

May 25, 2016

The Honorable Chuck Grassley
Chairman
The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20515

RE: S. 356 - Electronic Communications Privacy Act Amendments Act

Dear Chairman Grassley and Ranking Member Leahy,

We write in opposition to S. 356, the Electronic Communications Privacy Act Amendments Act, in its current form, and continue to have serious concerns with the House-passed version of H.R. 699, the Email Privacy Act. Additional changes are needed to update the Electronic Communications Privacy Act for the 21st Century.

We laid out our primary concerns with H.R. 699 in a letter to the House dated March 16, 2016. We appreciate that House substitute language addressed one of our concerns by removing the unprecedented notice requirement for law enforcement to serve a warrant for electronic evidence held by service providers directly on the customer or subscriber who is the target of the investigation, and to describe the nature of the investigation. However, it did not sufficiently address concerns that law enforcement has consistently raised with Congress over the past five years. Those concerns relate to the challenges faced by law enforcement when trying to obtain the electronic evidence that is increasingly important in generating leads, solving crimes, and finding missing people.

The version approved by the House:

- does not allow for law enforcement access to time-tested exceptions to the search warrant requirement like an imminent threat of physical harm, likely destruction of evidence, consent by a victim or a witness, or public safety emergencies that are not necessarily part of a criminal investigation (missing child, missing elderly adult);
- does not account for types of data that are increasingly a part of criminal and terrorism investigations such as publicly posted electronic content (e.g. social media postings by criminal organizations or online advertisements by child sex traffickers);
- does not provide for an exception to the warrant requirement for basic information such as the email address located on the To/From lines of an email, which is comparable to the address information externally displayed on an envelope containing a physical letter; and
- does not adequately address the lack of standards for service provider response to law enforcement legal demands, which is resulting in delays in the investigative process, diversion of resources from other investigations, and an inability by law enforcement to obtain the basic building blocks of a successful investigation in a timely manner. While the House language made improvements to the original bill by explicitly enabling a judge to include a “respond by” date on a warrant, and requiring service providers in receipt of a warrant to respond “promptly,” the definition of “promptly” should be clarified.

We strongly urge the committee to improve upon the House-passed version of H.R. 699 by addressing these issues. Three examples illustrate why we believe it is clearly in the public’s interest to do this. In Texas in 2014 a threatening text was received by a family member of a 17-year-old girl. It demanded \$50,000 or the girl would die. Working from one lead to

another, investigators sought information using various forms of legal process from a dozen different electronic communications service providers and remote computing service providers in order to find out what phone sent the text message, from where it was sent, and by whom. Despite the clear emergency - a missing girl with a ransom demand - some providers refused to provide information in a timely way. Some responded relatively quickly, and some took days. One initially refused to recognize the validity of a search warrant because it was issued in another state. One didn't respond until more than two weeks later. Ultimately a suspect confessed to sending the text and murdering the girl, but only after being confronted with indisputable evidence ultimately obtained from service providers. This demonstrates how critical this type of evidence is, and why it is so important to ensure we are able to obtain it as quickly as possible.

Earlier this month, also in Texas, an encrypted messaging application was being used by suspected human traffickers to demand a \$5,000 payment for safe return of a female trafficking victim. The smugglers claimed to already have killed an 11-year-old child for non-compliance. Law enforcement declared an emergency specifically related to the female victim and sought information from the app provider to help identify the sender and find the victim. The provider did not respond until two days after receiving the request from investigators, despite the clearly apparent emergency situation. But rather than providing records, the response consisted only of a question back to the investigator about whether the situation was still an emergency.

Recently, Internet Crimes Against Children (ICAC) investigators in Arizona served a court order on an Arizona Internet Service Provider (ISP) in support of a Sexual Exploitation of a Minor investigation. Investigators had clear evidence that the suspect was luring a minor. ICAC detectives encountered a delay of several weeks in receiving the requested data. By the time the data was provided, investigators learned the suspect fled and his whereabouts are still unknown today.

Unless S. 356 is updated to address these kinds of challenges encountered every day by investigators working to save victims and solve crimes, it will clearly fail to update ECPA for the 21st Century. We thank the committee for your attention to our concerns, and we are happy to provide additional expert perspectives on these issues.

Sincerely,

Association of State Criminal Investigative Agencies
FBI Agents Association
Federal Law Enforcement Officers Association
International Association of Chiefs of Police
Major Cities Chiefs Association
Major County Sheriffs Association
National Alliance of State Drug Enforcement Agencies
National Association of Assistant United States Attorneys
National Association of Police Organizations
National District Attorneys Association
National Narcotic Officers' Associations' Coalition
Sergeants Benevolent Association NYPD

cc: Members of the Senate Judiciary Committee