

CURRENT LEGAL STANDARDS FOR ACCESS TO PAPERS, RECORDS, AND COMMUNICATIONS

What Information Can the Government Get About You, and How Can They Get It?

**CENTER FOR
DEMOCRACY
&
TECHNOLOGY**

GREEN = STRONG PRIVACY PROTECTION
AMBER = MODEST OR INTERMEDIATE PRIVACY PROTECTION
RED = LITTLE OR NO PRIVACY PROTECTION

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		For real-time interception or immediate seizure, does government need a warrant issued on a HIGH PROBABLE CAUSE STANDARD?	Can government use a subpoena or court order under a LOWER STANDARD?	At time of search / subpoena, must government give the customer / subscriber to whom the information pertains NOTICE?	What are the standards for FOREIGN INTELLIGENCE?
RECORDS IN YOUR POSSESSION	PAPERS Papers in your home or office (record subject = record holder)	YES 4th Amendment	YES Subpoena	YES "Sneak and peek" - USA PATRIOT Act § 213, codified at 18 USC § 3103a	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1824-25
	DATA Electronic data on your hard drive or disks at home or office (record subject = record holder)	YES 4th Amendment	YES Subpoena	YES "Sneak and peek" - USA PATRIOT Act § 213, codified at 18 USC § 3103a	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1824-25
COMMUNICATIONS: REAL-TIME	TELEPHONE / VOICE Real-time interception of face-to-face conversations, phone calls, faxes	YES 18 USC § 2518 Various exceptions: 18 USC §§ 2510(5)(a), 2511(2)-(3)	NO	NO Always delayed 18 USC § 2518	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1805-06
	EMAIL / INTERNET Real-time interception of electronic communications in transit (grabbing bits off the wire)	YES 18 USC § 2518 Various exceptions: 18 USC §§ 2510(5)(a), 2511(2)-(3)	NO	NO Always delayed 18 USC § 2518	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1805-06
	TELEPHONE / VOICE (NON-CONTENT) Real-time interception of dialed numbers by pen register / trap & trace device	NO	YES, Court order 18 USC §§ 3122-23	NO Not even delayed 18 USC § 3123(d)(2)	Relevance standard. No notice. 50 USC §§ 1842, 1845
	EMAIL / INTERNET (NON-CONTENT) Real-time interception of routing information about electronic communications in transit by pen register / trap & trace device	NO	YES, Court order 18 USC §§ 3122-23 USA PATRIOT Act § 216 confirmed application of pen/trap to Internet	NO Not even delayed 18 USC § 3123(d)(2)	Relevance standard. No notice. 50 USC §§ 1842, 1845
	EMAIL, UNOPENED, <=180 DAYS OLD Unopened email (and voice) in storage for 180 days or less with provider of service to the public	YES 18 USC § 2703(a) Provider can voluntarily disclose in emerg, etc 18 USC § 2702	NO	NO 18 USC § 2703(a)	FISA does not expressly address communications in storage. If stored email is a business record, it is available with a court order upon a showing of reason to believe that it is relevant to a FI/FCI investigation. Notice prohibited. 50 USC § 1861
INFORMATION STORED BY 3RD PARTY: ELECTRONIC COMMUNICATIONS	EMAIL, OPENED, <=180 DAYS OLD Opened email (and voice) held by provider of service to the public	IN DISPUTE 18 USC § 2703, Theofel (9th Cir.), plus emerg, etc	IN DISPUTE 18 USC §§ 2702, 2703(b), 2703(d) - Theofel, emerg	NO if warrant; otherwise, can be delayed 18 USC §§ 2703(b), 2705	NSL: "relevant to" FCI. Notice prohibited. 18 USC § 2709
	EMAIL, > 180 DAYS OLD Opened and unopened email (and voice) in storage for more than 180 days with provider of service to the public	NO 18 USC § 2703(a)-(c)	YES, Subpoena or voluntary disclosure in emerg, etc 18 USC §§ 2702, 2703(b), 2703(d)	NO if warrant; otherwise, can be delayed 18 USC §§ 2703(b), 2705	NSL: "relevant to" FCI. Notice prohibited. 18 USC § 2709
	SUBSCRIBER INFORMATION Records identifying subscribers and telephone dialing records	NO 18 USC § 2703(c)(2)	YES, Subpoena or voluntary disclosure in emerg. 18 USC §§ 2702, 2703(c)(2)	NO 18 USC § 2703(c)(3)	NSL: "relevant to" FCI. Notice prohibited. 18 USC § 2709
	EMAIL / INTERNET LOGS Internet transactional records (e.g., to/from lines of email headers)	NO 18 USC § 2703(c)(1)	YES, § 2703(d) order or voluntary disclosure in emerg. 18 USC §§ 2702, 2703(c)(1), 2703(d)	NO 18 USC § 2703(c)(3)	NSL: "relevant to" FCI. Notice prohibited. 18 USC § 2709
INFORMATION STORED BY 3RD PARTY: OTHER RECORDS	CABLE TV Cable television subscription information	COURT ORDER for cable viewing info, but ECPA rules for other data 47 USC § 551	ECPA rules apply 47 USC § 551(c)(2)(D)	YES, cable viewing 47 USC § 551(h) For other data, see 18 USC § 2703	NSL or court order (reasonable grounds, relevance std). Notice prohibited. 50 USC § 1861(a), (d)
	FINANCIAL Records in possession of bank or other financial institution	NO 12 USC §§ 3405-06	YES, Subpoena 12 USC §§ 3405, 3407-08	NO Can be delayed 12 USC § 3409, 15 USC § 1681g	NSL: "sought for." Notice proh. 12 USC § 3414(a)(5)(A) 15 USC §§ 1681u NSL: "necessary to" 15 USC § 1681v
	CREDIT HISTORY	NO	YES, Grand jury subpoena 15 USC § 1681b(a)(1)	NO Can be delayed 12 USC § 3409, 15 USC § 1681g	Court order: relevance standard. Notice prohibited. 20 USC § 1232g(i)
	EDUCATION Educational records	NO	YES 20 USC §§ 1232g(b)(1)(J), 1232g(i)(2), 9007(c)	NO - Prohibited 20 USC § 1232g(b)(1)(J), 1232g(i); 34 CFR 99.31	Court order: relevance standard. Notice prohibited. 20 USC § 1232g(i)
	OTHER RECORDS Store purchases, library, travel, and other records not protected by a specific privacy law	NO Video rental & sale records: warrant, court order with prob cause, or grand jury sub 18 USC § 2710(b)	YES Plus voluntary disclosure	NO	Court order: reasonable grounds, relevance standard. Notice prohibited. 50 USC § 1861(a), (d) Plus voluntary disclosure
	INTERNATIONAL Voice, email, or data intercepted in transit or seized from storage medium overseas	Title III & the 4th Amendment warrant clause have no extraterritorial effect	N/A	NO	FISA, NSLs have no extraterritorial effect