



Maine State Legislature
OFFICE OF POLICY AND LEGAL ANALYSIS
 www.mainelegislature.gov/opla
 13 State House Station, Augusta, Maine 04333-0013
 (207) 287-1670

CARRYOVER UPDATE MEMO

TO: Members, Joint Standing Committee on Judiciary
FROM: Janet Stocco, Legislative Analyst
DATE: September 25, 2023
RE: **LD 1056, An Act Restricting State Assistance in Federal Collection of Personal Electronic Data and Metadata (Sen. Brakey) - carryover**

SUMMARY

This bill prohibits a department, agency or political subdivision of the State from assisting, participating with or providing material support to facilitate a federal agency’s collection or use of information about a person’s electronic communications in the absence of (1) the person’s informed consent; (2) a warrant based on probable cause; or (3) a legally recognized exception to the federal warrant requirements.

- The bill explicitly applies to “**electronic data**,” defined to include the contents, sender, recipient or format of an electronic communication; the location of the sender or recipient at any time during the communication; the date the communication was created, sent or received; and the identity of a device or person involved in the communication, including an IP address.
- The bill also appears intended to apply to “**metadata**,” defined as information not part of a printed electronic document, including history, tracking or management of the document as well as information about how, when and by whom the data in the document were collected, created, accessed, modified or formatted.

ISSUES RAISED AT PUBLIC HEARING

1. The Attorney General, the Maine State Police Computer Crimes Unit and Maine Chiefs of Police Association expressed concern that the bill will hinder the State’s cooperation with federal agencies investigating crimes committed against individuals in Maine through the internet, often by perpetrators in other states or countries. For example, if the State receives a “cybertip” involving apparent violations of child pornography laws, it will be unable to share the cybertip—which can include information about a communication’s sender and receiver, location and sometimes even some of the content of the communication—with federal agencies. Similarly, when a crime containing a screen shot of a social media post or an email thread (perhaps containing a threat to a person or school) is shared with state or local law enforcement, law enforcement would be prohibited from sharing the report with federal agencies that might otherwise cooperate with the investigation.
2. The State Department of Professional and Financial Regulation expressed concern that the bill limits information the Bureau of Insurance may share with federal agencies, including the Centers for Medicare and Medicaid Services, related to joint investigation efforts.

3. At the public hearing, committee members inquired whether the bill should be amended to (a) define “electronic communication”; (b) only prohibit state and local government actors from “knowingly” assisting or participating with federal agencies as prohibited by the bill; and/or (c) limit the bill’s prohibitions only to information collected “for law enforcement purposes.”

WORK SESSION INFORMATION

The committee held a work session on the bill on April 4th and voted to carry the bill over on May 25th.

1. **Sponsor proposed amendment.** At the work session, Senator Brakey explained that he does not intend to prevent state and local law enforcement from sharing information they lawfully possess—for example, through cybertips or other crime reports—with federal agencies. He proposed amending the bill to match the majority Judiciary Committee amendment to LD 531, *An Act To Establish the Maine Fourth Amendment Protection Act*, a bill he introduced in the 127th Legislature. He particularly emphasized that ¶D of that amendment would allow state and local law enforcement to share information they lawfully possess with federal agencies.

[New section of law]. Prohibition on assistance to federal agencies engaged in collection of electronic data or metadata

1. Prohibition. The State and its political subdivisions may assist, participate with, benefit from or provide material support or resources to enable or facilitate a federal agency in the collection or use of a person's electronic data or metadata only if:

- A. The collection is pursuant to that person's informed consent;
- B. The collection is pursuant to a warrant based upon probable cause that particularly describes the person, place or thing to be searched or seized;
- C. The State, the political subdivision of the State or the federal agency is acting in accordance with a legally recognized exception to the warrant requirements; or
- D. The electronic data or metadata is otherwise in the legal possession of the State or its political subdivision.

2. **Alternative proposal: California Law.** Committee members also asked Senator Brakey and law enforcement stakeholders to consider whether California’s 4th Amendment Protection Act, which was also attached to the bill analysis, provides a better approach to achieving the bill’s goals:

§7599. [The 4th Amendment Protection Act]

(a) For the purposes of this section, the following definitions shall apply:

(1) “Electronically stored information” means data that is created, altered, communicated, and stored in digital form.

(2) “Metadata” means data bearing the record of and not the content of communication, including, but not limited to, the time, date, location, duration, origin, or subject of the communication, and the identity of the person, persons, group, or entity sending or receiving the message.

(b) The state shall not provide material support, participation, or assistance in response to a request from a federal agency or an employee of a federal agency to collect the electronically stored information or metadata of any person if the state has actual knowledge that the request constitutes an illegal or unconstitutional collection of electronically stored information or metadata.

The committee agreed to table the bill to provide law enforcement stakeholders an opportunity to review these proposals and to provide time for Senator Brakey to work with Major Scott Gosselin of the Maine State Police to address any remaining concerns he may have with the language of either proposal.

3. **Information request.** Senator Carney inquired whether any of the proposals (the original bill or either proposed amendment) would provide protections not already available under current law.

DRAFTING ISSUES

1. **Remedy:** What remedy is contemplated for violations of the bill by state and local law governments?
2. **Metadata:** Although it appears intended to do so, subsection 2 of the bill does not actually prohibit state and local governments sharing metadata with federal agencies.
3. **Definitions:**
 - The bill’s definition of “**electronic data**” with reference to the undefined terms “**electronic communication**” and “**electronic communication service.**” Should these terms be defined and, if so, should the definitions match existing state law (or proposals in other pending legislation)?
 - LD 1576 (new): “**Electronic communication**’ means the transfer of information, including but not limited to signs, signals, writings, images, sounds, data or intelligence, in whole or in part by a wire or a radio or an electromagnetic, photoelectric or photo-optical system.”
 - 16 M.R.S. §641(3), §647(2) (current): “**Electronic communication service**’ means a service that provides to users the ability to send or receive spoken or electronic communications.”
 - The bill’s definition of “**electronic data**” is similar to, but slightly different than, the definition of “electronic communication information” in LD 1576. If the committee moves forward with both bills, should these definitions (as they are ultimately drafted) match?

<p>LD 1056:</p> <p>“Electronic data” means information related to an electronic communication or the use of an electronic communication service, including the contents, sender, recipient or format of an electronic communication, the precise or approximate <i>location of the sender or recipient of an electronic communication at any time during the electronic communication, the time or date the electronic communication was created, sent or received and the identity of a person or device involved in the electronic communication, including an Internet protocol address.</i></p>	<p>LD 1576:</p> <p>“Electronic communication information” means the information transferred through electronic communication or through the use of an electronic communication service, including but not limited to the format of information, the information contained under a sender or recipients folder, <i>the location of a sender or recipient at any time during the electronic communication, the time or date the electronic communication was transferred or any information relating to an individual or an electronic device participating in the electronic communication, such as an Internet protocol address.</i></p>
---	--

FISCAL INFORMATION

Not yet determined. However, the majority committee amendment to LD 531 in the 127th Legislature was determined not to have a fiscal impact.