

# CURRENT LEGAL STANDARDS FOR ACCESS TO PAPERS, RECORDS, AND COMMUNICATIONS

## What Information Can the Government Get About You, and How Can They Get It?

CENTER FOR  
**DEMOCRACY**  
&  
**TECHNOLOGY**

VERSION 3.0, AUGUST 2004  
THE CENTER FOR DEMOCRACY & TECHNOLOGY  
1634 EYE STREET NW, SUITE 1100 • WASHINGTON, DC 20006  
TELEPHONE 202.637.9800 • FACSIMILE 202.637.0968 • INFO@CDT.ORG • WWW.CDT.ORG

**GREEN** = STRONG PRIVACY PROTECTION  
**AMBER** = MODEST OR INTERMEDIATE PRIVACY PROTECTION  
**RED** = LITTLE OR NO PRIVACY PROTECTION

For real-time interception or immediate seizure, does government need a warrant issued on a HIGH PROBABLE CAUSE STANDARD?

Can government use a subpoena or court order under a LOWER STANDARD?

At time of search / subpoena, must government give the customer / subscriber to whom the information pertains NOTICE?

What are the standards for FOREIGN INTELLIGENCE?

		For real-time interception or immediate seizure, does government need a warrant issued on a HIGH PROBABLE CAUSE STANDARD?	Can government use a subpoena or court order under a LOWER STANDARD?	At time of search / subpoena, must government give the customer / subscriber to whom the information pertains NOTICE?	What are the standards for FOREIGN INTELLIGENCE?
<b>RECORDS IN YOUR POSSESSION</b>	<b>PAPERS</b> Papers in your home or office (record subject = record holder)	YES 4th Amendment	YES Subpoena	YES "Sneak and peek" under USA PATRIOT Act § 213, codified at 18 USC § 3103a	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1824-25
	<b>DATA</b> Electronic data on your hard drive or disks at home or office (record subject = record holder)	YES 4th Amendment	YES Subpoena	YES "Sneak and peek" under USA PATRIOT Act § 213, codified at 18 USC § 3103a	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1824-25
<b>COMMUNICATIONS: REAL-TIME</b>	<b>TELEPHONE / VOICE</b> Real-time interception of face-to-face conversations, phone calls, faxes	YES 18 USC § 2518 Various exceptions: 18 USC §§ 2510(5)(a), 2511(2)-(3)	NO	NO Always delayed 18 USC § 2518	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1805-06
	<b>EMAIL / INTERNET</b> Real-time interception of electronic communications in transit (grabbing bits off the wire)	YES 18 USC § 2518 Various exceptions: 18 USC §§ 2510(5)(a), 2511(2)-(3)	NO	NO Always delayed 18 USC § 2518	Probable cause-foreign power or agent of foreign power. No notice. 50 USC §§ 1805-06
	<b>TELEPHONE / VOICE (NON-CONTENT)</b> Real-time interception of dialed numbers by pen register / trap & trace device	NO	YES, Court order 18 USC §§ 3122-23	NO Not even delayed 18 USC § 3123(d)(2)	Relevance standard. No notice. 50 USC §§ 1842, 1845
	<b>EMAIL / INTERNET (NON-CONTENT)</b> Real-time interception of routing information of electronic communications in transit by pen register / trap & trace device	NO	YES, Court order 18 USC §§ 3122-23 USA PATRIOT Act § 216 confirmed application of pen/trap to Internet	NO Not even delayed 18 USC § 3123(d)(2)	Relevance standard. No notice. 50 USC §§ 1842, 1845
<b>INFORMATION STORED BY 3RD PARTY: ELECTRONIC COMMUNICATIONS</b>	<b>EMAIL, UNOPENED, &lt;= 180 DAYS OLD</b> Unopened email in storage for 180 days or less with provider of service to the public	YES 18 USC § 2703(a) Provider can voluntarily disclose in emergencies 18 USC § 2702	NO	NO 18 USC § 2703(a)	FISA is unclear. If it is considered an interception, probable cause-foreign power or agent. No notice. 50 USC §§ 1805-06
	<b>EMAIL, OPENED</b> Opened email held by provider of service to the public	NO 18 USC § 2703(a)-(c)	YES, Subpoena or voluntary disclosure in emerg. 18 USC §§ 2702, 2703(b), 2703(d)	NO if warrant; otherwise, can be delayed 18 USC §§ 2703(b), 2705	If it is a record, "sought for" std. Notice prohibited. 50 USC § 1861(a), (d)
	<b>EMAIL, UNOPENED, &gt; 180 DAYS OLD</b> Unopened email in storage for more than 180 days with provider of service to the public	NO 18 USC § 2703(a)-(c)	YES, Subpoena or voluntary disclosure in emerg. 18 USC §§ 2702, 2703(b), 2703(d)	NO if warrant; otherwise, can be delayed 18 USC §§ 2703(b), 2705	"Relevant to" & "sought for" stds. Notice prohibited. 18 USC § 2709(b), (c) 50 USC § 1861(a), (d)
	<b>SUBSCRIBER INFORMATION</b> Records identifying subscribers and telephone toll records	NO 18 USC § 2703(c)(2)	YES, Subpoena or voluntary disclosure in emerg. 18 USC §§ 2702, 2703(c)(2)	NO 18 USC § 2703(c)(3)	"Relevant to" & "sought for" stds. Notice prohibited. 18 USC § 2709(b), (c) 50 USC § 1861(a), (d)
	<b>EMAIL / INTERNET LOGS</b> Internet transactional records (e.g., to/from lines of email headers)	NO 18 USC § 2703(c)(1)	YES, § 2703(d) order or voluntary disclosure in emerg. 18 USC §§ 2702, 2703(c)(1), 2703(d)	NO 18 USC § 2703(c)(3)	"Relevant to" & "sought for" stds. Notice prohibited. 18 USC § 2709(b), (c) 50 USC § 1861(a), (d)
	<b>CABLE</b> Cable television subscription information	YES 18 USC § 2518 Clear & convincing 47 USC § 551(h)(1)	Where cable company provides Internet access, see 18 USC § 2703	YES 47 USC § 551(h) Where cable company provides Internet access, see 18 USC § 2703	"Sought for" standard. Notice prohibited. 50 USC § 1861(a), (d)
<b>INFORMATION STORED BY 3RD PARTY: OTHER RECORDS</b>	<b>FINANCIAL</b> Records in possession of bank or other financial institution	NO 12 USC §§ 3405-06	YES, Subpoena 12 USC §§ 3405, 3407-08	NO Can be delayed 12 USC § 3409 15 USC § 1681g	"Relevant to" & "sought for" stds. Notice prohibited. 12 USC § 3414(a)(5)(A) 15 USC §§ 1681u, 1681v 50 USC § 1861(a), (d)
	<b>CREDIT HISTORY</b>	NO	YES, Grand jury subpoena 15 USC § 1681b(a)(1)	NO Prohibited 20 USC § 1232g(b)(1)(J)(i), 1232g(j); 34 CFR 99.31	"Relevant to" & "sought for" stds. Notice prohibited. 20 USC § 1232g(j) 50 USC § 1861(a), (d)
	<b>EDUCATION</b> Educational records	NO	YES 20 USC §§ 1232g(b)(1)(J)(i), 1232g(j)(2), 9007(c)	NO Prohibited 20 USC § 1232g(b)(1)(J)(i), 1232g(j); 34 CFR 99.31	"Relevant to" & "sought for" stds. Notice prohibited. 20 USC § 1232g(j) 50 USC § 1861(a), (d)
	<b>OTHER RECORDS</b> Store purchases, library, travel, and other records not protected by a specific privacy law	NO Video rental & sale records require probable cause & notice 18 USC § 2710(b)	YES Plus voluntary disclosure	NO	"Sought for" standard. Notice prohibited. 50 USC § 1861(a), (d)
	<b>INTERNATIONAL</b> Voice, email, or data intercepted in transit or seized from storage medium overseas	Title III & the 4th Amendment warrant clause have no extraterritorial effect	N/A	NO	FISA, NSLs have no extraterritorial effect