

HB1641

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE GLENN WAKAI, CHAIR
SENATE COMMITTEE ON TECHNOLOGY AND THE ARTS
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawai'i

March 18, 2014

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

Chair Wakai, Vice-Chair Nishihara and members of the Senate Committee on Technology and the Arts, 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.

Gordon Fernandez

From: mailinglist@capitol.hawaii.gov
Sent: Friday, March 14, 2014 5:21 AM
To: TECTestimony
Cc: thirr33@gmail.com
Subject: Submitted testimony for HB1641 on Mar 18, 2014 13:25PM
Attachments: HB 1641 Hscr 631-14 Stored File-Prosecutor Package.gif

HB1641

Submitted on: 3/14/2014

Testimony for TEC on Mar 18, 2014 13:25PM in Conference Room 414

Submitted By	Organization	Testifier Position	Present at Hearing
Arvid Tadao Youngquist	The Mestizo Association	Support	Yes

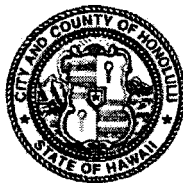
Comments: Chair, TEC Committee Vice Chair, TEC Committee Right Honorable Committee Members The Mestizo Association is pleased to provide testimony in support of this City Prosecutor Package introduced by request by the Right Honorable Speaker Joe Souki (D), Maui. It is slightly astounding that the Prosecutor's office is the one to request this measure. It is a telling point when even the law enforcement arm of justice, realized that due process has to be followed and enforced. Too long since 9-11, Homeland Security, and the Patriot Act, in the name of Safety and Security, so many of the U.S. Constitutional guarantees of liberty were presumed to be suspended. A small example of this trend was what I now presume is an inactive Act on the Book, commonly referred to as the "King Ben Law". Even the Legislature suspend the rule of law during the Interim to cede to the Speaker and the President of Senate, all authority of the 2 Chambers, if they in turn will "brief them afte the fact". I may have gotten the chronology of the fact dating back then out of sequence, but, this particular measure before us, is a great, giant step in the right direction, and I commend both the Speaker as well as City Prosecutor. Mahalo nui loa, Arvid Tadao Youngquist Spokesman, Founder, Administrator *Note: CD1 registered voter, from First US Congressional District (Kalihi Valley)...plannig to vote eagerly in the Primary and the General Election.

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POLICE DEPARTMENT
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OUR REFERENCE

KH-NTK

March 18, 2014

The Honorable Glenn Wakai, Chair
and Members
Committee on Technology and the Arts
House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Wakai and Members:

Subject: House Bill No. 1641, Relating to Governmental Access to Stored Communications

I am Keith Horikawa, Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

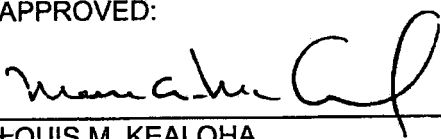
The Honolulu Police Department supports House Bill No. 1641, Relating to Governmental Access to Stored Communications.

Police investigators increasingly rely on access to stored electronic communications in order to properly investigate offenses and maintain currency in criminal and technological trends. This bill properly clarifies the requirement of a search warrant to obtain stored electronic communications and makes clear to investigators what type of information can be obtained and how it can be done. In addition, this bill appropriately aligns Section 803-47.6 of the Hawaii Revised Statutes with federal law, other state laws, and standard practices.

The Honolulu Police Department urges you to support House Bill No. 1641, Relating to Governmental Access to Stored Communications.

Thank you for the opportunity to testify.

APPROVED:


LOUIS M. KEALOHA
Chief of Police

Sincerely,


KEITH HORIKAWA, Captain
Criminal Investigation Division