

118TH CONGRESS
1ST SESSION

H. R. 3089

IN THE SENATE OF THE UNITED STATES

MAY 16, 2023

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 18, United States Code, to modify delayed
notice requirements, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “NDO Fairness Act”.

3 **SEC. 2. PRECLUSION OF NOTICE.**

4 Section 2705(b) of title 18, United States Code, is
5 amended to read as follows:

6 “(b) PRECLUSION OF NOTICE.—

7 “(1) APPLICATION.—

8 “(A) IN GENERAL.—A governmental entity
9 that is seeking a warrant, order, or subpoena
10 under section 2703, when it is not required to
11 notify the customer or subscriber, or to the ex-
12 tent that it may delay such notice pursuant to
13 subsection (a), may apply to a court for an
14 order, subject to paragraph (6), directing a pro-
15 vider of electronic communications service or re-
16 mote computing service to which a warrant,
17 order, or subpoena under section 2703 is di-
18 rected not to notify any other person of the ex-
19 istence of the warrant, order, or subpoena.

20 “(B) LENGTH.—An order granted under
21 subparagraph (A) shall be in effect for a period
22 of not more than 90 days.

23 “(C) OTHER REQUIREMENTS.—

24 “(i) IN GENERAL.—A application for
25 an order under subparagraph (A) shall
26 state, to the best of the applicant’s knowl-

1 edge, whether the named customer or sub-
2 scribe whose information is sought by the
3 warrant, order, or subpoena under section
4 2703—

5 “(I) is aware of the warrant,
6 order, subpoena, or underlying inves-
7 tigation; and

8 “(II) is suspected of involvement
9 in the commission of the crime under
10 investigation.

11 “(ii) ORDERS.—An order granted
12 under this paragraph may not direct, or
13 otherwise require, a provider of electronic
14 communications service or remote com-
15 puting service to provide notification of the
16 expiration of order to the court or govern-
17 ment entity that sought the order.

18 “(2) DETERMINATION.—

19 “(A) IN GENERAL.—The court may not
20 grant a request for an order made under para-
21 graph (1), or an extension of such order re-
22 quested by the governmental entity pursuant to
23 paragraph (3), unless—

24 “(i) the court issues a written deter-
25 mination, based on specific and articulable

1 facts, and including written findings of
2 fact and conclusions of law, that it is likely
3 that not granting the request will result
4 in—

5 “(I) endangering the life or phys-
6 ical safety of an individual;

7 “(II) flight from prosecution;

8 “(III) destruction of or tam-
9 pering with evidence;

10 “(IV) intimidation of potential
11 witnesses; or

12 “(V) otherwise seriously jeopard-
13 izing an investigation or unduly delay-
14 ing a trial; and

15 “(ii) the order is narrowly tailored
16 and there is no less restrictive alternative,
17 including notification to an individual or
18 organization within or providing legal rep-
19 resentation to the named customer or sub-
20 scriber, that is not likely to result in an
21 adverse result as described in clauses (i)
22 through (v) of subparagraph (A); and

23 “(iii) the court has reviewed the indi-
24 vidual warrant, order, or subpoena under

1 section 2703 to which the order issued
2 under this paragraph applies.

3 “(B) NATURE OF THE OFFENSE.—The
4 court may consider the nature of the offense in
5 issuing a determination under subparagraph
6 (A).

7 “(3) EXTENSION.—A governmental entity may
8 request one or more extensions of an order granted
9 under paragraph (2) of not more than 90 days for
10 each such extension. The court may only grant such
11 an extension if the court makes a written determina-
12 tion required under paragraph (2)(A) and the exten-
13 sion is in accordance with the requirements of
14 (2)(B).

15 “(4) NOTIFICATION OF CHANGED CIR-
16 CUMSTANCES.—If the need for the order issued
17 under paragraph (2) changes materially, the govern-
18 mental entity that requested the order shall notify
19 the court within a reasonable period of time (not to
20 exceed 14 days) of the changed circumstances, and
21 the court shall reassess the order and modify or va-
22 cate as appropriate.

23 “(5) OPPORTUNITY TO BE HEARD.—

24 “(A) IN GENERAL.—Upon an application,
25 petition, or motion by a provider of electronic

1 communications service or remote computing
2 service or person acting on behalf of the pro-
3 vider to which an order under paragraph (2)
4 (or an extension under paragraph (3)) has been
5 issued, the court may modify or vacate the
6 order if—

7 “(i) the order does not meet require-
8 ments provided in paragraph (2) or (3); or

9 “(ii) compliance with the order is un-
10 reasonable or otherwise unlawful.

11 “(B) STAY OF DISCLOSURE OF NAMED
12 CUSTOMER OR SUBSCRIBER COMMUNICATIONS
13 OR RECORDS.—A provider’s obligation to dis-
14 close the information requested in the warrant,
15 order, or subpoena to which the order in para-
16 graph (1) applies is stayed upon the filing of
17 the application, petition, or motion under this
18 paragraph pending resolution of the application,
19 petition, or motion, unless the court with juris-
20 diction over the challenge determines based on
21 a showing by the governmental entity that the
22 stay should be lifted in whole or in part prior
23 to resolution.

24 “(C) FINALITY OF ORDER.—The decision
25 of the court resolving an application, petition,

1 or motion under this paragraph shall constitute
2 a final, appealable order.

3 “(6) EXCEPTION.—A provider of electronic
4 communications service or remote computing service
5 to which an order under paragraph (2) applies, or
6 an officer, employee, or agent thereof, may disclose
7 information otherwise subject to any applicable non-
8 disclosure requirement to—

9 “(A) those persons to whom disclosure is
10 necessary in order to comply with the warrant,
11 order, or subpoena;

12 “(B) an attorney in order to obtain legal
13 advice or assistance regarding the order issued
14 under paragraph (2) or the warrant, order, or
15 subpoena to which the order applies; and

16 “(C) any person the court determines can
17 be notified of the warrant, order, or subpoena.

18 “(7) SCOPE OF NONDISCLOSURE.—Any person
19 to whom disclosure is made under paragraph (6)
20 (other than the governmental entity) shall be subject
21 to the nondisclosure requirements applicable to the
22 person to whom the order is issued. Any recipient
23 authorized under this subsection to disclose to a per-
24 son information otherwise subject to a nondisclosure

1 requirement shall notify the person of the applicable
2 nondisclosure requirement.

3 “(8) SUPPORTING DOCUMENTATION.—Upon
4 serving a provider of electronic communications serv-
5 ice or remote computing service with an order grant-
6 ed under paragraph (2), or an extension of such
7 order granted under paragraph (3), the govern-
8 mental entity shall include a copy of the warrant,
9 order, or subpoena to which the nondisclosure order
10 applies.

11 “(9) EXPIRATION OF ORDER PRECLUDING NO-
12 TICE.—Upon expiration of an order issued under
13 paragraph (2) or, if an extension has been granted
14 under paragraph (3), expiration of the extension, the
15 governmental entity shall deliver to the named cus-
16 tomer or subscriber, by at least 2 methods, which
17 shall be personal service, registered or first-class
18 mail, electronic mail, or other means approved by
19 the court as reasonably calculated to reach the
20 named customer or subscriber within 5 business
21 days of the expiration of the order—

22 “(A) a copy of the warrant, order, or sub-
23 poena; and

24 “(B) notice that informs the named cus-
25 tomer or subscriber—

1 “(i) of the nature of the law enforce-
2 ment inquiry with reasonable specificity;

3 “(ii) that information maintained for
4 such customer or subscriber by the pro-
5 vider of electronic communications service
6 or remote computing service to which the
7 warrant, order, or subpoena under section
8 2703, was directed was supplied to or re-
9 quested by the government entity;

10 “(iii) that notification of such cus-
11 tomer or subscriber was precluded by court
12 order;

13 “(iv) of the identity of the court au-
14 thorizing the preclusion of notice;

15 “(v) of the provision of this chapter
16 under which the preclusion of notice was
17 authorized; and

18 “(vi) that the government will, upon
19 request by the customer or subscriber
20 made within 180 days after receiving noti-
21 fication under this paragraph, provide the
22 named customer or subscriber with a copy
23 of the information that was disclosed in re-
24 sponse to the warrant, order or subpoena,
25 or in the event that no information was

1 disclosed, a written certification that no in-
2 formation was disclosed.

3 “(10) COPY OF INFORMATION DISCLOSED.—
4 Upon expiration of the order precluding notice
5 issued under paragraph (2) or (3) of this subsection,
6 and at the request of the named customer or sub-
7 scriber made within 180 days of receiving notifica-
8 tion under paragraph (9), the governmental entity
9 shall promptly provide the named customer or sub-
10 scriber—

11 “(A) with a copy of the information that
12 was disclosed in response to the warrant, order
13 or subpoena (except illicit records, child sexual
14 abuse material, and other illegal material); or

15 “(B) in the event that no information was
16 disclosed, a written certification that no infor-
17 mation was disclosed.

18 “(11) REDACTIONS.—Any information disclosed
19 pursuant to paragraphs (9) and (10) may be re-
20 dacted only if a court finds such redactions nec-
21 essary to preserve the secrecy or integrity of an in-
22 vestigation.”.

1 **SEC. 3. ADDITIONAL PROVISIONS REGARDING DELAYED**
2 **NOTICE.**

3 Section 2705 of title 18, United States Code, is
4 amended by adding at the end the following:

5 “(c) ANNUAL REPORT.—On an annual basis, the At-
6 torney General shall provide to the Committee on the Ju-
7 diciary of the House of Representatives, the Committee
8 on the Judiciary of the Senate, and the Director of the
9 Administrative Office of the United States Courts, which
10 the Director shall publish on the website of the Adminis-
11 trative Office of the United States Courts, in a manner
12 consistent with protection of national security, a report
13 setting forth with respect to the preceding calendar year,
14 for each Federal judicial district—

15 “(1) the number of named customers or sub-
16 scribers with respect to whom, in that calendar year,
17 a warrant, subpoena, or court order was issued pur-
18 suant to section 2703;

19 “(2) the aggregate number of applications re-
20 questing delay of notification pursuant to subsection
21 (a)(1), preclusion of notice pursuant to subsection
22 (b)(1), and extensions pursuant to subsection (b)(3);

23 “(3) the aggregate number of orders under this
24 section either granting, extending, or denying a re-
25 quest for delay of notification or preclusion of notice;

Attest: **CHERYL L. JOHNSON,**
Clerk.