



It's Time to Modernize ECPA

The Founding Fathers recognized that citizens in a democracy need privacy for their “persons, houses, papers, and effects.” That remains as true as ever. But our privacy laws have not kept up as technology has changed the way we hold information. Thomas Jefferson knew the papers and effects he stored in his office at Monticello would remain private. Today’s citizens deserve no less protection just because their “papers and effects” might be stored electronically.

The main statutory protection for the privacy of communications, the Electronic Communications Privacy Act (ECPA), was written in 1986 – before the Web was even invented. We are all increasingly living our lives online – learning, sharing, connecting and shopping – and we need an updated ECPA that keeps up with this modern online world. Americans expect and desire that their private online activities will remain private from the government, and they need laws that will protect that privacy.

Specifically, the following changes are needed to modernize ECPA:

1. **Robustly Protect All Personal Electronic Information.** In the modern world just as in Jefferson’s time, our personal and private information – whether documents and correspondence, or records of what we search and read online – reveals a tremendous amount about us. The disclosure of any of this information to the government without a warrant based on probable cause and without notice violates our rights to privacy, and also implicates our right to free speech, and free association. Current loopholes in our privacy laws need to be closed to protect electronic information without regard to its age, whether it is "content" or "transactional" in nature, or whether an online service provider has access to it to deliver services.
2. **Safeguard Location Information.** Fully 82% of Americans own cell phones. The location information transmitted by these phones every minute of every day reveals not only where people go, but often what they are doing and who they are talking to. Location information, whether it is ongoing tracking or records of previous location, is clearly personal information. The law should require government officials to obtain a warrant based on probable cause before allowing access.
3. **Institute Appropriate Oversight and Reporting Requirements.** Because electronic record keeping enables easy collection and aggregation of records, current low standards under ECPA allow the government to engage in a largely unsupervised and unreported “shopping spree” through the treasure trove of personal information held by private companies. To ensure adequate oversight by Congress and adequate

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transparency to the public, existing reporting requirements for wiretap orders must be extended to all types of law enforcement surveillance requests.

4. **Require a Suppression Remedy.** If a law enforcement official obtains non-electronic information illegally, that information usually can't be used in a court of law. The same rule, however, doesn't apply to illegally-obtained electronic information. Such a rule only encourages government overreaching and must be changed to require a judge to bar the use of such unlawfully obtained information in court proceedings.
5. **Craft Reasonable Exceptions.** Overbroad exceptions are also depriving Americans of their rightful privacy protection. Currently ECPA sometimes allows access to the content of communications without a true emergency, without informed consent and without prompt notice to the subject. ECPA must be amended on each of these fronts if electronic records are to receive the protections Americans need.

Since 1986, technology has advanced at breakneck speed while electronic privacy law remained at a standstill. The American people have received a great inheritance from our Founders and past generations, and we cannot let those rights slip away just because people communicate with each other using a newer form of technology. Privacy law doesn't auto-update. It's time for Congress to modernize ECPA.