

Email Privacy Act Set for Passage at House Judiciary Markup

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The House Judiciary Committee is likely to approve a popular bill that would modernize email privacy laws, aides and others said in interviews this week. Negotiations between law enforcement, other agencies and the bill's congressional backers largely reached accord, but it is still unclear how many amendments to the Email Privacy Act (HR-699) could be offered at the panel's markup Wednesday.

House Judiciary Chairman Bob Goodlatte, R-Va., will offer a manager's amendment at the markup that "preserves the core goal" of creating a uniform standard for law enforcement agencies to get a warrant when seeking the content of electronic communications in criminal investigations, his office said in an email Tuesday. A spokesman for bill sponsor Rep. Kevin Yoder, R-Kan., whose office has been in negotiations with Goodlatte, said in an email "we're confident in where the negotiations have taken us and we look forward to the markup tomorrow morning."

The manager's amendment also keeps in place a bill provision and current law allowing law enforcement officials to still request information from communications providers in public safety emergencies, "but compliance with these requests will be voluntary," Goodlatte's office said. The [amendment](#) removes what it called a "burdensome and potentially dangerous provision" in HR-699 that would have required law enforcement officials to notify targets of their investigations when they issue warrants to communications providers.

"The substitute amendment does allow providers to notify customers of email disclosures pursuant to a warrant, or records disclosures pursuant to a court order or subpoena, unless such notice is delayed by court order in appropriate circumstances," his office said.

Shifting the burden from the provider to a law enforcement agency was a "big deal" during bill negotiations Friday, said an industry official. The [Yoder/Polis bill](#) "was going to make it a prima facie responsibility of the government to do so," the source said. The provision in the federal bill is different from the California Electronic Communications Privacy Act (CalECPA) -- considered a model for other states -- that took effect Jan.

1. That state law requires a government entity to notify the target of a warrant at the same time it's executed unless notifying the target could adversely affect the investigation, meaning an individual could leave the country or the evidence could be destroyed (see [1601040031](#)).

HR-699, co-sponsored by Rep. Jared Polis, D-Colo., attracted more than 313 co-sponsors (see [1512010054](#)). The bill would codify long-sought changes to the 1986 ECPA, which many technology companies and privacy and civil liberties advocates have said is outdated. ECPA mandates that law enforcement agencies get a search warrant based on probable cause and signed by a judge for an individual's emails, text messages or other electronic content that's up to 180 days old and stored by communications service providers. However, ECPA allows government agencies to use an administrative subpoena, which is a lower legal standard, to obtain content that's older than 180 days.

Many supporters of HR-699 said those ECPA provisions were of a bygone era when computers had very little storage capacity and very slow processing speeds. "This should've been done decades ago," privacy consultant Tim Sparapani told us Tuesday. Sparapani said consumers, privacy advocates and companies are "very glad" the bill is progressing and that Goodlatte's office has worked through challenges. "Close observers think tomorrow's markup will now be essentially perfunctory and it should be," he said. "There is nothing that should hold up this bill anymore."

Mark Jaycox, Electronic Frontier Foundation's civil liberties legislative lead, said in a [blog post](#) Tuesday his organization supports Goodlatte's manager's amendment, which "makes both technical and substantive changes to ECPA, some good and some bad. Unfortunately, the government no longer has to provide notice to users that it is seeking their online data from their service providers under Rep. Goodlatte's amendment. This is a dangerous shift in current law; however, we think it's acceptable given that companies may continue to provide notice to users of government requests."

Sparapani said he hopes the "logjam breaking in the House" would spur the Senate to act accordingly. Sen. Mike Lee, R-Utah, sponsored the ECPA Amendments Act ([S-356](#)), which is co-sponsored by Sen. Pat Leahy, D-Vt. No action has been taken on that bill since a September hearing.

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