

**HOUSE . . . . . No. 3422**

**The Commonwealth of Massachusetts**

PRESENTED BY:

***Sarah K. Peake***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to protect electronic privacy.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Sarah K. Peake</i>	<i>4th Barnstable</i>
<i>Louis L. Kafka</i>	<i>8th Norfolk</i>
<i>Jack Patrick Lewis</i>	<i>7th Middlesex</i>
<i>Steven S. Howitt</i>	<i>4th Bristol</i>
<i>Angelo L. D'Emilia</i>	<i>8th Plymouth</i>
<i>Antonio F. D. Cabral</i>	<i>13th Bristol</i>
<i>Randy Hunt</i>	<i>5th Barnstable</i>
<i>Dylan A. Fernandes</i>	<i>Barnstable, Dukes and Nantucket</i>
<i>Steven Ultrino</i>	<i>33rd Middlesex</i>
<i>Maria Duaine Robinson</i>	<i>6th Middlesex</i>
<i>Harriette L. Chandler</i>	<i>First Worcester</i>
<i>John J. Mahoney</i>	<i>13th Worcester</i>
<i>Thomas M. Stanley</i>	<i>9th Middlesex</i>
<i>Bradley H. Jones, Jr.</i>	<i>20th Middlesex</i>
<i>Adrian C. Madaro</i>	<i>1st Suffolk</i>
<i>Jeffrey N. Roy</i>	<i>10th Norfolk</i>
<i>Michael J. Barrett</i>	<i>Third Middlesex</i>
<i>Ann-Margaret Ferrante</i>	<i>5th Essex</i>

<i>David Paul Linsky</i>	<i>5th Middlesex</i>
<i>Jay D. Livingstone</i>	<i>8th Suffolk</i>
<i>Daniel J. Hunt</i>	<i>13th Suffolk</i>
<i>Kate Hogan</i>	<i>3rd Middlesex</i>
<i>Joseph A. Boncore</i>	<i>First Suffolk and Middlesex</i>
<i>Mike Connolly</i>	<i>26th Middlesex</i>
<i>Carolyn C. Dykema</i>	<i>8th Middlesex</i>
<i>Denise Provost</i>	<i>27th Middlesex</i>
<i>Patrick M. O'Connor</i>	<i>Plymouth and Norfolk</i>
<i>David M. Rogers</i>	<i>24th Middlesex</i>
<i>Russell E. Holmes</i>	<i>6th Suffolk</i>
<i>Carlos Gonzalez</i>	<i>10th Hampden</i>
<i>Natalie M. Higgins</i>	<i>4th Worcester</i>
<i>Sal N. DiDomenico</i>	<i>Middlesex and Suffolk</i>
<i>Tommy Vitolo</i>	<i>15th Norfolk</i>
<i>Jennifer E. Benson</i>	<i>37th Middlesex</i>
<i>Carmine Lawrence Gentile</i>	<i>13th Middlesex</i>
<i>Mindy Domb</i>	<i>3rd Hampshire</i>
<i>Ruth B. Balser</i>	<i>12th Middlesex</i>
<i>Patricia D. Jehlen</i>	<i>Second Middlesex</i>
<i>Alice Hanlon Peisch</i>	<i>14th Norfolk</i>
<i>Frank A. Moran</i>	<i>17th Essex</i>
<i>Julian Cyr</i>	<i>Cape and Islands</i>
<i>Mary S. Keefe</i>	<i>15th Worcester</i>
<i>Elizabeth A. Poirier</i>	<i>14th Bristol</i>
<i>Jonathan Hecht</i>	<i>29th Middlesex</i>
<i>Michael S. Day</i>	<i>31st Middlesex</i>
<i>Hannah Kane</i>	<i>11th Worcester</i>
<i>Liz Miranda</i>	<i>5th Suffolk</i>
<i>Marjorie C. Decker</i>	<i>25th Middlesex</i>
<i>Daniel R. Cullinane</i>	<i>12th Suffolk</i>
<i>Daniel M. Donahue</i>	<i>16th Worcester</i>
<i>Patricia A. Haddad</i>	<i>5th Bristol</i>
<i>Susan Williams Gifford</i>	<i>2nd Plymouth</i>
<i>Jonathan D. Zlotnik</i>	<i>2nd Worcester</i>
<i>David Henry Argosky LeBoeuf</i>	<i>17th Worcester</i>
<i>Paul McMurtry</i>	<i>11th Norfolk</i>
<i>Elizabeth A. Malia</i>	<i>11th Suffolk</i>
<i>Paul Brodeur</i>	<i>32nd Middlesex</i>

<i>Brian M. Ashe</i>	<i>2nd Hampden</i>
<i>Angelo M. Scaccia</i>	<i>14th Suffolk</i>
<i>James B. Eldridge</i>	<i>Middlesex and Worcester</i>
<i>Kay Khan</i>	<i>11th Middlesex</i>
<i>Christine P. Barber</i>	<i>34th Middlesex</i>
<i>Sean Garballey</i>	<i>23rd Middlesex</i>
<i>William J. Driscoll, Jr.</i>	<i>7th Norfolk</i>
<i>Kimberly N. Ferguson</i>	<i>1st Worcester</i>
<i>Stephan Hay</i>	<i>3rd Worcester</i>
<i>Daniel J. Ryan</i>	<i>2nd Suffolk</i>
<i>James K. Hawkins</i>	<i>2nd Bristol</i>
<i>Joseph W. McGonagle, Jr.</i>	<i>28th Middlesex</i>
<i>David Allen Robertson</i>	<i>19th Middlesex</i>
<i>Paul W. Mark</i>	<i>2nd Berkshire</i>
<i>David Biele</i>	<i>4th Suffolk</i>
<i>Michelle M. DuBois</i>	<i>10th Plymouth</i>
<i>Natalie M. Blais</i>	<i>1st Franklin</i>

**HOUSE . . . . . No. 3422**

By Ms. Peake of Provincetown, a petition (accompanied by bill, House, No. 3422) of Sarah K. Peake and others for legislation to update penalties and protect electronic privacy. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE HOUSE, NO. 2332 OF 2017-2018.]

**The Commonwealth of Massachusetts**

\_\_\_\_\_  
**In the One Hundred and Ninety-First General Court  
(2019-2020)**  
\_\_\_\_\_

An Act to protect electronic privacy.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Chapter 276 of the General Laws, as appearing in the 2014 official edition,  
2 is hereby amended by striking Section 1B and inserting in its place the following:-

3 Section 1B. (a) As used in this section, the following words shall have the following  
4 meanings:

5 "Adverse result", occurs when notification of the existence of a search warrant results in:

6 (1) danger to the life or physical safety of an individual;

7 (2) a flight from prosecution;

8 (3) the destruction of or tampering with evidence;

9 (4) the intimidation of a potential witness or witnesses; or

10 (5) serious jeopardy to an investigation or undue delay of a trial.

11 "Cell site simulator device", a device that transmits or receives radio waves to simulate an  
12 electronic device, cell tower, cell site, or service for the purpose of conducting one or more of the  
13 following operations: (i) identifying, locating, or tracking the movements of an electronic device;  
14 (ii) intercepting, obtaining, accessing, or forwarding the communications, stored data, or  
15 metadata of an electronic device; (iii) affecting the hardware or software operations or functions  
16 of an electronic device; (iv) forcing transmissions from or connections to an electronic device; or  
17 (v) denying an electronic device access to other electronic devices, communications protocols, or  
18 services.

19 "Electronic communication services", shall be construed in accordance with sections  
20 2701 to 2711 Title 18, of the United States Code. This definition shall not apply to corporations  
21 that do not provide electronic communication services to the general public.

22 "Electronic device", any device that enables access to, or use of, an electronic  
23 communication service, remote computing service or location information service.

24 "Foreign corporation", any corporation or other entity that makes a contract or engages in  
25 a terms of service agreement with a resident of the commonwealth to be performed in whole or  
26 in part by either party in the commonwealth. The making of the contract or terms of service  
27 agreement shall be considered to be the agreement of the foreign corporation that a search  
28 warrant or subpoena which has been properly served on it has the same legal force and effect as  
29 if served personally within the commonwealth.

30 "Location information", any information concerning the location of an electronic device  
31 that, in whole or in part, is generated by or derived from the device or any of its applications.

32           “Location information service”, a global positioning service or other mapping, locational  
33 or directional information service.

34           "Massachusetts corporation", any corporation or other entity that is subject to chapter 155  
35 or chapter 156B.

36           “Metadata”, information, other than communications content, which is necessary to or  
37 associated with the provision of electronic communication services, remote computing services,  
38 or location information services, including but not limited to information about the source or  
39 destination of electronic communications, date and time of electronic communications, delivery  
40 instructions, account information, internet protocol address, quantum of data, data or file type, or  
41 data tags.

42           "Properly served", delivery of a search warrant or subpoena by hand, by United States  
43 mail, by commercial delivery service, by facsimile or by any other manner to any officer of a  
44 corporation or its general manager in the commonwealth, to any natural person designated by it  
45 as agent for the service of process, or if such corporation has designated a corporate agent, to any  
46 person named in the latest certificate filed pursuant to section 15.03 of chapter 156D.

47           "Remote computing services", shall be construed in accordance with sections 2701 to  
48 2711, inclusive, of Title 18, of the United States Code. This definition shall not apply to  
49 corporations that do not provide those services to the general public.

50           "Subpoena", a grand jury or trial subpoena issued in the course of a criminal proceeding  
51 or an administrative subpoena issued pursuant to section 17B of chapter 271.

52 (b) A government office or public official may obtain or access the following information  
53 only (1) with a person's informed consent, (2) pursuant to a warrant issued by a judicial officer  
54 upon an application demonstrating probable cause, or (3) acting in accordance with a legally  
55 recognized exception to the warrant requirement:

56 (i) data stored by or on behalf of a user of those services;

57 (ii) any content of communications transmitted by an electronic device or stored by those  
58 services; or

59 (iii) location information.

60 (c) A government office or public official may use a cell site simulator device to obtain or  
61 access information, including metadata, only (1) with the informed consent of the user of the  
62 targeted electronic device, (2) pursuant to a probable cause warrant issued upon an application  
63 specifically stating that use of a cell site simulator is sought, or (3) acting in accordance with a  
64 legally recognized exception to the warrant requirement.

65 (d) Upon complaint on oath that the complainant believes that (1) particular identified  
66 records or information are in the actual or constructive custody of a Massachusetts or foreign  
67 corporation providing electronic communication services, remote computing services, or location  
68 information services, and (2) such records or information constitute evidence of or the means or  
69 instrumentalities of the commission of a specified criminal offense under the laws of the  
70 commonwealth, a justice of the superior court may, if satisfied that there is probable cause for  
71 such beliefs, issue a warrant identifying those records to be sought and authorizing the person  
72 making application for the warrant to properly serve the warrant upon the corporation and to take  
73 all other actions prescribed by this section.

74 (e) Upon complaint on oath that the complainant believes that the use of a cell site  
75 simulator device will lead to (i) evidence of or the means or instrumentalities of the commission  
76 of a specified criminal offense under the laws of the commonwealth or (ii) the location of a  
77 person whom there is probable cause to believe has committed, is committing, or is about to  
78 commit a crime, a justice of the superior court may, if satisfied that probable cause has been  
79 established for such belief, issue a warrant authorizing that particular information be sought from  
80 a specified electronic device or, if the complainant is unable to specify the particular device,  
81 from electronic devices at a specified location, stating the duration for authorized use of the cell  
82 site simulator device, and directing the person authorized by the warrant to take all other actions  
83 prescribed by this section.

84 A warrant application to use a cell site simulator device shall: (i) specify sufficient facts  
85 to demonstrate that alternative methods of investigation and surveillance with less incidental  
86 impact on non-targeted parties and electronic devices are inadequate to achieve the same  
87 purposes; and (ii) identify the law enforcement agency that owns the cell site simulator device, if  
88 different from the law enforcement agency making the application.

89 If the application seeks authority to use a cell site simulator device to intercept the  
90 contents of oral communications, authorization may be granted only in compliance with the  
91 procedural and substantive requirements contained in section 99 of chapter 272 and federal law  
92 concerning wiretaps.

93 (f) Search warrants issued under this section shall designate the person, corporation or  
94 other entity, if any, in possession of the records or data sought, and shall describe, with  
95 particularity, the information sought and to be provided. They shall be issued in the form and



96 manner prescribed in sections 2A½ and 2B, insofar as they are applicable, and shall be directed  
97 to the law enforcement officer or government office making application for the warrant.

98 (g) The following provisions shall apply to any search warrant issued under this section  
99 and to any subpoena issued in the course of a criminal investigation or proceeding directed to a  
100 Massachusetts or foreign corporation that provides electronic communication services, remote  
101 computing services or location information services:

102 (1) when properly served with a search warrant issued by any court of the commonwealth  
103 or justice pursuant to this section or a subpoena, a corporation subject to this section shall  
104 provide all records sought pursuant to that warrant or subpoena within 14 days of receipt,  
105 including those records maintained or located outside the commonwealth;

106 (2) if the applicant makes a showing and the court or justice finds that failure to produce  
107 records within less than 14 days would cause an adverse result, a warrant may require production  
108 of records within less than 14 days;

109 (3) a court or justice may reasonably extend the time required for production of the  
110 records upon finding that the corporation has shown good cause for that extension and that an  
111 extension of time would not cause an adverse result;

112 (4) a corporation seeking to quash a warrant or subpoena served on it pursuant to this  
113 section shall seek relief from the court that issued the warrant or the court which has jurisdiction  
114 over the subpoena within the time required for production of records pursuant to this section. The  
115 court shall hear and decide such motion not later than 14 days after the motion is filed;

116 (5) in the case of an administrative subpoena issued by the attorney general, the superior  
117 court of Suffolk county shall have jurisdiction and in the case of an administrative subpoena  
118 issued by a district attorney, the superior court in any county in which the district attorney  
119 maintains an office shall have jurisdiction; and

120 (6) the corporation shall verify the authenticity of records that it produces by providing an  
121 affidavit from the person in custody of those records certifying that they are true and complete.

122 (h) A Massachusetts corporation that provides electronic communication services or  
123 remote computing services, when served with a warrant or subpoena issued by another state to  
124 produce records that would reveal the identity of the customers using those services, data stored  
125 by, or on behalf of the customer, the customer's usage of those services, the recipient or  
126 destination of communications sent to or from those customers, or the content of those  
127 communications, shall produce those records as if that warrant or subpoena had been issued  
128 under the law of the commonwealth.

129 (i) No cause of action shall lie against any foreign or Massachusetts corporation subject  
130 to this section, its officers, employees, agents or other persons for providing records,  
131 information, facilities or assistance in accordance with the terms of a warrant or subpoena issued  
132 pursuant to this section.

133 (j) A law enforcement officer or agency authorized to use a cell site simulator device in  
134 accordance with this section shall: (i) take all steps necessary to limit the collection of any  
135 information or metadata to the target specified in the application and warrant authorization; (ii)  
136 take all steps necessary to permanently delete any information or metadata collected from any  
137 person or persons not specified in the warrant immediately following such collection and ensure

138 that such information or metadata is not used, retained, or transmitted for any purpose  
139 whatsoever; and (iii) delete any information or metadata collected from the person or persons  
140 specified in the warrant authorization within thirty days if there is no longer probable cause to  
141 support the belief that such information or metadata is evidence of a crime.

142 (k) Not later than 7 days after information is obtained by a law enforcement officer or  
143 government office pursuant to a warrant under this section, that officer or office shall serve upon,  
144 or deliver by registered or first-class mail, electronic mail, or other means reasonably calculated  
145 to be effective as specified by the court issuing the warrant, to the customer or subscriber, or user  
146 of an electronic device targeted by a cell site simulator device, a copy of the warrant, a copy of  
147 the application for the warrant and notice that informs the customer, subscriber, or user of the  
148 following:

149 (1) the nature of the law enforcement inquiry with reasonable specificity;

150 (2) in the case of information maintained for the customer or subscriber by the  
151 provider of an electronic communications service, remote computing service or location  
152 information service, that such information was requested by or supplied to that government  
153 office or public official, a description of that information, and the dates on which the request was  
154 made and on which the information was supplied;

155 (3) in the case of information obtained or accessed by means of a cell site simulator  
156 device, a description of that information, and the dates, times, durations, and locations of the  
157 search;

158 (4) whether notification of the customer, subscriber, or user was delayed under  
159 subsection (j); and

160 (5) which court made the certification or determination under which that delay was  
161 made, if applicable.

162 (l) A government office or public official may include in its application for a warrant a  
163 request for an order delaying the notification required under subsection (k) for a period not to  
164 exceed 90 days, and the court may issue the order if it determines there is reason to believe that  
165 notification of the existence of the warrant may have an adverse result. Upon expiration of any  
166 period of delay granted under this subsection, the government office or public official shall  
167 provide the customer or subscriber a copy of the warrant together with notice required under, and  
168 by the means described in, subsection (k).

169 A government office or public official may include in its application for a warrant a  
170 request for an order directing a corporation or other entity to which a warrant is directed not to  
171 notify any other person of the existence of the warrant for a period of not more than 90 days, and  
172 the court may issue the order if the court determines that there is reason to believe that  
173 notification of the existence of the warrant will have an adverse result.

174 The court may, upon application, grant 1 or more extensions of orders delaying  
175 notification for an additional 90 days if the court determines that there is reason to believe that  
176 notification of the existence of the warrant will have an adverse result.

177 (m) Notwithstanding any general or special law to the contrary, a government office or  
178 public official may obtain information described in subsections (b) or (c):

179 (1) with the specific contemporaneous consent of the owner or user of the electronic  
180 communications device concerned;

181 (2) in order to respond to the user's call for emergency services; or

182 (3) if it reasonably believes that an emergency involving immediate danger of death  
183 or serious physical injury to any person requires obtaining without delay information relating to  
184 the emergency; provided, however, that the request is narrowly tailored to address the emergency  
185 and subject to the following limitations:

186 (i) the request shall document the factual basis for believing that an emergency  
187 involving immediate danger of death or serious physical injury to a person requires obtaining  
188 without delay of the information relating to the emergency; and

189 (ii) not later than 48 hours after the government office obtains access to records, it  
190 shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank  
191 designated by the head of the office setting forth the grounds for the emergency access.

192 (n) On the second Friday of January of each calendar year, any judge issuing or denying a  
193 warrant under this section during the preceding calendar year shall report on each such warrant  
194 to the office of court management within the trial court:

195 (1) the name of the agency making the application;

196 (2) the offense specified in the warrant or application therefor;

197 (3) the nature of the information sought;

198 (4) if the warrant application sought authorization to obtain or access information by  
199 means of a cell site simulator device;

- 200           (5)     if the warrant application sought authorization to obtain or access information  
201 from a corporation or other entity, the name of that entity;
- 202           (6)     whether the warrant was granted as applied for, was modified or was denied;
- 203           (7)     the period of disclosures or access authorized by the warrant;
- 204           (8)     the number and duration of any extensions of the warrant; and
- 205           (9)     any order directing delayed notification of the warrant's existence.

206           In June of each year, the court administrator in the office of court management within the  
207 trial court shall transmit to the legislature a full and complete report concerning the number of  
208 applications for warrants authorizing or requiring the disclosure of or access to information  
209 under this section. The reports shall include a summary and analysis of the data required to be  
210 filed with that office. The reports shall be filed with the offices of the clerk of the house and the  
211 senate and shall be public records. The court administrator in the office of court management  
212 within the trial court shall issue guidance regarding the form of the reports.

213           (o) Except in a judicial proceeding alleging a violation of this section, no information  
214 obtained in violation of this section and no information provided beyond the scope of the  
215 materials authorized to be obtained shall be admissible in any criminal, civil, administrative or  
216 other proceeding.

217           (p) The requirements of this section shall apply to all state and local law enforcement  
218 officers operating in the commonwealth, whether said officers are assigned to state and local law  
219 enforcement operations exclusively, or to joint task force or other collaborative operations with  
220 federal law enforcement agencies.

221 SECTION 2. Chapter 276 is hereby amended by inserting after section 2A the following  
222 section:-

223 Section 2A½. (a) A warrant issued pursuant to section 1B for records or data from a  
224 corporation providing electronic communication services, remote computing services or location  
225 information services shall be in substantially the following form:

226 THE COMMONWEALTH OF MASSACHUSETTS.

227 (COUNTY), ss. (NAME) COURT.

228 To the Sheriffs of our several counties, or their deputies, any State Police Officer, or a  
229 Police Officer of any city or town in the Commonwealth.

230 Proof by affidavit having been made this day before (name and office of person  
231 authorized to issue warrant) by (names of person or persons whose affidavits have been taken)  
232 that there is probable cause for believing that certain records or data are in the in the possession  
233 of (identify corporation or other entity) and that those records or data constitute evidence of or  
234 the means or instrumentalities of the commission of (specified criminal offense under the laws of  
235 the commonwealth).

236 We therefore authorize you to present this warrant to (identify corporation or other  
237 entity), which warrant shall operate as an order for immediate disclosure of the following records  
238 or data:

239 (description of particular records or data),

240 and if any such records or data are disclosed to bring it before (court having jurisdiction)  
241 at (name of court and location).

242 Dated at (city or town) this \_\_\_\_\_ day of \_\_\_\_\_, (insert year).

243 Justice of the Superior Court

244 (b) A warrant issued pursuant to section 1B authorizing the use of a cell site simulator  
245 device shall be in substantially the following form:

246 THE COMMONWEALTH OF MASSACHUSETTS.

247 (COUNTY), ss. (NAME) COURT.

248 To the Sheriff, or their deputy, State Police Officer, or municipal Police Officer who has  
249 made this complaint on oath.

250 Proof by affidavit having been made this day before (name and office of person  
251 authorized to issue warrant) by (names of person or persons whose affidavits have been taken)  
252 that there is probable cause for believing that the use of a cell site simulator device will lead to  
253 evidence of or the means or instrumentalities of the commission of (specified criminal offense  
254 under the laws of the commonwealth) or the location of a person whom there is probable cause  
255 to believe has committed, is committing, or is about to commit (specified criminal offense under  
256 the laws of the commonwealth).

257 We therefore authorize you to obtain or access by means of a cell site simulator device,  
258 the following records or data:

259 (description of particular records or data),

260 and if any such records or data are disclosed to bring it before (court having jurisdiction)  
261 at (name of court and location).



262 Dated at (city or town) this \_\_\_\_\_ day of \_\_\_\_\_, (insert year).

263 Justice of the Superior Court

264

265 SECTION 3. Section 2B of said chapter 276, as appearing in the 2014 official edition, is  
266 hereby amended by striking clauses 3 and 4 of the model affidavit and inserting in place thereof  
267 the following:-

268 3. Based upon the foregoing reliable information (and upon my personal knowledge)  
269 there is probable cause to believe that the property, records or data hereinafter described (has  
270 been stolen, or is being concealed, or constitutes evidence of a particular offense, etc.) and may  
271 be found (in the possession of A. B. or any other person or corporation) at premises (identify).

272 4. The (property, records, or data) for which I seek issuance of a search warrant is the  
273 following: (here describe the property, records, or data as particularly as possible).