

1-1 By: Frullo, Thompson of Harris, Fletcher H.B. No. 2268  
 1-2 (Senate Sponsor - Carona)  
 1-3 (In the Senate - Received from the House May 8, 2013;  
 1-4 May 9, 2013, read first time and referred to Committee on Criminal  
 1-5 Justice; May 16, 2013, reported adversely, with favorable  
 1-6 Committee Substitute by the following vote: Yeas 6, Nays 0;  
 1-7 May 16, 2013, sent to printer.)

1-8 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-9				
1-10	X			
1-11	X			
1-12			X	
1-13	X			
1-14	X			
1-15	X			
1-16	X			

1-17 COMMITTEE SUBSTITUTE FOR H.B. No. 2268 By: Schwertner

1-18 A BILL TO BE ENTITLED  
 1-19 AN ACT

1-20 relating to search warrants issued in this state and other states  
 1-21 for certain customer data, communications, and other related  
 1-22 information held in electronic storage in this state and other  
 1-23 states by providers of electronic communications services and  
 1-24 remote computing services.

1-25 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-26 SECTION 1. Article 18.02, Code of Criminal Procedure, is  
 1-27 amended to read as follows:

1-28 Art. 18.02. GROUNDS FOR ISSUANCE. (a) A search warrant may  
 1-29 be issued to search for and seize:

1-30 (1) property acquired by theft or in any other manner  
 1-31 which makes its acquisition a penal offense;

1-32 (2) property specially designed, made, or adapted for  
 1-33 or commonly used in the commission of an offense;

1-34 (3) arms and munitions kept or prepared for the  
 1-35 purposes of insurrection or riot;

1-36 (4) weapons prohibited by the Penal Code;

1-37 (5) gambling devices or equipment, altered gambling  
 1-38 equipment, or gambling paraphernalia;

1-39 (6) obscene materials kept or prepared for commercial  
 1-40 distribution or exhibition, subject to the additional rules set  
 1-41 forth by law;

1-42 (7) a drug, controlled substance, immediate  
 1-43 precursor, chemical precursor, or other controlled substance  
 1-44 property, including an apparatus or paraphernalia kept, prepared,  
 1-45 or manufactured in violation of the laws of this state;

1-46 (8) any property the possession of which is prohibited  
 1-47 by law;

1-48 (9) implements or instruments used in the commission  
 1-49 of a crime;

1-50 (10) property or items, except the personal writings  
 1-51 by the accused, constituting evidence of an offense or constituting  
 1-52 evidence tending to show that a particular person committed an  
 1-53 offense;

1-54 (11) persons; [~~or~~]

1-55 (12) contraband subject to forfeiture under Chapter 59  
 1-56 of this code; or

1-57 (13) electronic customer data held in electronic  
 1-58 storage, including the contents of and records and other  
 1-59 information related to a wire communication or electronic  
 1-60 communication held in electronic storage.

2-1 (b) For purposes of Subsection (a)(13), "electronic  
2-2 communication," "electronic storage," and "wire communication"  
2-3 have the meanings assigned by Article 18.20, and "electronic  
2-4 customer data" has the meaning assigned by Article 18.21.

2-5 SECTION 2. Article 18.06(a), Code of Criminal Procedure, is  
2-6 amended to read as follows:

2-7 (a) A peace officer to whom a search warrant is delivered  
2-8 shall execute the warrant [~~it~~] without delay and forthwith return  
2-9 the warrant [~~it~~] to the proper magistrate. A search warrant issued  
2-10 under Section 5A, Article 18.21, must be executed in the manner  
2-11 provided by that section not later than the 11th day after the date  
2-12 of issuance. In all other cases, a search warrant [~~it~~] must be  
2-13 executed within three days from the time of its issuance. A warrant  
2-14 issued under this chapter [~~and~~] shall be executed within a shorter  
2-15 period if so directed in the warrant by the magistrate.

2-16 SECTION 3. Article 18.07(a), Code of Criminal Procedure, is  
2-17 amended to read as follows:

2-18 (a) The period [~~time~~] allowed for the execution of a search  
2-19 warrant, exclusive of the day of its issuance and of the day of its  
2-20 execution, is:

2-21 (1) 15 whole days if the warrant is issued solely to  
2-22 search for and seize specimens from a specific person for DNA  
2-23 analysis and comparison, including blood and saliva samples;

2-24 (2) 10 whole days if the warrant is issued under  
2-25 Section 5A, Article 18.21; or

2-26 (3) [~~(2)~~] three whole days if the warrant is issued  
2-27 for a purpose other than that described by Subdivision (1) or (2).

2-28 SECTION 4. Section 1(20), Article 18.20, Code of Criminal  
2-29 Procedure, is amended to read as follows:

2-30 (20) "Electronic storage" means any storage of  
2-31 electronic customer data in a computer, computer network, or  
2-32 computer system, regardless of whether the data is subject to  
2-33 recall, further manipulation, deletion, or transmission, and  
2-34 includes any [~~+~~

2-35 [~~(A) a temporary, intermediate storage of a wire~~  
2-36 ~~or electronic communication that is incidental to the electronic~~  
2-37 ~~transmission of the communication; or~~

2-38 [~~(B)~~] storage of a wire or electronic  
2-39 communication by an electronic communications service or a remote  
2-40 computing service [~~for purposes of backup protection of the~~  
2-41 ~~communication~~].

2-42 SECTION 5. Section 1, Article 18.21, Code of Criminal  
2-43 Procedure, is amended by adding Subdivisions (3-b) and (3-c) to  
2-44 read as follows:

2-45 (3-b) "Domestic entity" has the meaning assigned by  
2-46 Section 1.002, Business Organizations Code.

2-47 (3-c) "Electronic customer data" means data or records  
2-48 that:

2-49 (A) are acquired by or stored with the provider  
2-50 of an electronic communications service or a remote computing  
2-51 service; and

2-52 (B) contain:

2-53 (i) information revealing the identity of  
2-54 customers of the applicable service;

2-55 (ii) information about a customer's use of  
2-56 the applicable service;

2-57 (iii) information that identifies the  
2-58 recipient or destination of a wire communication or electronic  
2-59 communication sent to or by the customer;

2-60 (iv) the content of a wire communication or  
2-61 electronic communication sent to or by the customer; and

2-62 (v) any data stored by or on behalf of the  
2-63 customer with the applicable service provider.

2-64 SECTION 6. Sections 4(a), (b), (c), and (d), Article 18.21,  
2-65 Code of Criminal Procedure, are amended to read as follows:

2-66 (a) An authorized peace officer may require a provider of an  
2-67 electronic communications service to disclose the contents of a  
2-68 wire communication or an electronic communication that has been in  
2-69 electronic storage for not longer than 180 days by obtaining a

3-1 warrant under Section 5A.  
 3-2 (b) An authorized peace officer may require a provider of an  
 3-3 electronic communications service to disclose the contents of a  
 3-4 wire communication or an electronic communication that has been in  
 3-5 electronic storage for longer than 180 days:  
 3-6 (1) if notice is not being given to the subscriber or  
 3-7 customer, by obtaining a warrant under Section 5A;  
 3-8 (2) if notice is being given to the subscriber or  
 3-9 customer, by obtaining:  
 3-10 (A) an administrative subpoena authorized by  
 3-11 statute;  
 3-12 (B) a grand jury subpoena; or  
 3-13 (C) a court order issued under Section 5 [~~of this~~  
 3-14 ~~article~~]; or  
 3-15 (3) as otherwise permitted by applicable federal law.  
 3-16 (c)(1) An authorized peace officer may require a provider of  
 3-17 a remote computing service to disclose the contents of a wire  
 3-18 communication or an electronic communication as described in  
 3-19 Subdivision (2) of this subsection:  
 3-20 (A) if notice is not being given to the  
 3-21 subscriber or customer, by obtaining a warrant [~~issued~~ under  
 3-22 Section 5A [~~this code~~];  
 3-23 (B) if notice is being given to the subscriber or  
 3-24 customer, by:  
 3-25 (i) an administrative subpoena authorized  
 3-26 by statute;  
 3-27 (ii) a grand jury subpoena; or  
 3-28 (iii) a court order issued under Section 5  
 3-29 [~~of this article~~]; or  
 3-30 (C) as otherwise permitted by applicable federal  
 3-31 law.  
 3-32 (2) Subdivision (1) of this subsection applies only to  
 3-33 a wire communication or an electronic communication that is in  
 3-34 electronic storage:  
 3-35 (A) on behalf of a subscriber or customer of the  
 3-36 service and is received by means of electronic transmission from or  
 3-37 created by means of computer processing of communications received  
 3-38 by means of electronic transmission from the subscriber or  
 3-39 customer; and  
 3-40 (B) solely for the purpose of providing storage  
 3-41 or computer processing services to the subscriber or customer if  
 3-42 the provider of the service is not authorized to obtain access to  
 3-43 the contents of those communications for purposes of providing any  
 3-44 service other than storage or computer processing.  
 3-45 (d) An authorized peace officer may require a provider of an  
 3-46 electronic communications service or a provider of a remote  
 3-47 computing service to disclose electronic customer data not  
 3-48 otherwise described by [~~records or other information pertaining to~~  
 3-49 a subscriber or customer of the service, other than communications  
 3-50 described in Subsection (c) of] this section[~~7~~] without giving the  
 3-51 applicable subscriber or customer notice:  
 3-52 (1) by obtaining an administrative subpoena  
 3-53 authorized by statute;  
 3-54 (2) by obtaining a grand jury subpoena;  
 3-55 (3) by obtaining a warrant under Section 5A;  
 3-56 (4) by obtaining the consent of the subscriber or  
 3-57 customer to the disclosure of the customer data [~~records or~~  
 3-58 ~~information~~];  
 3-59 (5) by obtaining a court order under Section 5 [~~of this~~  
 3-60 ~~article~~]; or  
 3-61 (6) as otherwise permitted by applicable federal law.  
 3-62 SECTION 7. Article 18.21, Code of Criminal Procedure, is  
 3-63 amended by adding Sections 5A and 5B to read as follows:  
 3-64 Sec. 5A. WARRANT ISSUED IN THIS STATE FOR STORED CUSTOMER  
 3-65 DATA OR COMMUNICATIONS. (a) This section applies to a warrant  
 3-66 required under Section 4 to obtain electronic customer data,  
 3-67 including the contents of a wire communication or electronic  
 3-68 communication.  
 3-69 (b) On the filing of an application by an authorized peace

4-1 officer, a district judge may issue a search warrant under this  
 4-2 section for electronic customer data held in electronic storage,  
 4-3 including the contents of and records and other information related  
 4-4 to a wire communication or electronic communication held in  
 4-5 electronic storage, by a provider of an electronic communications  
 4-6 service or a provider of a remote computing service described by  
 4-7 Subsection (h), regardless of whether the customer data is held at a  
 4-8 location in this state or at a location in another state. An  
 4-9 application made under this subsection must demonstrate probable  
 4-10 cause for the issuance of the warrant and must be supported by the  
 4-11 oath or affirmation of the authorized peace officer.

4-12 (c) A search warrant may not be issued under this section  
 4-13 unless the sworn affidavit required by Article 18.01(b) sets forth  
 4-14 sufficient and substantial facts to establish probable cause that:

4-15 (1) a specific offense has been committed; and

4-16 (2) the electronic customer data sought:

4-17 (A) constitutes evidence of that offense or  
 4-18 evidence that a particular person committed that offense; and

4-19 (B) is held in electronic storage by the service  
 4-20 provider on which the warrant is served under Subsection (i).

4-21 (d) Only the electronic customer data described in the sworn  
 4-22 affidavit required by Article 18.01(b) may be seized under the  
 4-23 warrant.

4-24 (e) A warrant issued under this section shall run in the  
 4-25 name of "The State of Texas."

4-26 (f) Article 18.011 applies to an affidavit presented under  
 4-27 Article 18.01(b) for the issuance of a warrant under this section,  
 4-28 and the affidavit may be sealed in the manner provided by that  
 4-29 article.

4-30 (g) The peace officer shall execute the warrant not later  
 4-31 than the 11th day after the date of issuance, except that the  
 4-32 officer shall execute the warrant within a shorter period if so  
 4-33 directed in the warrant by the district judge. For purposes of this  
 4-34 subsection, a warrant is executed when the warrant is served in the  
 4-35 manner described by Subsection (i).

4-36 (h) A warrant under this section may be served only on a  
 4-37 service provider that is a domestic entity or a company or entity  
 4-38 otherwise doing business in this state under a contract or a terms  
 4-39 of service agreement with a resident of this state, if any part of  
 4-40 that contract or agreement is to be performed in this state. The  
 4-41 service provider shall produce all electronic customer data,  
 4-42 contents of communications, and other information sought,  
 4-43 regardless of where the information is held and within the period  
 4-44 allowed for compliance with the warrant, as provided by Subsection  
 4-45 (j). A court may find any officer, director, or owner of a company  
 4-46 or entity in contempt of court if the person by act or omission is  
 4-47 responsible for the failure of the company or entity to comply with  
 4-48 the warrant within the period allowed for compliance. The failure  
 4-49 of a company or entity to timely deliver the information sought in  
 4-50 the warrant does not affect the admissibility of that evidence in a  
 4-51 criminal proceeding.

4-52 (i) A search warrant issued under this section is served  
 4-53 when the authorized peace officer delivers the warrant by hand, by  
 4-54 facsimile transmission, or, in a manner allowing proof of delivery,  
 4-55 by means of the United States mail or a private delivery service to:

4-56 (1) a person specified by Section 5.255, Business  
 4-57 Organizations Code;

4-58 (2) the secretary of state in the case of a company or  
 4-59 entity to which Section 5.251, Business Organizations Code,  
 4-60 applies; or

4-61 (3) any other person or entity designated to receive  
 4-62 the service of process.

4-63 (j) The district judge shall indicate in the warrant that  
 4-64 the deadline for compliance by the provider of an electronic  
 4-65 communications service or the provider of a remote computing  
 4-66 service is the 15th business day after the date the warrant is  
 4-67 served if the warrant is to be served on a domestic entity or a  
 4-68 company or entity otherwise doing business in this state, except  
 4-69 that the deadline for compliance with a warrant served in

5-1 accordance with Section 5.251, Business Organizations Code, may be  
 5-2 extended to a date that is not later than the 30th day after the date  
 5-3 the warrant is served. The judge may indicate in a warrant that the  
 5-4 deadline for compliance is earlier than the 15th business day after  
 5-5 the date the warrant is served if the officer makes a showing and  
 5-6 the judge finds that failure to comply with the warrant by the  
 5-7 earlier deadline would cause serious jeopardy to an investigation,  
 5-8 cause undue delay of a trial, or create a material risk of:

- 5-9 (1) danger to the life or physical safety of any
- 5-10 person;
- 5-11 (2) flight from prosecution;
- 5-12 (3) the tampering with or destruction of evidence; or
- 5-13 (4) intimidation of potential witnesses.

5-14 (k) If the authorized peace officer serving the warrant  
 5-15 under this section also delivers an affidavit form to the provider  
 5-16 of an electronic communications service or the provider of a remote  
 5-17 computing service responding to the warrant, and the peace officer  
 5-18 also notifies the provider in writing that an executed affidavit is  
 5-19 required, then the provider shall verify the authenticity of the  
 5-20 customer data, contents of communications, and other information  
 5-21 produced in compliance with the warrant by including with the  
 5-22 information the affidavit form completed and sworn to by a person  
 5-23 who is a custodian of the information or a person otherwise  
 5-24 qualified to attest to its authenticity that states that the  
 5-25 information was stored in the course of regularly conducted  
 5-26 business of the provider and specifies whether it is the regular  
 5-27 practice of the provider to store that information.

5-28 (l) On a service provider's compliance with a warrant under  
 5-29 this section, an authorized peace officer shall file a return of the  
 5-30 warrant and a copy of the inventory of the seized property as  
 5-31 required under Article 18.10.

5-32 (m) The district judge shall hear and decide any motion to  
 5-33 quash the warrant not later than the fifth business day after the  
 5-34 date the service provider files the motion. The judge may allow the  
 5-35 service provider to appear at the hearing by teleconference.

5-36 (n) A provider of an electronic communications service or a  
 5-37 provider of a remote computing service responding to a warrant  
 5-38 issued under this section may request an extension of the period for  
 5-39 compliance with the warrant if extenuating circumstances exist to  
 5-40 justify the extension. The district judge shall grant a request for  
 5-41 an extension based on those circumstances if:

5-42 (1) the authorized peace officer who applied for the  
 5-43 warrant or another appropriate authorized peace officer agrees to  
 5-44 the extension; or

5-45 (2) the district judge finds that the need for the  
 5-46 extension outweighs the likelihood that the extension will cause an  
 5-47 adverse circumstance described by Subsection (j).

5-48 Sec. 5B. WARRANT ISSUED IN ANOTHER STATE FOR STORED  
 5-49 CUSTOMER DATA OR COMMUNICATIONS. Any domestic entity that provides  
 5-50 electronic communications services or remote computing services to  
 5-51 the public shall comply with a warrant issued in another state and  
 5-52 seeking information described by Section 5A(b), if the warrant is  
 5-53 served on the entity in a manner equivalent to the service of  
 5-54 process requirements provided in Section 5A(h).

5-55 SECTION 8. Sections 6(a), (b), (d), (e), (f), and (g),  
 5-56 Article 18.21, Code of Criminal Procedure, are amended to read as  
 5-57 follows:

5-58 (a) A subpoena or court order for disclosure of the contents  
 5-59 of an electronic communication held in electronic storage by a  
 5-60 provider of an electronic communications service under Section 4(b)  
 5-61 or by a provider of a remote computing service under Section 4(c)  
 5-62 [of this article] may require that [the service] provider to [whom  
 5-63 the request is directed] create a copy of the contents of the  
 5-64 electronic communications sought by the subpoena or court order for  
 5-65 the purpose of preserving those contents. The [service] provider  
 5-66 may not inform the subscriber or customer whose communications are  
 5-67 being sought that the subpoena or court order has been issued. The  
 5-68 [service] provider shall create the copy not later than two  
 5-69 business days after the date of the receipt by the [service]

6-1 provider of the subpoena or court order.

6-2 (b) The provider of an electronic communications service or  
 6-3 the provider of a remote computing service shall immediately notify  
 6-4 the authorized peace officer who presented the subpoena or court  
 6-5 order requesting the copy when the copy has been created.

6-6 (d) The provider of an electronic communications service or  
 6-7 the provider of a remote computing service shall release the copy to  
 6-8 the requesting authorized peace officer not earlier than the 14th  
 6-9 day after the date of the peace officer's notice to the subscriber  
 6-10 or customer if the [service] provider has not:

6-11 (1) initiated proceedings to challenge the request of  
 6-12 the peace officer for the copy; or

6-13 (2) received notice from the subscriber or customer  
 6-14 that the subscriber or customer has initiated proceedings to  
 6-15 challenge the request.

6-16 (e) The provider of an electronic communications service or  
 6-17 the provider of a remote computing service may not destroy or permit  
 6-18 the destruction of the copy until the information has been  
 6-19 delivered to the applicable [designated] law enforcement [office  
 6-20 or] agency or until the resolution of any court proceedings,  
 6-21 including appeals of any proceedings, relating to the subpoena or  
 6-22 court order requesting the creation of the copy, whichever occurs  
 6-23 last.

6-24 (f) An authorized peace officer who reasonably believes  
 6-25 that notification to the subscriber or customer of the subpoena or  
 6-26 court order would result in the destruction of or tampering with  
 6-27 information sought may request the creation of a copy of the  
 6-28 information. The peace officer's belief is not subject to  
 6-29 challenge by the subscriber or customer or the provider of an  
 6-30 electronic communications service or the provider of a remote  
 6-31 computing service.

6-32 (g)(1) A subscriber or customer who receives notification  
 6-33 as described in Subsection (c) [~~of this section~~] may file a written  
 6-34 motion to quash the subpoena or vacate the court order in the court  
 6-35 that issued the subpoena or court order not later than the 14th day  
 6-36 after the date of the receipt of the notice. The motion must  
 6-37 contain an affidavit or sworn statement stating [~~that~~]:

6-38 (A) that the applicant is a subscriber or  
 6-39 customer of the provider of an electronic communications service or  
 6-40 the provider of a remote computing service from which the contents  
 6-41 of electronic communications stored for the subscriber or customer  
 6-42 have been sought; and

6-43 (B) the applicant's reasons for believing that  
 6-44 the information sought is not relevant to a legitimate law  
 6-45 enforcement inquiry or that there has not been substantial  
 6-46 compliance with the provisions of this article in some other  
 6-47 respect.

6-48 (2) The subscriber or customer shall give written  
 6-49 notice to the provider of an electronic communications service or  
 6-50 the provider of a remote computing service of the challenge to the  
 6-51 subpoena or court order. The authorized peace officer [~~or~~  
 6-52 designated law enforcement office or agency] requesting the  
 6-53 subpoena or court order must [shall] be served a copy of the papers  
 6-54 filed by personal delivery or by registered or certified mail.

6-55 SECTION 9. This Act takes effect immediately if it receives  
 6-56 a vote of two-thirds of all the members elected to each house, as  
 6-57 provided by Section 39, Article III, Texas Constitution. If this  
 6-58 Act does not receive the vote necessary for immediate effect, this  
 6-59 Act takes effect September 1, 2013.

6-60

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