SB 2095

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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

February 13, 2014

RE: S.B. 2095; 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 S.B. 2095. 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 Hawaii 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 Hawaii'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 Hawaii'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 S.B. 2095. Thank you for the opportunity to testify on this matter.

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TESTIMONY IN SUPPORT OF
S.B. No. 2095
A BILL FOR AN ACT RELATING TO GOVERNMENTAL ACCESS TO STORED COMMUNICATIONS

Justin F. Kollar, Prosecuting Attorney
County of Kauai

Senate Committee on Technology and the Arts

Thursday, February 13, 2014
1:15 p.m., Room 414

Honorable Chair Wakai, Vice-Chair Nishihara, and Members of the Senate Committee on Technology and the Arts:

The Office of the Prosecuting Attorney, County of Kauai submits the following testimony in support of S.B. 2095, Relating to Governmental Access to Stored Communications.

The purpose of S.B. 2095 is to amend H.R.S. 803-47.6 to require law enforcement to obtain (1) a search warrant for production of contents of electronic communications; and (2) a court order to compel production of "historical" transactional records.

By amending the current statute, this not only increases the privacy rights of Hawai'i residents, but it also simplifies the statute by clearly defining the requirement of either a warrant or a court order based on the type of computer data needed by law enforcement in order to continuously and effectively investigate criminal activity.

For this reason, we support S.B. 2095. Thank you very much for the opportunity to provide testimony on this bill.

Respectfully,

Justin F. Kollar
Prosecuting Attorney
County of Kaua'i