
Civil Rights & Judiciary Committee

HB 1872

Brief Description: Protecting minors from sexual exploitation.

Sponsors: Representatives Klippert and Dent.

Brief Summary of Bill

- Authorizes the Attorney General and prosecutors 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.

Hearing Date: 2/20/19

Staff: Edie Adams (786-7180).

Background:

In 2017 legislation was enacted addressing procedures for prosecutors in child sexual exploitation investigations to subpoena certain subscriber or customer records through a special inquiry judge (SIJ) proceeding. A SIJ proceeding may be initiated by petition of a prosecutor. In an SIJ proceeding, the SIJ may issue subpoenas for records and testimony relevant to an investigation when there is reason to suspect crime or corruption, which is a lower standard than probable cause.

A prosecutor must use the SIJ process when the prosecutor determines it is necessary to the investigation to subpoena a provider of electronic communication services or remote computing services for production of records relevant to a child sexual exploitation investigation. "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

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the public of computer storage or processing services by means of an electronic communications system.

Records or information that may be obtained under the subpoena include, but are not limited to, the following subscriber or customer information:

- 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.

Upon petition of a prosecutor, the court shall establish the SIJ proceeding, if appropriate, as soon as practicable but no later than 72 hours after the filing of the petition.

A provider of electronic communication services or remote computing services that receives a subpoena for subscriber or customer records may not disclose the existence of the subpoena to the subscribers or customers whose records or information are requested or released under the subpoena.

Federal Stored Communications Act.

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 that 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.

Summary of Bill:

In a criminal investigation involving child sexual exploitation, a prosecutor may, rather than must, use the special inquiry judge (SIJ) process to subpoena a provider of electronic communication services or remote computing services for production of records relevant to the investigation. A new procedure is authorized allowing a prosecutor or the Attorney General to issue a subpoena for the production of these records.

Administrative Subpoena Authority.

In any criminal investigation of an offense involving the sexual exploitation of children, the Attorney General or a prosecutor 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 prosecutor 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, content, 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.

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 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.

A 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 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.

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.