But we should also have some language that will allow a judge to direct that a provider not disclose the order to the customer or subscriber whose records were obtained. So, I think we can rewrite the last sentence with a minor modification.

Instead of this language: ~~Upon the request of the state and upon a showing of good cause, the judge may issue an order delaying any required notice to the subscriber or customer of the subpoena or warrant.~~ Perhaps the language should read: *The order may also specify that the person to whom the subpoena or warrant is directed is prohibited from disclosing the existence of the subpoena or warrant to the customer or subscriber without further order of the court.*

Section 5 [968.375(15)(a)]: Because of the nature of the ECPA, we believe that general consent will not suffice. Rather, law enforcement would need specific consent.

Section 5 [968.375(15)(b)]: We believe this section is appropriate because it provides providers with authority to release information in cases of emergencies, when life or limb may be in jeopardy.



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-2789/P2

RLR:cjs:md

In 1/11/10
Wanted by Tues

stays

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

RMR

D-N

SA ✓
1/11/10

Reagan Act

1 AN ACT ~~to amend~~ 968.27 (intro.), 968.27 (17) and 968.30 (10); and **to create**
2 968.27 (14g) and 968.375 of the statutes; **relating to:** subpoenas and warrants
3 requiring providers of electronic communications services or of remote
4 computing services to provide customer information or disclose contents of wire
5 or electronic communications.

Analysis by the Legislative Reference Bureau

Under current law a judge may, upon a showing of probable cause, issue a search warrant authorizing the police to search a designated person, object, or place for the purpose of seizing specific property. A judge may issue a search warrant authorizing a search anywhere the state. In addition, a judge may, upon a showing of probable cause, issue a subpoena requiring a person to produce specified documents.

This bill authorizes a judge to issue a subpoena or warrant requiring a provider of electronic communication service or of remote computing service to produce certain records relating to a customer or the customer's wire or electronic communications. Under the bill, "remote computing service" means computer storage or processing provided to the public by means of an electronic communications system. Upon a showing of probable cause, a court may issue a subpoena requiring a provider of electronic communication service or of remote computing service to provide information related to a customer, including the customer's name, address, telephone number, network address, and bank or credit

card account number used to pay the provider, as well as records of the services the customer utilized and records of session times and durations. The bill also authorizes a judge, upon a showing of probable cause, to issue a warrant requiring a provider of electronic communication service or of remote computing service to disclose the contents of a customer's wire or electronic communications as well as the customer information described above.

A judge may issue a subpoena or warrant authorized by the bill to any provider that enters into an agreement with a person, whether or not the person is a resident of this state, if any part of the performance of the agreement takes place within this state. Under the bill, a law enforcement officer need not be present for the service or execution of the subpoena or warrant. The bill requires that a subpoena or warrant be issued secretly and provides that a judge may seal the subpoena or warrant and the request, complaint, affidavit, or testimony upon which the subpoena or warrant is based. The bill grants a provider of electronic communication service or of remote computing service immunity from civil liability for acts or omissions committed in accordance with a subpoena or warrant.

The bill also allows a provider of electronic communication service or of remote computing service to disclose information relating to a customer or the contents of a customer's wire or electronic communications if the customer consents, or if the provider has a good faith belief that disclosure is required to prevent death or serious physical injury to a person or to mitigate serious physical injury to a person.

Finally, the bill modifies the definition of "wire communication" that is applicable to the requirement to obtain a warrant before intercepting a wire communication. Under current law, "wire communication" is defined, in part, as any aural transfer made through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or like connection that is furnished or operated by a person engaged as a public utility. The changes in the bill include deleting reference to microwave and to public utility.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JNS
2-1

1
2
3
4
5
6

SECTION 1. 968.27 (intro.) of the statutes is amended to read:

968.27 Definitions. (intro.) In ss. 968.28 to ~~968.37~~ 968.375:

SECTION 2. 968.27 (14g) of the statutes is created to read:

968.27 (14g) "Remote computing service" means computer storage or processing that is provided to the public by means of an electronic communications system.

****NOTE: Please note changes to the definition of "remote computing service."

1 **SECTION 3.** 968.27 (17) of the statutes is amended to read:

2 **968.27 (17)** "Wire communication" means any aural transfer made in whole or
3 in part through the use of facilities for the transmission of communications by the
4 aid of wire, cable, ~~microwave~~ or other like connection between the point of origin and
5 the point of reception, including the use of the connection in any switching station,
6 furnished or operated by any person ~~engaged as a public utility~~ in providing or
7 operating the facilities for the transmission of intrastate, interstate or foreign
8 communications. "Wire communication" includes the electronic storage of any such
9 aural transfer, ~~but does not include the radio portion of a cordless telephone~~
10 ~~communication that is transmitted between the cordless telephone handset and the~~
11 ~~base unit.~~

****NOTE: The deletion of "engaged as a public utility" is necessary for the bill. The deletion of "microwave" and of the last sentence are not necessary for the bill, but were added by DOJ.

12 **SECTION 4.** 968.30 (10) of the statutes is amended to read:

13 **968.30 (10)** Nothing in ss. 968.28 to ~~968.37~~ 968.375 shall be construed to allow
14 the interception of any wire, electronic, or oral communication between an attorney
15 and a client.

16 **SECTION 5.** 968.375 of the statutes is created to read:

17 **968.375 Subpoenas and warrants for records or communications of**
18 **customers of an electronic communication service or remote computing**
19 **service provider. (1) DEFINITION.** In this section, "adverse result" means any of
20 the following:

- 21 (a) Danger to the life or physical safety of a person.
22 (b) Flight from prosecution.
23 (c) Destruction of or tampering with evidence.

1 (d) Intimidation of a potential witness.

2 (e) Serious jeopardy to an investigation by a law enforcement agency or undue
3 delay of an investigation by a law enforcement agency or of a trial.

****NOTE: I narrowed the reference to investigations in par. (e).

4 (2) JURISDICTION. For purposes of this section, a person is considered to be doing
5 business in this state and is subject to service and execution of process from this
6 state, if the person makes a contract with or engages in a terms of service agreement
7 with any other person, whether or not the other person is a resident of this state, and
8 any part of the performance of the contract or provision of service takes place within
9 this state on any occasion.

****NOTE: Rather than using the term "foreign corporation," this draft relies on the
definition of "person" s. 990.01 (26), which includes corporations, other forms of business
associations, and individuals.

10 (3) SUBPOENA. (a) Upon the request of the attorney general or a district
11 attorney and upon a showing of probable cause, a judge may issue a subpoena
12 requiring a person who provides electronic communication service or remote
13 computing service to disclose a record or other information pertaining to a subscriber
14 or customer of the service, including all of the following relating to the subscriber or
15 customer:

16 1. Name.

17 2. Address.

18 3. Local and long distance telephone connection records, or records of session
19 times and durations.

20 4. Length of service, including start date, and types of service utilized.

21 5. Telephone or instrument number or other subscriber number or identity,
22 including any temporarily assigned network address.

1 6. Means and source of payment for the electronic communication service or
2 remote computing service, including any credit card or bank account number.

****NOTE: I didn't include a specification that a judge's authority to issue a subpoena under sub. (3) applies to John Doe proceedings. Such a specification is not included in the section on search warrants or subpoena for documents, so why is it necessary here?

3 (b) A subpoena under this subsection may not require disclosure of the contents
4 of communications.

****NOTE: I didn't refer to a "subpoena that conforms to the requirements of s. 968.135." Are there any particular requirement that DOJ wants to incorporate that are not already covered in this draft?

5 (4) WARRANT. Upon the request of the attorney general or a district attorney
6 and upon a showing of probable cause, a judge may issue a warrant requiring a
7 person who provides electronic communication service or remote computing service
8 to disclose any of the following:

****NOTE: In subs. (3) and (4), I didn't specify that a judge may issue a subpoena or warrant upon the request of an assistant attorney general or assistant district attorney. Assistant attorney generals are not specified in provisions providing similar authority, and I don't want to create an implication that if assistants are not specified they cannot act. The authority of assistant district attorneys is covered under s. 967.03.

****NOTE: I didn't include the phrase "notwithstanding s. 968.13 (1) (d)" in sub. (4), because 968.13 (1) (d) applies to a search warrant, which is described in s. 968.12 (1) as "an order directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property." The warrant under this subsection does not fit the description of "search warrant." I also did ^{not} include "notwithstanding s. 968.135," because this subsection is not contrary to s. 968.135.

9 (a) The content of a wire or electronic communication that is in electronic
10 storage in an electronic communications system or held or maintained by a provider
11 of remote computing service.

12 (b) A record or information described under sub. (3) (a).

13 (5) BASIS, APPLICATION FOR, AND ISSUANCE OF SUBPOENA OR WARRANT. Section
14 968.12 (2) and (3) applies to the basis and application for, and issuance of, a subpoena

1 under sub. (3) or a warrant under sub. (4) as it applies to the basis and application
2 for, and issuance of, a search warrant under s. 968.12.

3 (6) MANNER OF SERVICE. A subpoena or warrant issued under this section may
4 be served in the manner provided for serving a summons under s. 801.11 (5) or, if
5 delivery can reasonably be proved, by United States mail, delivery service, telephone
6 facsimile, or electronic transmission. The subpoena or warrant is executed when
7 served as provided in this subsection.

****NOTE: The second sentence substitutes for the DOJ provision stating that a subpoena or warrant shall be deemed executed when the law enforcement officer or agency transmits the same to the provider by US mail, etc. What is the purpose of specifying when a subpoena or warrant is executed?

8 (7) TIME FOR SERVICE. A subpoena or warrant issued under this section shall
9 be served not more than 5 days after the date of issuance.

****NOTE: Consistent with the criminal procedure code, this draft refers to "days" as described under s. 990.001 (4) for computing time, rather than using the term "business days."

10 (8) TIME FOR PRODUCTION. (a) The person on whom a subpoena or warrant
11 issued under this section is served shall provide the law enforcement officer or
12 agency named in the subpoena or warrant all records or information described in the
13 subpoena or warrant within 8 days after service unless the court sets a different date
14 for compliance.

****NOTE: The draft provides that the AG or a DA may request a subpoena or warrant, but later portions of the draft provide that records described in the subpoena or warrant shall be delivered to a law enforcement officer or agency. Is "law enforcement officer or agency" intended to refer to the AG or DA only, or could the subpoena or warrant require delivery of the records directly to the police or sheriff?

15 (b) If attorney general or district attorney, whichever requests a subpoena or
16 warrant under this section, makes a showing, and the judge finds that failure to
17 produce the records or information described in the subpoena or warrant within
18 fewer than 8 days after service would cause an adverse result, the judge may require

attorney general, district attorney, or a law enforcement agency, whichever is designated shall

1 production within fewer than 8 days after service. The judge may reasonably extend
2 the time required for production upon a finding that the person on whom the
3 subpoena or warrant is served, or the attorney general or district attorney, has shown
4 good cause for the extension and that the extension would not cause an adverse
5 result.

****NOTE: Paragraph (a) allows a judge to establish a time for production that is different from the general 8 day time for any reason. Paragraph (b) allows the judge to set a shorter time to avoid an adverse result. Paragraph (b) doesn't provide any authority that is not already provided under par. (a), so why is it included? Should par. (b) require, rather than authorize, the judge to shorten the time for production upon showing of an adverse result?

6 (9) MOTION TO QUASH. The person on whom a subpoena or warrant issued under
7 this section is served may file a motion to quash the subpoena or warrant with the
8 the judge who issued the subpoena or warrant. If the person files the motion within
9 the time for production of records or information under sub. (8), the judge shall hear
10 and decide the motion within 8 days after the motion is filed.

11 (10) LAW ENFORCEMENT PRESENCE NOT REQUIRED. The presence of a law
12 enforcement officer is not required for service or execution of a subpoena or warrant
13 issued under this section.

****NOTE: I didn't include "notwithstanding any other provision of state law." If there is a conflicting provision, the bill should identify it and address the conflict.

14 (11) RETURN. A subpoena or warrant issued under this section shall be
15 returned to the court not later than 5 days after the records or information described
16 in the subpoena or warrant are received by the law enforcement officer or agency
17 named in the subpoena or warrant.

18 (12) SECRECY. A subpoena or warrant issued under this section shall be issued
19 with all practicable secrecy and the request, complaint, affidavit, or testimony upon
20 which it is based may not be filed with the clerk or made public until the subpoena

whichever is designated

attorney general, district attorney or attorney

The judge may issue an order prohibiting the person on whom the subpoena or warrant is served from disclosing the existence of the subpoena or warrant to the customer or subscriber unless the judge subsequently authorizes such disclosure.

1 or warrant has been executed and returned to the court. The judge may issue an
2 order sealing the subpoena or warrant and the request, complaint, affidavit, or
3 testimony upon which it is based. Upon the request of the state and upon a showing
4 of good cause, the judge may issue an order delaying any required notice to the
5 subscriber or customer of the subpoena or warrant.

****NOTE: This section does not require any notice to the subscriber or customer.
What required notice does the last sentence refer to?

6 (13) IMMUNITY. A person on whom a subpoena or warrant issued under this
7 section is served is immune from civil liability for acts or omissions in providing
8 records or information, facilities, or assistance in accordance with the terms of the
9 subpoena or warrant.

10 (14) TECHNICAL IRREGULARITIES. Evidence disclosed under a subpoena or
11 warrant issued under this section shall not be suppressed because of technical
12 irregularities or errors not affecting the substantial rights of the defendant.

13 (15) DISCLOSURE WITHOUT SUBPOENA OR WARRANT. A provider of electronic
14 communication or remote computing service may disclose records or information
15 described under sub. (3) (a) of a customer or subscriber or the content of
16 communications of a customer or subscriber described under sub. (4) without a
17 subpoena or warrant if any of the following applies:

18 (a) The customer or subscriber *provides consent for the particular*
~~consents to the~~ disclosure.

****NOTE: Does general consent for disclosure, for example a statement signed
when a subscriber opens an account, suffice for consent, or do you want to require consent
specific to each disclosure?

19 (b) The provider of electronic communication or remote computing service
20 believes in good faith that an emergency involving the danger of death or serious
21 physical injury to any person exists and that disclosure of the information is required
22 to prevent the death or injury or to mitigate the injury.

****NOTE: Subsection (15) is not necessary to satisfy the original bill request. It is based on the DOJ draft.

1

(END)

2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB+2789/lins
RLR:.....

as affected by 2009
Wisconsin Act 28, ✓

1 **Ins 2-1:**
2 **SECTION 1.** 911.01 (4) (c) of the statutes is amended to read:
3 911.01 (4) (c) *Miscellaneous proceedings.* Proceedings for extradition or
4 rendition; sentencing, granting or revoking probation, modification of a sentence
5 under s. 302.1135, adjustment of a bifurcated sentence under s. 973.195 (1r), release
6 to extended supervision under s. 302.113 (2) (b) or 304.06 (1) or discharge under s.
7 973.01 (4m); issuance of subpoenas or warrants under s. 968.375, arrest warrants,
8 criminal summonses, and search warrant; hearings under s. 980.09 (2); proceedings
9 under s. 971.14 (1) (c); proceedings with respect to pretrial release under ch. 969
10 except where habeas corpus is utilized with respect to release on bail or as otherwise
11 provided in ch. 969.

NOTE: NOTE: Par. (c) is shown as amended eff. 10-1-09 by 2009 Wis. Act 28. Prior to 10-1-09 it reads:NOTE:
12 (c) *Miscellaneous proceedings.* Proceedings for extradition or rendition; sentencing, granting or revoking probation, modification of a bifurcated sentence under
13 s. 302.113 (9g), adjustment of a bifurcated sentence under s. 973.195 (1r), issuance of arrest warrants, criminal summonses and search warrants; hearings under s. 980.09
14 (2); proceedings under s. 971.14 (1) (c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail
15 or as otherwise provided in ch. 969.
History: Sup. Ct. Order, 59 Wis. 2d R1, R366 (1973); 1977 c. 305 s. 64; 1977 c. 345; 1979 c. 32 s. 92 (16); 1981 c. 183, 367, 390, 391; 1987 a. 208, 398; 1991 a. 40, 269;
2001 a. 61, 109; 2005 a. 434; 2009 a. 24, 28.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2789/1dn

RLR:/s:....

gs

- date -

Representative Pasch: /

This redraft makes the changes requested by DOJ. I did not modify s. 757.69 (1) (b) to clarify that the authority of a court commissioner to issue a "search warrant" does not extend to issuance of a warrant under proposed s. 968.375, because the description of "search warrant" under s. 968.12 does not cover a warrant under proposed s. 968.375. ✓

I searched the statutes for additional references to "search warrant" that should apply to subpoenas and warrants under proposed s. 968.375. Section 911.01 (4) (c) provides that the rules of evidence do not apply to the issuance of search warrants. This bill provides that the rules of evidence also do not apply to issuance of subpoenas or warrants under proposed s. 968.375. Section 946.76 provides that it is a Class I felony to disclose, prior to execution of a search warrant, that the search warrant has been applied for or issued. This bill does not amend s. 946.76 to include reference subpoenas or warrants under proposed. 968.375. Please let me know if you want to affect s. 946.76 either in a redraft or an amendment. ✓

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-2789/1dn
RLR:cjs:rs

January 11, 2010

Representative Pasch:

This redraft makes the changes requested by DOJ. I did not modify s. 757.69 (1) (b) to clarify that the authority of a court commissioner to issue a "search warrant" does not extend to issuance of a warrant under proposed s. 968.375, because the description of "search warrant" under s. 968.12 does not cover a warrant under proposed s. 968.375.

I searched the statutes for additional references to "search warrant" that should apply to subpoenas and warrants under proposed s. 968.375. Section 911.01 (4) (c) provides that the rules of evidence do not apply to the issuance of search warrants. This bill provides that the rules of evidence also do not apply to issuance of subpoenas or warrants under proposed s. 968.375. Section 946.76 provides that it is a Class I felony to disclose, prior to execution of a search warrant, that the search warrant has been applied for or issued. This bill does not amend s. 946.76 to include reference subpoenas or warrants under proposed. 968.375. Please let me know if you want to affect s. 946.76 either in a redraft or an amendment.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.wisconsin.gov

Basford, Sarah

From: Ludwig, Frederic

Sent: Thursday, February 04, 2010 12:15 PM

To: LRB.Legal

Subject: Draft Review: LRB 09-2789/1 Topic: Search warrants for electronic communications

Please Jacket LRB 09-2789/1 for the ASSEMBLY.

02/04/2010