STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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August 19, 2021

The Honorable William R. Rehm
New Mexico State Representative
Box 14768
Albuquerque, New Mexico 87191
Email: Bill.rehm@nmlegis.gov

Re: Opinion Request – Electronic Communications Privacy Act

Dear Representative Rehm,

You have requested our opinion as to the meaning of the Electronic Communications Privacy Act (the "Act"), NMSA 1978, Sections 10-16F-1 through -6 (2019, as amended through 2020). In particular, you asked for our interpretation of the words and phrases "sought," "number of times," "other electronic communication information," and "number of records" as used in the Act's reporting requirements. As explained in greater detail below, we reach the following conclusions based on the language of the Act and its larger statutory context:

1. The Act's requirement that each government entity must report the "number of times" it "sought" electronic information refers to all occasions in which the government entity either obtained or attempted to obtain electronic information through a wiretap order, search warrant, emergency request, or other manner authorized by the Act. This includes occasions in which the government entity requested but was denied a warrant, wiretap order, or emergency authorization by a court.

2. The phrase "other electronic communication information" in Section 10-16F-6(A)(2) means any "information about an electronic communication or the use of an electronic communication service" other than the content of an electronic communication or the location of the sender or recipient. Section 10-16F-2(D).

3. The best interpretation of the phrase "number of records" is the number of electronic files originally obtained by the government entity containing one of the four types of information specified by Section 10-16F-6(A)(2).

Background

Originally enacted in 2019,[1] the Electronic Communications Privacy Act imposes restrictions on governmental access to "electronic communications information" and "electronic device information." Section 10-16F-3(A). In particular, government entities may not "compel or incentivize the production of or access to electronic communication information from a service provider" unless authorized by the Act. Section 10-16F-3(A)(1). Similarly, only when permitted by the Act may government entities "compel the production of or access to electronic device information from a person other than the device's authorized possessor" or access such information through "physical interaction or electronic communication with the electronic device." Section 10-16F-3(A)(3). As evidenced by the title of the Act itself and these restrictive provisions, the purpose of the Act is clearly to protect the individual privacy interests associated with electronic devices and electronic communications.

The Act specifies how government entities may access electronic communications information or electronic device information. It is most restrictive with respect to government entities compelling "the production of or access to electronic communication information from a service provider" or "the production of or access to electronic device information from a person other than the authorized possessor of the device," requiring a warrant or wiretap order in either situation. Section 10-16F-3(B). Similarly, where a government entity seeks to "access electronic device information by means of physical interaction or electronic communication with the device," the Act requires a warrant, wiretap order, consent from the device's owner or authorized possessor, or more unique circumstances involving a "lost, stolen or abandoned" device or emergency. Section 10-16F-3(C). The Act also permits a government entity to bypass these processes and access electronic communications information or electronic device information immediately "because of an emergency that involves danger of death or serious physical injury to a natural person and that requires access to the electronic information without delay." Section 10-16F-3(K).

Whenever obtaining electronic information pursuant to a warrant or an emergency, government entities are also subject to the Act's notification requirements. In either situation, the Act specifically requires a government entity to notify "the identified targets of the warrant or emergency request" that "information about the recipient has been compelled or requested." Section 10-16F-4(A)(1). This notification must also state "with reasonable specificity the nature of the government investigation under which the information is sought." *Id*. The government entity must deliver or serve this notification to the targeted person either "contemporaneously with the execution of a warrant" or, "in the case of an emergency, within three days after obtaining the electronic information," Section 10-16F-4(A)(2), although a court may permit a delayed notification where "there is reason to believe that notification may have an adverse result." Section 10-16F-4(B)(1). The government entity also must provide notification to the Attorney General when "there is no identified target of a warrant or emergency request at the time of the warrant's or request's issuance." Section 10-16F-4(D).

Through its extensive reporting and publication requirements, the Act also appears to be intended to promote transparency with respect to governmental access to electronic information. Most importantly, any government entity that "obtains electronic communication information under the

[1] *See* 2019 N.M. Laws, ch. 39, §§ 1-6.

Electronic Communications Privacy Act" is required to report its activities under the Act to the Attorney General by February 1 each year. Section 10-16F-6(A). This annual report must contain the following statistical information:

> (1) the number of times electronic information was sought or obtained under the Electronic Communications Privacy Act;
>
> (2) the number of times each of the following were sought and, for each, the number of records obtained:
>
> (a) electronic communication content;
>
> (b) location information;
>
> (c) electronic device information, excluding location information; and
>
> (d) other electronic communication information; and
>
> (3) for each type of information listed in Paragraph (2) of this subsection:
>
> (a) the number of times that type of information was sought or obtained under: 1) a wiretap order issued under the Electronic Communications Privacy Act; 2) a search warrant issued under the Electronic Communications Privacy Act; and 3) an emergency request as provided in Subsection K of Section 10-16F-3 NMSA 1978;
>
> (b) the number of instances in which information sought or obtained did not specify a target natural person; and
>
> (c) the number of times notice to targeted persons was delayed.

Section 10-16F-6(A). In turn, the Attorney General is responsible for aggregating all of this statistical information from the annual reports and posting a summary of the data online on or before April 1 of each year.[2] Section 10-16F-6(B).

As with any statute, the meaning of the Act must be determined through the basic principles of statutory interpretation. Fundamentally, we begin by recognizing that the purpose of statutory interpretation is to "determine and effectuate the intent of the legislature." *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234. "The words of a statute, including terms not statutorily defined, should be given their ordinary meaning absent clear and express legislative intention to the contrary." *Id.* This "ordinary meaning" may often be gleamed from simple dictionary definitions. *See Best v. Marino*, 2017-NMCA-073, ¶ 38 ("Appellate courts often refer to dictionary definitions to ascertain the ordinary meaning of statutory language."). Although courts generally will refrain from further analysis where the literal meaning of a statute is clear, it is well-settled that they "must look beyond the four corners of the statute" in cases where "the literal meaning leads to conclusions that are unjust or nonsensical." *Inv. Co. of the Sw. v. Reese*, 1994-NMSC-051, ¶ 13, 117 N.M. 655. In addition, individual statutory provisions must be interpreted "as a whole so that each provision may be considered in relation to every other part." *New Mexico Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 8, 106 N.M. 73. *See also Giant Cab, Inc. v. CT Towing, Inc.*, 2019-NMCA-072, ¶

[2] Where a government entity notifies the Attorney General of its access to electronic information because "there is no identified target of a warrant or emergency request at the time of the warrant's or request's issuance," the Attorney General must post this report online as well. Section 10-16F-4(D).

7 ("We read provisions in their entirety and construe them in relation with all others so as to produce a harmonious whole.").

Preliminary Terms

The first question we must address is the meaning of the word "sought" as used in the Act's reporting requirements. As mentioned previously, Section 10-16F-6 requires each government entity to report, among other data, "the number of times electronic information was sought or obtained under the Electronic Communications Privacy Act." Section 10-16F-6(A). The word "sought" is not particularly ambiguous in its ordinary meaning, as it is customarily defined as "to ask for," "to try to acquire or gain," or "to make an attempt." *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/sought (last visited Aug. 9, 2021). In the context of Section 10-16F-6, though, the word is somewhat more ambiguous because the Act contemplates government entities accessing electronic information through wiretap orders (which involve collecting information over a period of time rather than all at once).[3] In addition, it is at least somewhat unclear whether the Legislature desired each government entity to include in its annual data reporting those instances in which it was unsuccessful in requesting a warrant or wiretap order from a court.

In light of other statutory provisions, we think the word "sought" should be interpreted broadly to include all instances in which a government entity attempted to access electronic information in the manner set forth by the Act. With respect to wiretaps, each particular wiretap order must specify "the period of time during which such interception is authorized," NMSA 1978, Section 30-12-5(A)(5) (1973), and logically this entire period of time should constitute a singular "time" in which the government entity "sought" electronic information pursuant to the Act. Section 10-16F-6(A)(1). Similarly, unsuccessful attempts to request a warrant or wiretap order from a court should also constitute "times" in which the government entity "sought" electronic information. The Act uses the word "seeks" in Section 10-16F-4(B) in the context of a government entity requesting a warrant that has not yet been granted, so even if such a request were denied by the court, this would still have been an instance where the government entity "sought" electronic information.

By contrast, the phrase "number of times" is not otherwise ambiguous or vague as used in the Act. Although the Act does not define this term, its ordinary meaning is clear, as it is the equivalent of the phrases "number of instances" or "number of occasions." In the context of the Act and its reporting requirements, the Legislature clearly intended to require government entities to report the number of occasions in which they either obtained or attempted to obtain electronic information. As is all but stated expressly by Section 10-16F-6(A)(3)(a), each warrant, wiretap, or emergency request constitutes its own "time" for the purposes of annual data reporting.

Your request also asks for our interpretation of the phrase "other electronic communication information," as used in the Act's reporting requirements. Specifically, Section 10-16F-6(A)(2) requires each government entity to report the number of times it sought or obtained electronic communication content, location information, "electronic device information, excluding location information," and "other electronic communication information." This latter phrase does not

[3] *See* NMSA 1978, § 30-12-6 (providing that no wiretap order may be valid for "longer than thirty days").

appear to be ambiguous because the Act contains a specific definition for the phrase "electronic communication information." It reads:

> "electronic communication information":
>
> (1) means information about an electronic communication or the use of an electronic communication service, including:
>
> (a) the contents, sender, recipients, format or the sender's or recipients' precise or approximate location at any point during the communication;
>
> (b) the time or date the communication was created, sent or received; and
>
> (c) any information, including an internet protocol address, pertaining to a person or device participating in the communication; and
>
> (2) excludes subscriber information;

Section 10-16F-2(D). In light of this definition, the phrase "other electronic communication information" plainly means any electronic communications information other than the content of an electronic communication or the location of the sender or recipient. This might include the time or date of the communication, an internet protocol address, or the identity of the sender or recipient.

"Number of Records"

The Act does not define the word "record," and it is not apparent what the Act means by "the number of records" in its reporting requirements. As previously noted, the Act requires each government entity to report to the Attorney General "the number of times each of the following were sought and, for each, the *number of records* obtained: electronic communication content; location information; electronic device information, excluding location information; and other electronic communication information." Section 10-16F-6(A)(2) (emphasis added). While this provision requires government entities to calculate "the number of records" for each of four categories of statistical information ("location information," for example), information of the type sought generally is not a document or other type of readily identifiable record, rendering the meaning of the phrase "number of records" unclear.

The Act uses the word "record" in only one other provision, Section 10-16F-4, where it requires a government entity, after obtaining a court order to delay notification to an identified target of a warrant, to provide the identified target either "a copy of all electronic information obtained" or a summary stating "the number and types of records disclosed." Section 10-16F-4(C)(2). As both of these provisions require government entities to calculate the number of records obtained pursuant to the Act, you have asked our Office "whether records should be counted by whole document, by data, by page or by some other method."

The ordinary meaning of the word "record" may be determined from its dictionary definition, which is "a collection of related items of information (as in a database) treated as a unit." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/record (last visited Aug. 9, 2021). This dictionary definition is consistent with a variety of other New Mexico statutes that define "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." NMSA 1978, § 46-9A-2(H)

(2009). A significant number of statutes, addressing a wide array of subject matters, utilize this definition.[4] In addition, the term "public record" appears to be consistently defined in other statutes as referring to entire documents rather than individual pages or merely information contained within a document. *See* NMSA 1978, § 14-2-6(G) (1993, as amended through 2018) (defining "public records" for the purposes of the Inspection of Public Records Act as "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics"), NMSA 1978, § 14-3-2(G) (1959, as amended through 2005), and NMSA 1978, § 14-5-2(B) (1973). Together, all of these definitions demonstrate that mere information is not itself a record but instead may become a part of a record when written or stored in a document or other tangible medium. The word "record," then, means an entire document rather than some smaller component.

Calculating the "number of records" is nevertheless challenging in the context of modern electronic communications. While a single text message or email is generally understood to constitute a record unto itself, electronic devices and service providers frequently group together text messages and emails and save them as larger files containing multiple messages. In a series of text messages, then, calculating the "number of records" could mean either the number of text messages or the number of saved electronic files, potentially two different statistical figures. Section 10-16F-6(A)(2). In addition, a service provider also might respond to a warrant or other court order by providing the government entity a large number of files contained within a single file folder, providing a third potential method of calculation. Finally, we understand that service providers are inconsistent in their method of saving and producing electronic information, using different file formats and a variety of specialized software programs. Responding to warrants seeking similar data or information, two service providers may produce the information in entirely different forms. All this is to say that, in the context of modern electronic communications, there are a number of ways to calculate the "number of records."

The express language of the Act's reporting requirements, however, does appear to provide some indication of the Legislature's intent. Most importantly, Section 10-16F-6(A)(2) does not require government entities to report the number of electronic communications obtained through the Act, instead literally requiring them to report the number of records containing certain information (electronic communication content, location information, etc.). This would suggest that, where multiple electronic communications are saved within a single electronic file, the government entity should report the single file as a record rather than the total number of electronic communications. In addition, it is notable that the Act requires government entities to report "the number of times electronic information was … obtained" in Section 10-16F-6(A)(1) while separately requiring them to report the "number of records obtained" in Section 10-16F-6(A)(2). This alone would seem to dispel the notion that a government entity may simply report its total number of productions as its "number of records."

[4] *See, e.g.*, NMSA 1978, § 14-14A-2(K) (2021) (defining the term "record" as used in the Revised Uniform Law on Notarial Acts), NMSA 1978, § 14-16-2(13) (2001) (the Uniform Electronic Transactions Act), NMSA 1978, § 24-14B-3(M) (2009) (the Electronic Medical Records Act), NMSA 1978, § 44-10-2(C) (2009) (the Uniform Unsworn Foreign Declarations Act), NMSA 1978, § 40-10A-110(e) (2001) (the Uniform Child-Custody Jurisdiction and Enforcement Act), NMSA 1978, § 40-10C-2(G) (2013, as amended through 2014) (the Uniform Child Abduction Prevention Act), NMSA 1978, § 42-5A-2(H) (2017, as amended through 2018) (the Uniform Partition of Heirs Property Act), and § 46-9A-2(H) (the Uniform Prudent Management of Institutional Funds Act).

In the absence of a clear statutory definition of the word "record" in the Act, the best interpretation of the phrase "number of records" is the number of electronic files originally obtained by the government entity containing the requisite information. As opposed to a record-within-a-record or a file folder, an individual electronic file is more clearly "a collection of related items of information … treated as a unit." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/record (last visited Aug. 9, 2021). Since the Act does not literally require a government entity to report the number of electronic communications received, reporting the number of electronic files obtained appears to be most consistent with the Legislature's intent.

Although we believe it best for the Legislature to revisit the Act's reporting requirements to provide for greater clarity in this area, we trust that this opinion will bring greater consistency in annual reports submitted pursuant to Section 10-16F-6. Government entities subject to the Act should include in their annual reports the number of electronic files which they originally obtained containing each of the four categories of statistical information in Section 10-16F-6(A)(2). Each electronic file containing this information should be included in this statistical figure.

Conclusion

The meaning of the words and phrases "sought," "number of times," "other electronic communication information," and "number of records" as used in the Act's reporting requirements may be determined by considering their ordinary meaning and statutory context. Most importantly, the Act's provision stating that each government entity must report the "number of times" it "sought" electronic information applies to all occasions in which the government entity either obtained or attempted to obtain electronic information through a wiretap order, search warrant, emergency request, or other manner authorized by the Act. Based on the definition of "electronic communication information," the phrase "other electronic communication information" means any "information about an electronic communication or the use of an electronic communication service" other than the content of an electronic communication or the location of the sender or recipient. Section 10-16F-2(D). Finally, the phrase "number of records" should be interpreted as the number of electronic files originally obtained by the government entity containing one of the four types of information specified by Section 10-16F-6(A)(2), at least until the statute may be amended to provide for greater clarity.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,

John F. Kreienkamp
Assistant Attorney General