

To: Commission
From: Christian Weisenbacher
Date: January 8, 2018
Re: Communications Data Warrants and Electronic Communications—*In the Matter of Application of State for Communications Data Warrants*

MEMORANDUM

Executive Summary

In the case of *In the Matter of the Application of the State of New Jersey for Communications Data Warrants to Obtain the Contents of Stored Communications from Twitter, Inc.*, the Appellate Division considered the State’s application for a communications data warrant.¹ Specifically, it considered whether the audio portions of a video camera or video tape falls within the Wiretapping and Electronic Surveillance Control Act (the Act).

Ultimately, the Court determined that the audio portions of videos and video messages qualify instead as “electronic communications” and are therefore accessible to the state through a communications data warrant (CDW).²

Background

This case concerns the state of New Jersey’s pursuit of two communications data warrants (CDWs) from Twitter, Inc., under the Wiretapping and Electronic Surveillance Control Act, N.J.S. 2A:156A-1 to -37.³ In the two CDW’s, the State asked for an extensive list of information and data associated with two specific Twitter accounts as well as the contents of those accounts.⁴

In the Law Division, the judge approved both warrants, but only after significant editing.⁵ Specifically, the judge edited the warrants to include only the “visual but not oral component of video messages,” and the “visual but not aural/oral component” of any “videos.”⁶ The Appellate Division granted the State’s motion for leave to appeal.

¹ *In the Matter of the Application of the State of New Jersey for Communications Data Warrants to Obtain the Contents of Stored Communications from Twitter, Inc.*, 448 N.J. Super. 471 (App. Div. 2017).

² *Id.* at 485.

³ *Id.* at 473.

⁴ *Id.* at 473.

⁵ *Id.* at 473-74.

⁶ *Id.* at 474.

The Appellate Division explained that case law prior to this decision had held that the audio portion of a video camera or video tape fell within the Act as an oral communication.⁷ Under this interpretation, a search for a video with an aural, oral, or audio portion would require a Wiretap Order separate from a CDW.⁸ In the instant case, the court disagreed.⁹

The Appellate Division first considered the definitions contained within the Act. First is the definition of a “wire communication” which the Act defines in N.J.S.A. 2A:156A-2(b) as follows:

Any aural transfer made...through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception, including the use of such connection in a switching station, furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications.¹⁰

As the Court noted, the Legislature amended the Act after enactment to make several changes. First, the amendments substituted the term “aural transfer” for the term “communication.”¹¹ The term “aural transfer” is now defined as “a transfer containing the human voice at any point between and including the point of origin and the point of reception”¹² The term “oral communication” is now defined as “any...utter[ance] by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation...”¹³ In addition, the amendment introduced the term “electronic communication.”

Under N.J.S.A. 2A:156A-2(m)(1), “electronic communication” is defined as:

Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system that affects interstate, intrastate or foreign commerce, but does not include: (1) Any wire or oral communication...

The Court further explained and defined “electronic storage” as it relates to “electronic communication,” as

⁷ *Id.* at 474.

⁸ *Id.* at 474.

⁹ *Id.* at 485.

¹⁰ *Id.* at 475.

¹¹ *Id.* at 475.

¹² N.J.S. 2A:156A-2(t)

¹³ N.J.S. 2A:156A-2(b)

‘both wire and electronic communications, but not oral communications [are] subject to “electronic storage,” defined as “[a]ny temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof[,] and [a]ny storage of such communication by an electronic communication service for purpose of backup protection of the communication...”¹⁴

Under N.J.S. 2A:156A-27, it is unlawful to “knowingly...obtain...access to a wire or electronic communication while that communication is in electronic storage.” With limited exceptions, an electronic communication service “shall not knowingly divulge the contents of a communication while in electronic storage...” N.J.S. 2A:156A-28(a)(1).

Notably, one exception to the above rule permits disclosure to law enforcement “of the contents of an electronic communication,” but not a wire communication, “without notice to the subscriber...if the law enforcement agency obtains a warrant [(CDW)].” N.J.S. 2A:156A-29(a).

The Appellate Division has previously held that “a CDW is not subject to the more restrictive procedures and enhanced protections of the ...Act, which include a showing of necessity because normal investigative procedures have failed, N.J.S.A. 2A:156A-10. By contrast, N.J.S.A. 2A:156A-29(a) requires only that a law enforcement agency obtain a warrant upon a showing of probable cause.”¹⁵

Given the conflicting definitions above and absent discernable State legislative intent in the language of the statute, the Appellate Division in this case looked to Title III of the federal Omnibus Crime and Safe Streets Act, the source from which the Act was modeled.¹⁶ As the language of the federal and state Acts were substantially similar, the Court inferred that the State Legislature’s intent matched the Congressional intent.

In the instant case, the Appellate Division first observed that there is a “blurring of any distinction between the definitions of [wire communications and aural transfer].”¹⁷ Next, the Court noted that “whether the particular communication contains the human voice is not dispositive of whether it is a “wire” or “electronic communication.”¹⁸

The Court also reviewed Congress’s definition of “electronic communication”, which was defined broadly as follows:

¹⁴ *Id.* at 476 (quoting N.J.S. 2A:156A-2(q)).

¹⁵ *State v. Finesmith*, 408 N.J. Super. 206, 2128 (App. Div. 2009).

¹⁶ 18 U.S.C.A. §§2510-2520, *State v. Ates*, 217 N.J. 253, 266

¹⁷ *Id.* at 482-83.

¹⁸ *In Re Application for CDW*, 448 N.J. Super. 471, 483 (2017).

The term ‘electronic communication’ is intended to cover a broad range of communication activities...As a rule, a communication is an electronic communication if it is neither carried by sound waves nor can fairly be characterized as one containing the human voice (carried in part by wire). Communications consisting solely of data, for example...would be electronic communications.¹⁹

It is noted that the New Jersey Senate report cited “video teleconferences” as an example of electronic communications.²⁰ As the Court stated, “In enacting the Amendment, our Legislature clearly contemplated ‘electronic communications’ could include the human voice, stating the term included ‘digital or voice transmissions to a beeper, a pager, fax machines, electronic mail service and computers.’”²¹ The Appellate Division noted that “courts have uniformly concluded that communications sent to social media platforms or even private websites are clearly ‘electronic communications’ under the federal act.”²²

As a result, the Appellate Division found in favor of the State, holding that the audio portions of the videos and video messages held in the accounts by Twitter do qualify as “electronic communications” under the Act.²³ That information was therefore accessible to the State through a CDW and the Court remanded the matter to the Law Division for the entry of CDW’s that did not contain the access-limiting edits and deletions made by the Law Division judge.

A search of bills introduced in the 2016-2017 Legislative Session revealed no relevant legislation confronting the issues addressed in this case.

Conclusion

The law in this area is complicated and does not appear to reflect relatively recent technological advances. For this reason, the Legislature may wish to consider whether the outcome of this case matches the intent behind the statute. Staff seeks authorization to engage in further research and outreach in order to determine if it would be appropriate to revise the statute to better reflect the intent of the New Jersey Legislature as well as current technological trends and habits.

¹⁹ H.R. Rep. No. 99-647 at 35 (1986).

²⁰ *S. Rep. No. 99-541, 99th Cong. 2d Sess.*, at 481 (1986).

²¹ *In Re Application for CDW*, 448 N.J. Super. 471, 484 (2017) (quoting Assembly Judiciary, Law and Public Safety Comm., Statement to A. Nos. 130 and 1587 (Sept. 21, 1992)).

²² *In Re Application for CDW*, 448 N.J. Super. 471, 484 (2017) (see *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876 (9th Cir. 2002); *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F.Supp.2d 659, 667 (D.N.J. 2013); *In re Application of the United States*, 830 F.Supp.2d 114, 127-28 (E.D. Va. 2011).

²³ *In Re Application for CDW*, 448 N.J. Super. 471, 485 (2017).