Bill as Introduced

HB 539 - AS INTRODUCED

2021 SESSION

21-0740 10/11

HOUSE BILL

539

AN ACT

relative to records of communications common carriers.

SPONSORS:

Rep. Yokela, Rock. 33

COMMITTEE:

Criminal Justice and Public Safety

ANALYSIS

This bill requires that customer information in records of communications common carriers only be provided pursuant to a search warrant or a judicially-recognized exception to the warrant requirement.

Explanation:

Matter added to current law appears in bold italics.

Matter removed from current law appears [in brackets and struckthrough.]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT

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relative to records of communications common carriers.

Be it Enacted by the Senate and House of Representatives in General Court convened:

- 1 Attorney General; Records of Communications Common Carriers. Amend RSA 7:6-b to read 2 as follows:
 - 7:6-b Certain Records of Communications Common Carriers.
 - I. Every communications common carrier, as defined in RSA 570-A:1, IX, [upon the written demand of the attorney general that the attorney general has reasonable grounds for belief that the service furnished to a person or to a location by such communications common carrier has been, is being, or may be used for an unlawful purpose, shall furnish to the attorney general] shall ensure its customers be kept free from governmental intrusion into their private or personal information by requiring a search warrant or a judicially-recognized exception to the warrant requirement before providing information about its customers to a governmental entity, such information includes, but it not limited to:
 - (a) The names and addresses of persons to whom stated listed or unlisted telephone numbers are assigned.
 - (b) The names and addresses of persons to whom any stated or identified services are provided.
 - (c) Any local and long distance billing records for any subscriber to, or customer of telephone service or wireless telephone service as defined in RSA 638:21, XI.
 - (d) The length of service provided to a subscriber or customer by the communications common carrier.
 - (e) The types of services provided to the subscriber or customer by the communications common carrier, and
 - (f) The telephone number or other subscriber number or identity.
 - II. No such communications common carrier nor any agent, servant, or employee thereof, shall be civilly or criminally responsible or liable for furnishing or delivering any records or information in compliance with [said demand and the attorney general shall not disclose any information obtained as a result of said demand except as it is essential to the proper discharge of the attorney general's duties. Any such written demand by the attorney general shall be understood to constitute an administrative subpoena for purposes of determining compliance with federal law] a search warrant or a judicially-recognized exception to the warrant requirement.
 - [III. The attorney general may delegate authority under this section to any assistant attorney general. Where the offense under investigation is defined in RSA 318 B or RSA 649-B, the

HB 539 - AS INTRODUCED - Page 2 -

1	attorney general may delegate authority under this section to a county attorney. A county attorney
2	may further delegate authority under this section to any assistant county attorney in the county
3	attorney's office. The county attorney may exercise this authority only in eases within the
4	jurisdiction of that county attorney. The attorney general shall adopt rules, pursuant to RSA 541 A,
5	relative to:
6	(a) Circumstances under which an assistant attorney general, a county-attorney, or an
7	assistant county-attorney may issue such demands to communications common carriers under this
8	section.
9	(b) The procedures for applying for such demands.
10	(c) The records of such demands which shall be kept and maintained.
11	2 Effective Date. This act shall take effect January 1, 2022.

Committee Minutes

SENATE CALENDAR NOTICE Judiciary

Sen Sharon Carson, Chair Sen Bill Gannon, Vice Chair Sen Harold French, Member Sen Rebecca Whitley, Member Sen Jay Kahn, Member

Date: May 6, 2021

HEARINGS

	Tuesday	05/11/2021		
	(Day)	(Date)		
Judiciary		REMOTE	1:00 p.m.	
(Name of	Committee)	(Place)	(Time)	
1:00 p.m. HB 539 relative to records of communications common carriers.			n carriers.	
1:15 p.m.	HB 566	relative to the discussion and disclosure of minutes from a nonpublic session under the right-to-know law.		
1:30 p.m.	HB 232	relative to nonpublic sessions under the right to know law.		
1:45 p.m.	HB 236	creating a statute of limitation on civil actions relative to damage caused by perfluoroalkyl and polyfluoroalkyl substances.		
2:00 p.m.	HB 440	prohibiting the suspension of civil liberties during a state of emergency.		
2:15 p.m.	HB 542	relative to the protection of religious liberty.		

Committee members will receive secure Zoom invitations via email.

Members of the public may attend using the following links:

- 1. Link to Zoom Webinar: https://www.zoom.us/j/92583269385
- 2. To listen via telephone: Dial(for higher quality, dial a number based on your current location):
- 1-301-715-8592, or 1-312-626-6799 or 1-929-205-6099, or 1-253-215-8782, or 1-346-248-7799, or 1-669-900-6833
- 3. Or iPhone one-tap: US: +13017158592,,92583269385# or +13126266799,,92583269385#
- 4. Webinar ID: 925 8326 9385
- 5. To view/listen to this hearing on YouTube, use this link:

https://www.youtube.com/channel/UCjBZdtrjRnQdmg-2MPMiWrA

6. To sign in to speak, register your position on a bill and/or submit testimony, use this link: http://gencourt.state.nh.us/remotecommittee/senate.aspx

The following email will be monitored throughout the meeting by someone who can assist with and alert the committee to any technical issues: remotesenate@leg.state.nh.us or call (603-271-6931).

EXECUTIVE SESSION MAY FOLLOW

Sponsors: HB 539 Rep. Yokela HB 566 Rep. Yokela Rep. Yakubovich HB 232 Rep. Hough Rep. Johnson Rep. Trottier Rep. O'Hara Rep. Baldasaro Rep. Comtois Rep. Binford Rep. Bordes Rep. Sylvia HB 236 Rep. Vail Rep. Mooney Rep. Mullen Rep. M. Murray Rep. Chase Rep. Labranche Rep. Healey Rep. Meuse Sen. Perkins Kwoka HB 440 Rep. Kofalt Rep. Ammon Rep. Nunez Sen. Avard Rep. Homola HB 542 Rep. Ammon Rep. Kofalt Rep. O'Hara

Jennifer Horgan 271-7875

Sharon M Carson Chairman

Senate Judiciary Committee

Jennifer Horgan 271-7875

HB 539, relative to records of communications common carriers.

Hearing Date:

May 11, 2021

Time Opened:

1:08 p.m.

Time Closed:

1:29 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley

and Kahn

Members of the Committee Absent: None

Bill Analysis: This bill requires that customer information in records of communications common carriers only be provided pursuant to a search warrant or a judicially-recognized exception to the warrant requirement.

Sponsors:

Rep. Yokela

Who supports the bill: Rep. Yokela; Alexandra Mennella; Alvin See; Nicholas Thomas

Who opposes the bill: Teresa Rosenberger, NH Telephone Association; Ellen Scarponi, Consolidated Communications

Who is neutral on the bill: Brent Skorup

Summary of testimony presented in support: Representative Yokela

- This bill rolls back the allowance that went into effect in 2001 to allow the Attorney General's Office to get records of communication common carriers without a search warrant.
- Since 2018, NH has had a constitutional amendment that says citizens should be free from governmental intrusion.
- Since 2018, the Attorney General's Office received 48-49 requests of information for this and all except one were sent to local police departments, not the DOJ.
- These common carriers include Facebook, ISPs, phone companies, and more.
- This bill just says that police cannot use the Attorney General's Office to get around the search warrant requirement.
- Senator French asked on page 1, line 11 it says, 'but it not limited to', should it be 'but is not limited to'.

- o Yes.
- Senator Kahn asked what next step would occur after these administrative orders are issued.
 - o Common carriers are required to give the information, as there is no judicial option for them to say no. The bill does not say that the department could not ask for any other type of information the carrier has. The next step for law enforcement, once they get the information, would be to investigate that information to see if a crime was committed.
- Senator Kahn asked after the administrative warrant is provided, is there a judicial warrant that is necessary for the contents to be released.
 - Getting the contents of the person's device would require a search warrant given to the subscriber to get the information from their phone.
 Law enforcement could get a search warrant based off the administrative warrant to search their business or home.
- Senator Carson asked if the local police had to go through a process with the Attorney General's office to get that information.
 - Does not know what the process is.
- Senator Carson stated that on page 2, line 4 it says, 'the Attorney General shall adopt rules pursuant to RSA 541-A relative to'; asked if that process was completed.
 - Does not know exactly what rules were created. Did ask for the records that were kept based on the law. Those records were provided via a Rightto-Know request. They are in compliance as far as he knows.

Amy Peikoff (Parlor)

- The existing law that allows government agencies to obtain information without a warrant is premised on the third-party doctrine.
- The third-party doctrine allows the government to obtain information without a warrant because it was already shared with this third party so a person doesn't have a reasonable expectation of privacy in it.
- The third-party doctrine came about from so-called secret agent cases, where a
 government agent had penetrated a criminal organization and was getting
 information shared with them in the context of that criminal activity: an illegal
 contract.
- In the 1970s the third-party doctrine was transported to ordinary business contracts with phone companies, banks, social media, etc., which are all legal contracts.
- This bill is bringing the law back to where it should have been.
- When people make contracts with companies they are not engaging in criminal enterprise, so the promises made to keep that information private should be respected and require a warrant to induce the violation of that contract.
- This was recognized in small part in Carpenter.
- The trend across the country is to recognize that the third-party doctrine should not be applying in these situations.

Summary of testimony presented in opposition:

Ellen Scarponi (Consolidated Communications)

- The current process has and continues to work.
- Confused as to how this is being taken to be a more comprehensive privacy act than what it is intended to.
- Common carriers must adhere to the Customer Proprietary Network Information regulations at the FCC and cannot divulge information about subscribers.
- The original language of this statute says that the only thing furnished to the Attorney General's Office is the names and addresses of any local and long-distance billing records, the length of service, the types of service, and the telephone number.
- The current law does not talk about any content or anything further than that.
- This language here is 'but is not limited to', but it is definitely limited to those things.
- Senator Kahn asked what is lost with the passage of this bill.
 - o Cannot venture an answer to that. What has come up in conversation is that a 'search warrant' may be defined in law but has not seen where a 'judicially recognized exception' to the warrant requirement is defined. Will adhere to whatever the law is but is concerned about that being put into law without a definition.

Neutral Information Presented:

Brent Skorup (Mercatus Center) (provided written testimony)

- Technology and telecommunications companies today collect large amounts of private and personal data, including geolocation information, home addresses, medical information, and financial information.
- The legislature should consider bringing clarity to the warrantless collection of phone and internet records and, the warrantless purchase of consumer data by state law enforcement.
- Due to the increase in technology, companies have much denser installation of their equipment, meaning they have pretty precise local data on users.
- In 2018, the Supreme Court in Carpenter v. United States held that when information is collected on a single subject over multiple days, that amounts to a search and police need a warrant.
- The court did not expressly include "tower dumps", which is when all information of a certain tower is acquired by police via subpoena.
- The Committee may want to consider to expressly add phone geolocation data, including cell triangulation data and tower dumps, to the examples of protected data to provide more protections to residents and to bring clarity to state law.
- The New Hampshire Law Enforcement Manual currently interprets the law to allow law enforcement acquisition of not only phone records but also internet records without a warrant.

- According to recent news reports, some federal law enforcement agencies are collecting certain private or personal information by purchasing it from commercial data collection companies.
- Is not aware of reports of phone or internet companies selling such information to New Hampshire law enforcement, but news reports indicate it is an increasing tool of law enforcement.
- Current law does not protect against acquisition of private data because it is acquired under the exception.
- The Committee may want to consider requiring a search warrant or other safeguards before using or purchasing such data from phone and internet companies.

jch Date Hearing Report completed: May 19, 2021

Speakers

Senate Remote Testify

Judiciary Committee Testify List for Bill HB539 on 2021-05-11

Support: 4 Oppose: 2 Neutral: 1 Total to Testify: 2

<u>Name</u>	Email Address	Phone	<u>Title</u>	Representing	<u>Position</u>	Testifing	Signed Up
Skorup, Brent	mercatusoutreach@mercatus.gmu.edu	Not Given	A Member of the Public	Myself	Neutral	Yes	5/6/2021 3:50 PM
Yokela, Josh	josh.yokela@leg.state.nh.us	603-722-0501	An Elected Official	Rockingham 33	Support	Yes	5/11/2021 11:49 AM
Scarponi, Ellen	ellenscarp1@gmail.com	603.703.7315	A Lobbyist	Consolidated Communications	Oppose	No	5/7/2021 4:26 PM
Mennella, Alexandra	am88@fastmail.com	646.610.9858	A Member of the Public	Myself	Support	No	5/10/2021 5:13 PM
Rosenberger, Teresa	trosenberger@bernsteinshur.com	Not Given	A Lobbyist	NH Telephone Association	Oppose	No	5/10/2021 1:53 PM
See, Alvin	absee@4Liberty.net	Not Given	A Member of the Public	Myself	Support	No	5/10/2021 10:51 PM
Thomas, Nicholas	nicholas.w.thomas@uconn.edu	Not Given	A Member of the Public	Myself	Support	No	5/11/2021 2:51 AM

Testimony

MERCATUS CENTER George Mason University

TESTIMONY

NEW HAMPSHIRE SHOULD CLARIFY THE LEGALITY OF COLLECTING PHONE AND INTERNET RECORDS

Brent Skorup

Senior Research Fellow, Mercatus Center at George Mason University

New Hampshire Senate, Judiciary Committee

May 11, 2021

Chair Carson, Vice Chair Gannon, and members of the committee, thank you for the opportunity to testify today. My name is Brent Skorup, and I am a senior research fellow at the Mercatus Center at George Mason University. My research focuses on telecommunications and technology law.

Technology and telecommunications companies today collect large amounts of private and personal data, including geolocation information, home address, medical information, and financial information. So it is welcome news that New Hampshire legislators are assessing the state of new technology, privacy, and constitutional principles. Today I offer the following for the committee's consideration. The legislature should consider bringing clarity to

- 1. the warrantless collection of phone and internet records and
- 2. the warrantless purchase of consumer data by state law enforcement.

BRING CLARITY TO COLLECTION OF PHONE AND INTERNET RECORDS

Wireless providers collect information about the approximate location of customers for business and for operational purposes, such as having a mobile call routed to customers' nearest cell towers.² Given the popularity of 5G and Wi-Fi technologies, which have much denser installations than traditional cell towers, cellular providers necessarily collect fairly precise geolocation and proximity information about users' phones.³ The Supreme Court in *Carpenter v. United States* held that law enforcement collection of this cellular phone location information from a wireless carrier amounts to a search.⁴ However, the decision was narrowed to the facts before it, and the decision did not expressly apply to law

^{1.} Generally, this data collection is benign or necessary to provide important commercial services to users, such as sending an Uber driver to the right location, sending money via Venmo, or monitoring blood pressure or glucose levels with a Fitbit. 2. Sarah Jensen, "Are Cell Phone Conversations Stored Somewhere and Are They Retrievable?," Ask an Engineer, November 5, 2013. This information may be accurate from the nearest quarter mile to the nearest few meters, depending on the technology used.

^{3.} Carpenter v. United States, 138 S. Ct. 2206, 2218-19 (2018).

^{4.} According to Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018), "The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment."

enforcement using real-time phone location information from common carriers or "tower dumps" of all users of a certain cell tower.⁵

New Hampshire may wish to expressly add phone geolocation data, including cell triangulation data and tower dumps, to the examples of protected data to provide more protections to residents and to bring clarity to state law. Furthermore, the New Hampshire Law Enforcement Manual currently interprets the law to allow law enforcement acquisition of not only phone records but also internet records without a warrant. Lawmakers may wish to expressly include internet records as an example of protected data to avoid ambiguity about residents' privacy rights.

CLARIFY WHETHER WARRANTLESS PURCHASES OF CONSUMER INFORMATION BY LAW ENFORCEMENT IS PERMITTED

According to recent news reports, some federal law enforcement agencies collect certain private or personal information by purchasing it from commercial data collection companies. I am not aware of reports of phone or internet companies selling such information to New Hampshire law enforcement. However, consumer data is regularly bought and sold for, say, advertising purposes, and these recent news reports suggest that such data are increasingly a tool of law enforcement.

To protect against this practice in the future, New Hampshire may consider requiring a search warrant or other safeguards before using or purchasing such data from phone and internet companies. As written, the current draft does not protect against these acquisitions because this information is acquired via a judicially recognized exception to a warrant requirement—the third-party doctrine.⁸

Thank you for the opportunity to testify today about this important privacy legislation. I look forward to answering any questions.

^{5.} Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018).

^{6.} New Hampshire Department of Justice, Law Enforcement Manual, 2020 ed., November 2020, 120.

^{7.} For examples of several federal agencies purchasing users' information, see Byron Tau and Michelle Hackman, "How the U.S. Government Obtains and Uses Cellphone Location Data," *Wall Street Journal*, February 7, 2020; Joseph Cox, "How the U.S. Military Buys Location Data from Ordinary Apps," *Vice*, November 16, 2020.

^{8.} Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976).

Voting Sheets

Senate Judiciary Committee EXECUTIVE SESSION RECORD

2021-2022 Session

Bill#HB339
Vote: 5 - 🔾
Yes No
2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2
Vote: 5-
Yes No
Vote:
Yes No
31

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE FOR THE CONSENT CALENDAR

Tuesday, May 25, 2021

THE COMMITTEE ON Judiciary

to which was referred HB 539

AN ACT

relative to records of communications common carriers.

Having considered the same, the committee recommends that the Bill

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 5-0

Senator Bill Gannon For the Committee

This bill would require that customer information in records of communications common carriers only be provided pursuant to a search warrant or a judicially-recognized exception to the warrant requirement. Common carriers already must adhere to the Customer Proprietary Network Information regulations at the FCC and cannot divulge information about subscribers without the proper judicial requirements. This bill would implement a significant amount of change and there is a lack of clarity regarding the impact of this on our existing emergency procedures. Therefore, the Committee asks for support of the motion of Inexpedient to Legislate.

Jennifer Horgan 271-7875

FOR THE CONSENT CALENDAR

JUDICIARY

HB 539, relative to records of communications common carriers. Inexpedient to Legislate, Vote 5-0. Senator Bill Gannon for the committee.

This bill would require that customer information in records of communications common carriers only be provided pursuant to a search warrant or a judicially-recognized exception to the warrant requirement. Common carriers already must adhere to the Customer Proprietary Network Information regulations at the FCC and cannot divulge information about subscribers without the proper judicial requirements. This bill would implement a significant amount of change and there is a lack of clarity regarding the impact of this on our existing emergency procedures. Therefore, the Committee asks for support of the motion of Inexpedient to Legislate.

General Court of New Hampshire - Bill Status System

Docket of HB539

Docket Abbreviations

Bill Title: relative to records of communications common carriers.

Official Docket of HB539.:

Date	Body	Description
1/12/2021	Н	Introduced (in recess of) 01/06/2021 and referred to Criminal Justice and Public Safety HJ 2 P. 52
3/10/2021	Н	Public Hearing: 03/10/2021 09:00 am Members of the public may attend using the following link: To join the webinar: https://www.zoom.us/j/92387218591 / Executive session on pending legislation may be held throughout the day (time permitting) from the time the committee is initially convened.
3/16/2021	Н	Majority Committee Report: Ought to Pass (Vote 13-8; RC) HC 18 P. 36
3/16/2021	н	Minority Committee Report: Inexpedient to Legislate
4/8/2021	H	Ought to Pass: MA VV 04/08/2021 HJ 6 P. 4
4/13/2021	S	Introduced 04/08/2021 and Referred to Judiciary; SJ 12
5/6/2021	S	Remote Hearing: 05/11/2021, 01:00 pm; Links to join the hearing can be found in the Senate Calendar; SC 23
5/25/2021	S	Committee Report: Inexpedient to Legislate; Vote 5-0; CC; 05/27/2021; SC 25A
5/27/2021	S	Inexpedient to Legislate, MA, VV === BILL KILLED ===; 05/27/2021; SJ 17

NH House	NH Senate	•

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: HBS39	Senate Committee: Juc
Please include all documents in the order listed beloincluded with an "X" beside	w and indicate the documents which have been
Final docket found on Bill Status	
Bill Hearing Documents: {Legislative Aides}	
Bill version as it came to the committee	
All Calendar Notices	
Hearing Sign-up sheet(s)	
Y Prepared testimony, presentations, & other	submissions handed in at the public hearing
X Hearing Report	
Revised/Amended Fiscal Notes provided by	the Senate Clerk's Office
Committee Action Documents: {Legislative Ai	<u>les}</u>
All amendments considered in committee (including	those not adopted):
amendment # ame	endment #
amendment # ame	endment #
X Executive Session Sheet	· .
∠ Committee Report	
Floor Action Documents: {Clerk's Office}	
All floor amendments considered by the body during	g session (only if they are offered to the senate):
amendment # am	endment #
amendment # am	endment #
Post Floor Action: (if applicable) {Clerk's Office	ee}
	off by all members. Include any new language proposed
Enrolled Bill Amendment(s)	•
Governor's Veto Message	
All available versions of the bill: {Clerk's Office	<u>e}</u>
as amended by the senate	as amended by the house
final version	
Completed Committee Report File Delivered t	o the Senate Clerk's Office By:
Jenni fer Horga Committee Aide	8/16/21 Date
Senate Clerk's Office	
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