

77-23b-5 Backup copy of communications -- When required of provider -- Court order -- Procedures.

- (1)
 - (a) A governmental entity acting under Subsection 77-23b-4(2)(b) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of the subpoena or court order, the service provider shall create the backup as soon as practicable, consistent with its regular business practices. The provider shall also confirm to the governmental entity that the backup copy has been made. The backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.
 - (b) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of confirmation, unless the notice is delayed under Subsection 77-23b-6(1).
 - (c) The service provider may not destroy the backup copy until the later of:
 - (i) the delivery of the information; or
 - (ii) the resolution of any proceedings, including appeals of any proceeding, concerning the government's subpoena or court order.
 - (d) The service provider shall release the backup copy to the requesting governmental entity no sooner than 14 days after the governmental entity's notice to the subscriber or customer, if the service provider:
 - (i) has not received notice from the subscriber or customer that the subscriber or customer has challenged the governmental entity's request; and
 - (ii) has not initiated proceedings to challenge the request of the governmental entity.
 - (e) A governmental entity may seek to require the creation of a backup copy under Subsection (1)(a) if in its sole discretion the entity determines that there is reason to believe that notification under Section 77-23b-4 of the existence of the subpoena or court order may result in destruction of or tampering with evidence. This determination is not subject to challenge by the subscriber, customer, or service provider.
- (2)
 - (a) Within 14 days after notice by the governmental entity to the subscriber or customer under Subsection (1)(b), the subscriber or customer may file a motion to quash the subpoena or vacate the court order, with copies served upon the governmental entity, and with written notice of the challenge to the service provider. A motion to vacate a court order shall be filed in the court that issues the order. A motion to quash a subpoena shall be filed in the appropriate district court. The motion or application shall contain an affidavit or sworn statement:
 - (i) that the applicant is a customer or subscriber to the service from which the contents of electronic communications maintained for him have been sought; and
 - (ii) that the applicant's reason for believing the records sought are not relevant to a legitimate law enforcement inquiry or that there has not been substantial compliance with the provisions of this chapter in some other respect.
 - (b) Service shall be made under this section upon a governmental entity by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice the customer received under this chapter. For purposes of this subsection, "deliver" has the same meaning as under the Utah Rules of Criminal Procedure.
 - (c) If the court finds that the customer has complied with Subsections (2)(a) and (b), the court shall order the governmental entity to file a sworn response, that may be filed in camera if the governmental entity includes in its response the reasons making in camera review

appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct additional proceedings as it considers appropriate. All proceedings shall be completed, and the motion or application decided, as soon as practicable after the filing of the governmental entity's response.

- (d) If the court finds that the applicant is not the subscriber or customer for whom the communications sought by the governmental entity are maintained, or that there is a reason to believe that the law enforcement inquiry is legitimate and that the communications sought are relevant to that inquiry, it shall deny the motion or application and order the process enforced. If the court finds that the applicant is the subscriber or customer for whom the communications sought by the governmental entity are maintained, and that there is no reason to believe that the communications sought are relevant to a legitimate law enforcement inquiry, or that there has not been substantial compliance with this chapter, it shall order the process quashed.
- (e) A court order denying a motion or application under this section is not considered a final order, and no interlocutory appeal may be taken from it by the customer or subscriber.

Enacted by Chapter 251, 1988 General Session