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## MEMORANDUM

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**Date:** March 28, 2016

**From:** Justine Luongo

**To:** New York State Legislature

**Re: Memorandum in Support – The New York  
Electronic Communications Privacy Act, A.09235  
(Dinowitz)**

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The Legal Aid Society writes in strong support of the proposed New York Electronic Communications Privacy Act, NY-ECPA, A.09235, that will update the current, antiquated state privacy law to reflect the modern privacy expectations of an evolving digital age. NY-ECPA will extend Fourth Amendment protection of physical media to digital data and information by requiring law enforcement to obtain a warrant before searching a citizen's cellphone. This expansion is not only important, but is also constitutionally necessary in light of technological developments that have changed the way people produce, keep, and store private information.

The state's current privacy law reflects a pre-digital age understanding of privacy rights. Today, most people carry around intimate, personal and financial information with them in their cell phones. For example, modern personal and business communication has evolved from sending letters to sending text messaging and e-mail. Emails and text messages also often contain document attachments, financial statements, pictures, audio files, and other personal and/or confidential materials. Likewise, mobile applications contain and store personal information in an easily accessible manner such that sensitive information can be made available by the tap of an icon. Clearly, technological advancements have brought private materials that used to be kept inside the home or office, outside, where they remain vulnerable to government surveillance.

Presently, the lack clarity in the law regarding digital privacy rights has allowed law enforcement unlimited access to search cellphones. The NY-ECPA's warrant requirement protects an individual's private digital information from mere police discretion to conduct a search. Judicial oversight will thwart law enforcement from using cell phone access obtained to find evidence of one crime to unlawfully search for evidence of another crime. If an officer conducting a search does not follow the law's procedural requirements, the evidence obtained during the search will be excluded. Even if the emergency exception applies, the officer must obtain a warrant within three days of obtaining the electronic data

or else the data must be destroyed. When adopted, these protections will put New York's privacy law in line with the Fourth Amendment right to be free from unreasonable searches and seizures as understood in the current digital age.

The proposed bill is also supported by the recent Supreme Court *Riley v. California* (2014) decision. Recognizing the evolution of privacy expectations, Chief Justice John Roberts, writing for the majority declared: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." The Court held that law enforcement agents are required to obtain a warrant or demonstrate exigent circumstances to search a cell phone.

The proposed law is in the best interests of all New York citizens. Most people today have an expectation that their private digital media are protected to the same degree as their physical media. However, the current federal law and most state laws have not been updated to afford digital data that same, expected level of protection. If adopted, NY-ECPA will prevent digital content, like text messages, pictures, application data, and personal emails from being subject to warrantless searches. NY-ECPA is a commonsense law that will revamp current state privacy laws to comply with the Fourth Amendment, which will ensure modern, digital private information is protected from unbridled government intrusion.

In light of the above, the Legal Aid Society SUPPORTS and asks the New York State legislature to pass this proposed legislation.