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**THE HONORABLE KARL RHOADS, CHAIR**  
**HOUSE COMMITTEE ON JUDICIARY**  
**Twenty-Seventh State Legislature**  
**Regular Session of 2014**  
**State of Hawai'i**

February 18, 2014

**RE: H.B. 1641; RELATING TO GOVERNMENTAL ACCESS TO STORED COMMUNICATIONS.**

Chair Rhoads, Vice-Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong support of H.B. 1641. The purpose of this bill is to increase the privacy rights of Hawai'i residents, and simplify the standards by which law enforcement is able to access certain information, without unduly interfering with law enforcement's legitimate need to investigate criminal activity.

The federal Stored Communications Act ("SCA") establishes privacy rights for users of:

- (1) "electronic communication services" (e.g. web-based e-mail service providers such as Gmail, Hotmail, and Yahoo, and Internet Service Providers such as AOL and Roadrunner); and
- (2) "remote storage providers" (e.g. cloud-based storage providers such as Drop Box, Google Drive, and Sky Drive).

See 18 U.S.C. §2701 – §2712. In 1989, Hawai'i adopted its own version of the federal SCA; while similar to the federal provisions, Hawai'i's SCA provides *greater* protection for Hawai'i residents than the corresponding federal statutes. See HRS §803-47.6 – §803-47.9.

For example, under the federal SCA, law enforcement can obtain "records of session times and durations" (such as IP logs for network access or Internet browsing) by *subpoena*. See 18 U.S.C. §2703(c)(2)(C). Yet Hawai'i's SCA requires that law enforcement obtain a *court order* based on probable cause before it can access "transactional records"; a mere subpoena is not allowed. See HRS §803-47.6(d)(2)(D). Similarly, the federal SCA only requires a *subpoena* to obtain "retrieved" e-mail (i.e., opened e-mail) and e-mail that has been held in storage for more than 180 days, whereas Hawai'i's stricter standards require a *court order* to compel production of these types of emails. See §2703(a) and (b)(1)(B); and HRS §803-47.6(a-b).

The proposed amendments to HRS §803-47.6(a) and HRS §803-47.6(b) would require law enforcement officials to obtain a *search warrant* to compel production of the “content of communications,” regardless of whether those communications were held in storage or not, how long the communications have existed, and regardless of whether those communications were “retrieved” or “unretrieved.” Thus, in order to compel the production of content—for example, e-mail, voicemail, text messages, and the contents of private social network posts/comments—law enforcement would have to obtain a search warrant; a court order would no longer be sufficient to obtain the content of these communications.

The proposed amendment to HRS §803-47.6(d)(2)(B) would apply to production of “historical” transactional records—as opposed to “real-time” transactional records, which are governed by the pen register and trap and trace statutes—and require law enforcement to obtain a *court order* to compel production of such records. The proposed rule is consistent with the current practice in the courts of the State of Hawaii, and comports with the overwhelming weight of authority on this issue. In addition, under subsection (e), if law enforcement wishes to obtain a court order for “transactional records”, it would first have to demonstrate “probable cause” that the records constitute or relate to the fruits, implements, or existence of a crime or are relevant to a legitimate law enforcement inquiry. This “probable cause” requirement provides greater protection than the corresponding federal statute, which requires a mere showing of “articulable facts” to obtain such a court order.

Lastly, the proposed amendment to HRS §803-47.6(e) eliminates language indicating that a court order can be used to obtain the “contents of a communication,” because the proposed amendments to subsections (a) and (b) make it clear that such information is only available with a search warrant demonstrating probable cause; a court order would no longer be sufficient.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 1641. Thank you for the opportunity to testify on this matter.

**LATE**

**HB1641**

Submitted on: 2/17/2014

Testimony for JUD on Feb 18, 2014 14:00PM in Conference Room 325

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Justin F. Kollar	County of Kauai Office of the Prosecuting Attorney	Support	No

Comments: Joining in the reasons stated by the Honolulu Prosecutor.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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February 18, 2014

The Honorable Representative Karl Rhoads  
Chair, House Committee on Judiciary  
Hawaii House of Representatives

*RE: Testimony on House Bill 1641 with Proposed Amendment  
Tuesday, Feb. 18, 2:00 p.m., Conference Room 325*

Dear Chair Rhoads and Members of the House Committee on Judiciary:

AT&T appreciates this opportunity to testify on House Bill 1641, which would require law enforcement to obtain a search warrant for the production of the contents of electronic communications. AT&T is supportive of this measure, although we have both a question about the bill in regards to administrative subpoenas and we propose an amendment to address exigent circumstances and indemnity

On the first matter, this bill would require a search warrant or court order showing probable cause for the production of electronic communications, which is very clear. However, in section (d)(2)(D) where "an administrative subpoena authorized by statute, an attorney general subpoena, or a grand jury or trial subpoena" may be used to obtain customer information, billing records, and other information, it appears this is in direct conflict with 2. (2), which states in part that a search warrant is needed to provide this information. AT&T is concerned that this provision may conflict with the intent of the legislation which, again, is to increase the standard for release of customer information, billing records, and other information. AT&T also does not want to be put in the position of deciding whether a subpoena or search warrant/court order is needed when information requests are made. We request that clarity be provided on this issue by the supporters of the bill.

AT&T also requests that House Bill 1641 be amended (see attachment with new paragraph f.) to allow for the release of electronic communication and customer information during exigent circumstances. It's critical that we are allowed to respond to information requests during emergency situations when lives are at stake. Hawaii state law already allows for such a provision in HRS §803-42, which addresses interception of electronic communications (real-time transactional records). This same provision should be made for historical records. AT&T also urges adoption of an indemnification provision similar to HRS §803-42. (new paragraph g.)

Thank you for considering our testimony. Please contact me if you have any questions.

Respectfully Submitted, Dan Youmans, AT&T

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## A BILL FOR AN ACT

RELATING TO GOVERNMENTAL ACCESS TO STORED COMMUNICATIONS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

SECTION 1. Section 803-47.6, Hawaii Revised Statutes, is amended as follows:

1. By amending subsections (a) and (b) to read:

"(a) A governmental entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication [~~that has been in electronic storage for one hundred and eighty days or less, where storage has taken place,~~] pursuant to a search warrant only. [~~A governmental entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication that has been in electronic storage for more than one hundred and eighty days by the means available under subsection (b) of this section.~~

(b) A governmental entity may require a provider of remote computing services to disclose the contents of any

electronic communication [~~to which this subsection is made applicable by subsection (c) of this section:~~

- ~~(1) Without notice to the subscriber or customer, if a search warrant has been obtained; or~~
- ~~(2) With prior notice to the subscriber or customer, if a court order for disclosure under subsection (d) of this section has been obtained; except that delayed notice may be authorized by the order.] pursuant to a search warrant only."~~

2. By amending subsections (d) and (e) to read:

- "(d) (1) A provider of electronic communication service or remote computing service may disclose a record or other information pertaining to a subscriber to, or customer of, the service (other than the contents of any electronic communication) to any person other than a governmental entity.
- (2) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to, or customer of, the service (other than the contents of an electronic communication) to a governmental entity only when:

- (A) Presented with a search warrant;
  - (B) Presented with a court order [~~for~~], which seeks the disclosure[+] of transactional records, other than real-time transactional records;
  - (C) The consent of the subscriber or customer to the disclosure has been obtained; or
  - (D) Presented with an administrative subpoena authorized by statute, an attorney general subpoena, or a grand jury or trial subpoena, which seeks the disclosure of information concerning electronic communication, including but not limited to the name, address, local and long distance telephone billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of the service, and the types of services the subscriber or customer utilized.
- (3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.
- (e) A court order for disclosure under subsection [~~(b)~~ or ~~(c)~~ of this section] (d) shall issue only if the

governmental entity demonstrates probable cause that the [contents of a wire or electronic communication, or] records or other information sought, constitute or relate to the fruits, implements, or existence of a crime or are relevant to a legitimate law enforcement inquiry. An order may be quashed or modified if, upon a motion promptly made, the service provider shows that compliance would be unduly burdensome because of the voluminous nature of the information or records requested, or some other stated reason establishing such a hardship."

(f) A provider of electronic communication service or remote computing service shall disclose a record or information pertaining to a subscriber to, or customer of, the service to a governmental entity without a search warrant, court order, or subpoena as provided in subsections (d) (2) (A) - (D) only upon receipt of a request from a law enforcement officer stating that:

- i. the disclosure of the record or information is required due to an emergency situation involving imminent danger or risk of death or serious physical harm; and



ii. a warrant cannot be obtained in time to prevent the identified emergency situation.

(g) No cause of action, either civil or criminal, lies in any court against a provider of electronic communication service or remote computing service or its officers, employees, agents, or other specified persons for providing a record or information in accordance with Section 1.

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY: \_\_\_\_\_  
BY REQUEST

**Report Title:**

Honolulu Prosecutor's Package; Stored Communications; Governmental Access

**Description:**

Requires law enforcement to obtain: (1) a search warrant to compel production of the contents of electronic communications; and (2) a court order to compel production of historical transactional records.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*