

# HOUSE BILL REPORT

## HB 1728

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**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, Smith, Caldier, Jinkins, Fey, Kloba, Ortiz-Self, Stanford and Frame.

**Brief History:**

**Committee Activity:**

Judiciary: 2/7/17, 2/16/17 [DP].

**Brief Summary of 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 sexual exploitation of children.
- Establishes requirements governing disclosure of the subpoenas, and court actions to enforce, modify, or quash issued subpoenas, and provides immunity from civil liability for good faith compliance with a subpoena.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass. Signed by 12 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Muri, Assistant Ranking Minority Member; Frame, Goodman, Graves, Haler, Hansen, Kirby, Klippert and Orwall.

**Minority Report:** Do not pass. Signed by 1 member: Representative Shea.

**Staff:** Edie Adams (786-7180).

**Background:**

Federal Stored Communications Act.

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*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.*

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.

#### Constitutional Privacy Rights.

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 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 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 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 in a person's private affairs.

#### Sexual Exploitation of Children.

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

- 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 a 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.

## **Summary of 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 and 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, 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.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Staff Summary of Public Testimony:**

(In support) Washington leads the nation in the number of images of child rape that are downloaded. There is a real need for expediency in order to protect kids from sexual exploitation. Investigators are up against the clock to recover evidence because the providers hold on to the information for short time periods. It is common to have a provider that subcontracts out services, which requires law enforcement investigators to repeatedly restart the process of obtaining a judicial subpoena to get the records needed to identify where the activity is occurring, and more importantly, where the evidence is held. The time it takes to get a warrant can mean that the information is lost. Investigators are up against this issue more and more as technology continues to advance and more and more entities are operating inside the space in a more complex manner. This bill allows prosecutors to move more efficiently and effectively to get a records preservation hold. Investigators would still have to go before a judge to get a search warrant.

(Opposed) Aggressive and effective investigation of crimes against children is important. Washington has a long and proud history of protecting children but also of protecting the privacy of its citizens. Traditionally in this state we require a finding of individualized suspicion by a neutral judicial officer who is independent and outside of the enforcement process before we allow an intrusion on the privacy of citizens. We already have a special inquiry judge process that allows for the issuance of a subpoena on a lower standard, but that retains the role of a neutral judicial officer. It is not too time consuming and burdensome to go to a judge for these subpoenas.

**Persons Testifying:** (In support) Representative Sawyer, prime sponsor; and Mike Edwards, Seattle Police Department and Washington State Internet Crimes Against Children Task Force.

(Opposed) David Donnan, Washington Defender Association and Washington Association of Criminal Defense Lawyers.

**Persons Signed In To Testify But Not Testifying: None.**