

Union Calendar No. 37

118TH CONGRESS
1ST SESSION

H. R. 3089

[Report No. 118-54]

To amend title 18, United States Code, to modify delayed notice requirements,
and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 2023

Mr. FITZGERALD (for himself and Mr. NADLER) introduced the following bill;
which was referred to the Committee on the Judiciary

MAY 15, 2023

Reported from the Committee on the Judiciary; committed to the Committee
of the Whole House on the State of the Union and ordered to be printed

A BILL

To amend title 18, United States Code, to modify delayed notice requirements, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “NDO Fairness Act”.

5 **SEC. 2. PRECLUSION OF NOTICE.**

6 Section 2705(b) of title 18, United States Code, is
7 amended to read as follows:

8 “(b) PRECLUSION OF NOTICE.—

9 “(1) APPLICATION.—

10 “(A) IN GENERAL.—A governmental entity
11 that is seeking a warrant, order, or subpoena
12 under section 2703, when it is not required to
13 notify the customer or subscriber, or to the ex-
14 tent that it may delay such notice pursuant to
15 subsection (a), may apply to a court for an
16 order, subject to paragraph (6), directing a pro-
17 vider of electronic communications service or re-
18 mote computing service to which a warrant,
19 order, or subpoena under section 2703 is di-
20 rected not to notify any other person of the ex-
21 istence of the warrant, order, or subpoena.

22 “(B) LENGTH.—An order granted under
23 subparagraph (A) shall be in effect for a period
24 of not more than 90 days.

25 “(C) OTHER REQUIREMENTS.—

1 “(i) IN GENERAL.—A application for
2 an order under subparagraph (A) shall
3 state, to the best of the applicant’s knowl-
4 edge, whether the named customer or sub-
5 scriber whose information is sought by the
6 warrant, order, or subpoena under section
7 2703—

8 “(I) is aware of the warrant,
9 order, subpoena, or underlying inves-
10 tigation; and

11 “(II) is suspected of involvement
12 in the commission of the crime under
13 investigation.

14 “(ii) ORDERS.—An order granted
15 under this paragraph may not direct, or
16 otherwise require, a provider of electronic
17 communications service or remote com-
18 puting service to provide notification of the
19 expiration of order to the court or govern-
20 ment entity that sought the order.

21 “(2) DETERMINATION.—

22 “(A) IN GENERAL.—The court may not
23 grant a request for an order made under para-
24 graph (1), or an extension of such order re-

1 quested by the governmental entity pursuant to
2 paragraph (3), unless—

3 “(i) the court issues a written deter-
4 mination, based on specific and articulable
5 facts, and including written findings of
6 fact and conclusions of law, that it is likely
7 that not granting the request will result
8 in—

9 “(I) endangering the life or phys-
10 ical safety of an individual;

11 “(II) flight from prosecution;

12 “(III) destruction of or tam-
13 pering with evidence;

14 “(IV) intimidation of potential
15 witnesses; or

16 “(V) otherwise seriously jeopard-
17 izing an investigation or unduly delay-
18 ing a trial; and

19 “(ii) the order is narrowly tailored
20 and there is no less restrictive alternative,
21 including notification to an individual or
22 organization within or providing legal rep-
23 resentation to the named customer or sub-
24 scriber, that is not likely to result in an

1 adverse result as described in clauses (i)
2 through (v) of subparagraph (A); and

3 “(iii) the court has reviewed the indi-
4 vidual warrant, order, or subpoena under
5 section 2703 to which the order issued
6 under this paragraph applies.

7 “(B) NATURE OF THE OFFENSE.—The
8 court may consider the nature of the offense in
9 issuing a determination under subparagraph
10 (A).

11 “(3) EXTENSION.—A governmental entity may
12 request one or more extensions of an order granted
13 under paragraph (2) of not more than 90 days for
14 each such extension. The court may only grant such
15 an extension if the court makes a written determina-
16 tion required under paragraph (2)(A) and the exten-
17 sion is in accordance with the requirements of
18 (2)(B).

19 “(4) NOTIFICATION OF CHANGED CIR-
20 CUMSTANCES.—If the need for the order issued
21 under paragraph (2) changes materially, the govern-
22 mental entity that requested the order shall notify
23 the court within a reasonable period of time (not to
24 exceed 14 days) of the changed circumstances, and

1 the court shall reassess the order and modify or va-
2 cate as appropriate.

3 “(5) OPPORTUNITY TO BE HEARD.—

4 “(A) IN GENERAL.—Upon an application,
5 petition, or motion by a provider of electronic
6 communications service or remote computing
7 service or person acting on behalf of the pro-
8 vider to which an order under paragraph (2)
9 (or an extension under paragraph (3)) has been
10 issued, the court may modify or vacate the
11 order if—

12 “(i) the order does not meet require-
13 ments provided in paragraph (2) or (3); or

14 “(ii) compliance with the order is un-
15 reasonable or otherwise unlawful.

16 “(B) STAY OF DISCLOSURE OF NAMED
17 CUSTOMER OR SUBSCRIBER COMMUNICATIONS
18 OR RECORDS.—A provider’s obligation to dis-
19 close the information requested in the warrant,
20 order, or subpoena to which the order in para-
21 graph (1) applies is stayed upon the filing of
22 the application, petition, or motion under this
23 paragraph pending resolution of the application,
24 petition, or motion, unless the court with juris-
25 diction over the challenge determines based on

1 a showing by the governmental entity that the
2 stay should be lifted in whole or in part prior
3 to resolution.

4 “(C) FINALITY OF ORDER.—The decision
5 of the court resolving an application, petition,
6 or motion under this paragraph shall constitute
7 a final, appealable order.

8 “(6) EXCEPTION.—A provider of electronic
9 communications service or remote computing service
10 to which an order under paragraph (2) applies, or
11 an officer, employee, or agent thereof, may disclose
12 information otherwise subject to any applicable non-
13 disclosure requirement to—

14 “(A) those persons to whom disclosure is
15 necessary in order to comply with the warrant,
16 order, or subpoena;

17 “(B) an attorney in order to obtain legal
18 advice or assistance regarding the order issued
19 under paragraph (2) or the warrant, order, or
20 subpoena to which the order applies; and

21 “(C) any person the court determines can
22 be notified of the warrant, order, or subpoena.

23 “(7) SCOPE OF NONDISCLOSURE.—Any person
24 to whom disclosure is made under paragraph (6)
25 (other than the governmental entity) shall be subject

1 to the nondisclosure requirements applicable to the
2 person to whom the order is issued. Any recipient
3 authorized under this subsection to disclose to a per-
4 son information otherwise subject to a nondisclosure
5 requirement shall notify the person of the applicable
6 nondisclosure requirement.

7 “(8) SUPPORTING DOCUMENTATION.—Upon
8 serving a provider of electronic communications serv-
9 ice or remote computing service with an order grant-
10 ed under paragraph (2), or an extension of such
11 order granted under paragraph (3), the govern-
12 mental entity shall include a copy of the warrant,
13 order, or subpoena to which the nondisclosure order
14 applies.

15 “(9) EXPIRATION OF ORDER PRECLUDING NO-
16 TICE.—Upon expiration of an order issued under
17 paragraph (2) or, if an extension has been granted
18 under paragraph (3), expiration of the extension, the
19 governmental entity shall deliver to the named cus-
20 tomer or subscriber, by at least 2 methods, which
21 shall be personal service, registered or first-class
22 mail, electronic mail, or other means approved by
23 the court as reasonably calculated to reach the
24 named customer or subscriber within 5 business
25 days of the expiration of the order—

1 “(A) a copy of the warrant, order, or sub-
2 poena; and

3 “(B) notice that informs the named cus-
4 tomer or subscriber—

5 “(i) of the nature of the law enforce-
6 ment inquiry with reasonable specificity;

7 “(ii) that information maintained for
8 such customer or subscriber by the pro-
9 vider of electronic communications service
10 or remote computing service to which the
11 warrant, order, or subpoena under section
12 2703, was directed was supplied to or re-
13 quested by the government entity;

14 “(iii) that notification of such cus-
15 tomer or subscriber was precluded by court
16 order;

17 “(iv) of the identity of the court au-
18 thorizing the preclusion of notice;

19 “(v) of the provision of this chapter
20 under which the preclusion of notice was
21 authorized; and

22 “(vi) that the government will, upon
23 request by the customer or subscriber
24 made within 180 days after receiving noti-
25 fication under this paragraph, provide the

1 named customer or subscriber with a copy
2 of the information that was disclosed in re-
3 sponse to the warrant, order or subpoena,
4 or in the event that no information was
5 disclosed, a written certification that no in-
6 formation was disclosed.

7 “(10) COPY OF INFORMATION DISCLOSED.—
8 Upon expiration of the order precluding notice
9 issued under paragraph (2) or (3) of this subsection,
10 and at the request of the named customer or sub-
11 scriber made within 180 days of receiving notifica-
12 tion under paragraph (9), the governmental entity
13 shall promptly provide the named customer or sub-
14 scriber—

15 “(A) with a copy of the information that
16 was disclosed in response to the warrant, order
17 or subpoena (except illicit records, child sexual
18 abuse material, and other illegal material); or

19 “(B) in the event that no information was
20 disclosed, a written certification that no infor-
21 mation was disclosed.

22 “(11) REDACTIONS.—Any information disclosed
23 pursuant to paragraphs (9) and (10) may be re-
24 dacted only if a court finds such redactions nec-

1 essary to preserve the secrecy or integrity of an in-
2 vestigation.”.

3 **SEC. 3. ADDITIONAL PROVISIONS REGARDING DELAYED**
4 **NOTICE.**

5 Section 2705 of title 18, United States Code, is
6 amended by adding at the end the following:

7 “(c) ANNUAL REPORT.—On an annual basis, the At-
8 torney General shall provide to the Committee on the Ju-
9 diciary of the House of Representatives, the Committee
10 on the Judiciary of the Senate, and the Director of the
11 Administrative Office of the United States Courts, which
12 the Director shall publish on the website of the Adminis-
13 trative Office of the United States Courts, in a manner
14 consistent with protection of national security, a report
15 setting forth with respect to the preceding calendar year,
16 for each Federal judicial district—

17 “(1) the number of named customers or sub-
18 scribers with respect to whom, in that calendar year,
19 a warrant, subpoena, or court order was issued pur-
20 suant to section 2703;

21 “(2) the aggregate number of applications re-
22 questing delay of notification pursuant to subsection
23 (a)(1), preclusion of notice pursuant to subsection
24 (b)(1), and extensions pursuant to subsection (b)(3);

1 “(3) the aggregate number of orders under this
2 section either granting, extending, or denying a re-
3 quest for delay of notification or preclusion of notice;

4 “(4) the aggregate number of orders under this
5 section affecting a member of the news media, in-
6 cluding any conduct related to activities protected
7 under the First Amendment; and

8 “(5) the aggregate number of arrests, trials,
9 and convictions, resulting from investigations in
10 which orders under this section were obtained, in-
11 cluding the offenses for which individuals were ar-
12 rested, tried, or convicted.

13 The Attorney General shall include in the report under
14 this subsection a description of the process and the infor-
15 mation used to determine the numbers for each of para-
16 graphs (1) through (5).”.

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