

HOUSE BILL REPORT

HB 2483

As Reported by House Committee On:
Judiciary

Title: An act relating to protecting minors from sexual exploitation.

Brief Description: Protecting minors from sexual exploitation.

Sponsors: Representatives Sawyer, Orwall, Jinkins, Tarleton, Kilduff, Sells, McBride, Bergquist, Ormsby, Santos and Goodman.

Brief History:

Committee Activity:

Judiciary: 2/2/16, 2/4/16 [DPS].

Brief Summary of Substitute Bill

- Authorizes the Attorney General and prosecuting attorneys to issue administrative subpoenas to providers of electronic communication services and remote computing services in order to obtain certain subscriber information in investigations involving the criminal exploitation of children.
- Establishes requirements governing disclosure of the subpoenas, and court actions to enforce, or modify or quash, issued subpoenas, and provides immunity from civil liability for good faith compliance with a subpoena.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Kuderer, Muri, Orwall and Stokesbary.

Staff: Edie Adams (786-7180).

Background:

The criminal laws addressing the sexual exploitation of children establish a number of specific crimes, including:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Sexual Exploitation of a Minor;
- Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Sending or Bringing into State Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Communication with Minor for Immoral Purposes;
- Commercial Sexual Abuse of a Minor;
- Promoting Commercial Sexual Abuse of a Minor;
- Promoting Travel for Commercial Sexual Abuse of a Minor; and
- Permitting Commercial Sexual Abuse of a Minor.

Under a federal law known as the Stored Communications Act, a provider of electronic communication services or remote computing services must disclose certain information about a subscriber or customer to a governmental entity when requested by an administrative subpoena authorized under either federal or state statute. Disclosable information includes only the following subscriber information, and not content of communications: name and address; local and long distance telephone connection records, or records of session times and durations; length and types of service; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment, including any credit card or bank account number.

Both the federal and state constitutions protect a person's privacy interests from being invaded without authority of law. Fourth Amendment protections extend to areas where a person has a reasonable expectation of privacy, and any search requires a warrant issued upon probable cause unless an established exception to the warrant requirement applies. Federal courts have held that an individual does not have a reasonable expectation of privacy under the Fourth Amendment in subscriber information records provided to an Internet service provider, such as electronic mail addresses, Internet protocol addresses, and amounts of information transmitted.

The Washington Constitution provides greater protection from governmental searches of private information than is provided under the Fourth Amendment. Article 1, section 7 of the state constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The determination of what constitutes a "private affair" is not limited to a person's reasonable privacy expectations. Rather, Article 1, section 7 protects those privacy interests which citizens have held, and those privacy interests that citizens should be entitled to hold, safe from governmental intrusion absent authority of law. Washington courts have held that the necessary "authority of law" for a governmental invasion of private affairs is not limited to a search warrant based on probable cause, but can also include a judicially issued subpoena. A subpoena must be based on some reason beyond statutory authorization and must be subject to judicial review to reduce mistaken intrusions of people's private affairs.

Summary of Substitute Bill:

Administrative Subpoena Authority.

In any criminal investigation of an offense involving the sexual exploitation of children, the Attorney General or a prosecuting attorney may issue a subpoena to a provider of electronic communication services or remote computing services requiring the production of relevant records where the Attorney General or prosecuting attorney has reason to suspect a crime of sexual exploitation of a child has been committed. A subpoena must specify the records or information required to be produced and specify a return date within a reasonable period. The subpoena may not require a provider to produce any customer or subscriber records or information other than the following:

- name;
- address;
- local and long distance telephone connection records, or records of session times and durations;
- length of service and types of service utilized;
- telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
- means and source of payment for such service, including any credit card or bank account number.

"Electronic communication service" means any service that provides users the ability to send or receive wire or electronic communications. "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

Disclosure.

A provider is prohibited from disclosing the existence of a subpoena to the subscribers or customers whose records or information are requested or released under the subpoena for 90 days from the date of receipt of the subpoena. After the 90 day period, a provider is permitted, but not required, to notify a subscriber or customer whose information or records were disclosed. A governmental entity receiving records or information under the subpoena is not required to notify a subscriber or customers.

Modifying or Quashing Orders.

At any time before the return date specified in the subpoena, the provider to whom a subpoena is directed may petition the superior court for an order modifying or quashing the subpoena on the grounds that it is oppressive or unreasonable. A petition may be filed: in the county of the prosecuting attorney, if the subpoena was issued by a prosecuting attorney; in Thurston County superior court, if the subpoena was issued by the Attorney General; or where the person subject to the subpoena resides, is found, or carries on business.

Enforcement of Subpoenas.

The Attorney General or a prosecuting attorney may seek an injunction from the superior court to compel compliance with a subpoena. A person who neglects or refuses to comply with a subpoena may be punished for contempt of the court. An injunction may be filed: in the county of the prosecuting attorney, if the subpoena was issued by a prosecuting attorney; in Thurston County superior court, if the subpoena was issued by the Attorney General; or where the person subject to the subpoena resides, is found, or carries on business.

Civil Liability.

Any person receiving a subpoena, including his or her officers, agents, and employees, who complies in good faith with the subpoena, may not be liable to any customer or other person for production of the materials sought, or for not disclosing to the customer that the materials were produced.

Substitute Bill Compared to Original Bill:

The standard for issuance of a subpoena is changed from "reasonably relevant to the investigation" to "reason to suspect that a crime involving sexual exploitation of a child has been committed." Technical corrections are made to replace some references to "orders" with the correct reference to "subpoenas," and to clarify the provisions designating in which county a court action may be commenced.

Appropriation: None.

Fiscal Note: Requested on February 4, 2016.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This is a hard subject to talk about because we are dealing with the sexual abuse of children. Washington has the highest rate of people downloading images of child rape. We know that most of the people who are downloading child pornography are hands-on offenders. Many of these kids are under the age of three. This bill balances the rights of our vulnerable children with privacy rights. There is a real need for expediency in these sexual exploitation cases. Law enforcement investigators are having to constantly restart the process of obtaining a judicial subpoena because the subpoenaed provider points to another company as the holder of the records. This is time consuming and jeopardizes law enforcement's ability to protect children. We need to expedite this process.

(Opposed) Child exploitation is a serious problem, but we cannot water down our rights to solve the problem. There is already a mechanism for prosecutors to obtain this evidence through a judicial subpoena. Under that process, there must be a reason to suspect a crime has been committed. This bill only requires that the request be reasonably related to an investigation. The bill is too broad. It erodes the Fourth Amendment and the Washington Constitution. There is no requirement that the subpoena be disclosed. Subscribers have no idea that their information is being requested and so cannot ask to quash or modify the subpoena.

Persons Testifying: (In support) Representative Sawyer, prime sponsor.

(Opposed) Sarah McFadden, Washington Association of Criminal Defense Lawyers and Washington Defenders Association.

Persons Signed In To Testify But Not Testifying: None.