WISCONSIN LEGAL PROCESS

OBTAINING INFORMATION FROM THIRD PARTY RECORD HOLDERS

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DISCLAIMERS

- Any legal opinions expressed herein are mine alone.
- They are not necessarily those of the Attorney General or the WI DOJ.
- They do not bind WI DOJ now or in the future.

PURPOSE OF PRESENTATION

- ID WI statutes re: obtaining information/records from 3rd parties.
  - Wis. Stats. 968.135
  - Wis. Stats. § 968.375
  - Wis. Stats. § 968.28 - .30 – Wiretaps
  - Wis. Stats. § 968.34 - .37 – Pen Registers/Trap and Trace (#'s dialed or #'s calling)

TAKE AWAYS

- The Sky is Not Falling in WI
- We have existing statutory framework that protects privacy of data held by 3rd parties.
- We have done, and continue to do, essentially what ABA standards suggest.
- In areas where statutes are unclear, we have developing statutory and case law (i.e., location data, drones, etc.).

Wis. Stats. § 968.135

- General Provision re: accessing 3rd party records.

"Upon the request of the Attorney General or a DA and upon a showing of probable cause under § 968.12, a court shall issue a subpoena requiring the production of documents as specified in § 968.13(2). …"

Wis. Stats. § 968.375

- Legal process for LE access to records or communications held by ECSP.
- § 968.375(3) – Subpoena process to obtain subscriber and transactional data.
  - Similar to § 968.135 – "AG or DA request" and "probable cause."
- § 968.375(4) – Warrant process to obtain content of communications (and subscriber and transactional data).
  - Similar again to § 968.135.

§ 968.375 and Federal Law

- WI Statute designed in part to more clearly dovetail WI legal process with federal law.
- Electronic Communication Privacy Act (ECPA) and the Stored Communication Act (SCA).
  - SCA = 18 U.S.C. 2701, *et seq.*

ECPA/SCA

- 18 USC 2703 – state government agents get information from ECSP by:
  - State authorized administrative, grand jury, or trial subpoenas [18 U.S.C. § 2703(b)(1)(B)(i)]
  - State "warrant" complying with FRCrP 41 (Wis. Stats. 968.12) - [18 U.S.C. § 2703(b)(1)(A)]
  - Orders from court of "competent jurisdiction" supported by "specific and articulable facts" (i.e., reasonable suspicion) that records/info relevant. [18 U.S.C. § 2703(d) "2703(d) Order"]

Administrative, GJ, Trial Subpoena & 2703(d) Order

- Name of account holder
- Billing Address
- Local & Long distance telephone connection records and records of session times/duration
- Length of service/types of services used by subscriber
- Telephone and instrument number and temporarily assigned network address (IP assignment)
- Means and source of payment for service by subscriber.

§ 968.375(3) Subpoena

- Designed to meet standard of 18 U.S.C. 2703(d) in WI law.
- Permits access to same categories of data.
- But more restrictive
  - "probable cause" not "reasonable suspicion"
  - At request of (and with review/approval) of prosecutor.
- Must be issued by judge (court of competent jurisdiction).

ECPA/SCA: Warrant

- Under federal SCA, a *warrant* to the service provider allows access to
  - Content of electronic communications

    AND
  - Subscriber info/Transactional data.
- Without requirement for prior notice to subscriber [18 U.S.C. § 2703(b)(1)(A)]
  - 2703(d) order requires notice, unless court orders secrecy.

§ 968.375(4) Warrant

- Creates separate procedure for "warrant" to ECSP
- Requires that warrant be on request of AG or DA
  - Similar to 968.135 and 968.375(3) subpoenas and unlike 968.12 warrant.
- Supported by showing of probable cause.
- Must be issued by a **judge**.

§ 968.375(4) Warrant

- Warrant may order ECSP to disclose
  - *Content* of wire or electronic communications held in electronic storage in an electronic communications system [968.27(6)]or held/maintained by a provider of remote computing service [968.27(14g)],

    and/or
  - Any of the subscriber/transactional data available thru a 968.375(3) subpoena.

Interception of Communications

- SCA/ § 968.375 warrant DOES NOT permit "real time" interception of content of wire or electronic communications.
- Prospective interception requires court order under both federal and state law.
  - Wis. Stats. §§ 968.28 - .31 & 18 U.S.C 2510 – 2520.
  - Requires "super probable cause"
  - Establishes procedural protections and review.
- Very rare.

Pen Registers/Trap and Trace

- Devices that record the #'s dialed or the numbers calling a phone or similar device.
- Only the numbers – no content.
- Permitted upon application of AG or DA
- Standard – certification by applicant that the info obtained is relevant to ongoing criminal investigation.
  - Wis. Stats. §§ 968.34 - .36 & 18 U.S.C. 3123 or 50 U.S.C. 1801 - 1811