



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018**

ON THE FOLLOWING MEASURE:

H.B. NO. 2296, H.D. 1, RELATING TO INTERNET PRIVACY.

BEFORE THE:

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Tuesday, February 13, 2018 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): Russell A. Suzuki, Acting Attorney General, or
Mana Moriarty, Deputy Attorney General

Chair Takumi and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to prohibit internet service providers from using the personal information of customers for specific purposes without the prior written consent of customers.

The Federal Communications Commission (FCC) recently issued a declaratory order repealing net neutrality in which it asserts that the FCC may preempt inconsistent state laws regarding broadband internet access service providers. *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, WC Docket No. 17-108, FCC 17-166 (released on Jan. 4, 2018) ("Order"). Although it is unclear whether the FCC intended to preempt state regulation of internet service providers' data privacy practices, we want to ensure that the Legislature understands that this bill may be subject to a preemption challenge. This bill by section -1 of the new chapter on page 1, lines 6–9, attempts to regulate internet service providers in the State by prohibiting them from using, disclosing, selling, or permitting access to the personal information of customers, except as provided in the bill.

The FCC's position generally is that "regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." Order at ¶194. The FCC noted that "allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to

comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates." Order at ¶194. Additional provisions in the Order justifying FCC preemption could be construed to apply to state laws regulating ISPs' data privacy practices.

The scope of FCC preemption, however, is unclear because the FCC maintains that its regulation of broadband internet access services does not completely preempt state regulation: "we do not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives." Order at ¶196. It is an open question whether state regulation of ISPs' data privacy practices falls under this exception.

We further note that this area of the law is developing rapidly and other developments may also affect the risk of a legal challenge to this bill. The Order itself will not take effect until publication in the Federal Register, which is anticipated to occur within a short time. Moreover, the Order is subject to judicial review and has already been challenged in court; Hawai'i is one of twenty-one states that filed a petition for review of the Order in the United States Court of Appeals for the District of Columbia Circuit. *Petition for Protective Review, New York, et al., Petitioners v. Federal Communications Commission, et al., Respondents*, Case No. 18-1013. The federal courts could ultimately overturn the Order; however, there are no guarantees in litigation and any judicial ruling may occur years from now.

We further note that the lack of definition of the term "internet service provider" could create confusion as to whose conduct is regulated by this bill. The definitions on page 8, line 21, to page 11, line 14, do not address the meaning of "internet service provider." We suggest that this term be defined in a manner that clarifies whether a person offering telecommunications on a common carrier basis would be considered an "internet service provider."

We are not recommending that this bill be held on legal grounds, and simply want to ensure that the Committee is informed of the possible legal risk.

Thank you for the opportunity to comment.



Committee: House Committee on Consumer Protection & Commerce
Hearing Date/Time: Tuesday, February 13, 2018, 2:00 p.m.
Place: Conference Room 329
Re: Testimony of the ACLU of Hawai'i in **Support** of H.B. 2296, H.D. 1, Relating to Internet Privacy

Dear Chair Takumi, Vice Chair Ichiyama, and Committee Members:

The American Civil Liberties Union of Hawai'i ("**ACLU of Hawai'i**") testifies in **strong support** of H.B. 2296, H.D. 1, which provides that internet service providers ("**ISPs**") may not use, disclose, sell, or permit access to a customer's personal information, including names, addresses, geolocation, and browsing history, without the customer's prior consent.

In 2017, the U.S. Congress and President Trump overturned the Federal Communications Commission's ("**FCC**") privacy rules protecting the private information of ISP subscribers.¹ These FCC rules would have prevented ISPs from sharing customers' browsing history with advertisers, forced ISPs to be clear about what information they are collecting, required ISPs to take reasonable steps to protect your data from hackers, and prohibited companies from completely conditioning service on providing consent to share personal information.

The repeal of the FCC's privacy rules has not been popular. A Huffington Post/YouGov poll found that an astonishingly high 83 percent of Americans — including 82% of Democrats and 84% of Republicans — agree that telecom and cable companies "should not be allowed to share personal information about customers, such as their web browsing history, without first getting customers' permission."² Only 6 percent disagree.

H.B. 2296 seeks to restore Hawai'i residents' control over our online personal information, such as browsing history, which can reveal deeply personal things about our lives and may be used in harmful and discriminatory ways. For example, in 2013, a congressional report found that data brokers increasingly seek to identify financially vulnerable populations to assist companies in targeting their financial products.³ Yet even if consumers take steps to protect their private information by, for example, using a private web browsing option, their ISP can still see the websites they visit and has access to a host of other sensitive information.

¹ FCC, *In re Protecting the Privacy of Customers of Broadband and Other Telecommunication Services*, WC Docket No16-106 (Oct. 27 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-148A1.pdf.

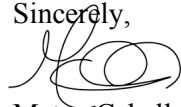
² Huffington Post and YouGov, *March 31, 2017, poll*, available at http://big.assets.huffingtonpost.com/tabs_HP_Online_Privacy_20170330.pdf#page=3.

³ U.S. Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff, *A Review of Data Broker Industry: Collection, Use, and Sale of Consumer Data* (Dec. 18, 2013), available at <https://www.commerce.senate.gov/public/cache/files/0d2b3642-6221-4888-a631-08f2f255b577/AE5D72CBE7F44F5BFC846BECE22C875B.12.18.13-senate-commerce-committee-report-on-data-broker-industry.pdf>.

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With the repeal of the privacy rules through an act of Congress, the FCC is now prevented by law from issuing rules that are “substantially the same” in the future.⁴ As a result, the FCC may be unable to issue rules that directly respond to future abuses. Thus, it is incumbent upon the Hawai‘i Legislature to pass H.B. 2296 to protect everyone’s online privacy in Hawai‘i.

Thank you for the opportunity to testify.

Sincerely,

Mateo Caballero
Legal Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for 50 years.

⁴ 5 U.S.C. § 801(b)(2).



**Testimony of
Gerard Keegan
CTIA**

**Before the Hawaii House of Representatives Committee on Consumer Protection &
Commerce**

February 13, 2018

On behalf of CTIA®, the trade association for the wireless communications industry, I submit this testimony in opposition to Hawaii House Bill 2296 HD1, which would restrict how internet service providers (ISPs) operate in Hawaii.

Any suggestions that ISPs, including CTIA members, have unique access to consumer data online are unfounded. A comprehensive study by veteran Clinton and Obama Administration privacy expert Peter Swire showed that ISPs actually have limited insight into the online activity of consumers.¹ HB 2296 HD1 unnecessarily targets one set of providers - ISPs - and treats them differently than others operating in the internet ecosystem.

The wireless industry takes a proactive approach to protect consumer privacy. Our members provide consumers with detailed privacy policies, which clearly describe how providers protect consumer data. Current federal and state statutes also provide additional layers of protection for sensitive consumer information. In addition, ISPs, including CTIA members, have committed to principles that maintain privacy protections consistent with the Federal Trade Commission's effective privacy framework, covering transparency, consumer choice, security, and data breach notifications.²

CTIA member companies have long recognized the importance of protecting consumer data and respecting consumer privacy. In 2003, CTIA and the wireless carriers that are signatories to the "Consumer Code for Wireless Service," including AT&T, Sprint, T-Mobile, and Verizon Wireless, made a commitment to help consumers make informed choices.³ The tenth point of the Code provides that signatory carriers agree to abide by policies for the protection of customer privacy. As part of that commitment, carriers follow policies regarding the privacy of customer information in accordance with applicable federal

¹ "Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others," http://www.iisp.gatech.edu/sites/default/files/images/online_privacy_and_isps.pdf, Swire, Peter, last accessed 2/12/2018; "ISP access to user data is not comprehensive – technological developments place substantial limits on ISPs' visibility. [And] ISP access to user data is not unique – other companies often have access to more information and a wider range of user information than ISPs."

² "Protecting Consumer Privacy Online," <http://www.ctia.org/docs/default-source/default-document-library/final--protecting-consumer-privacy-online.pdf>, last accessed 2/12/2018.

³ CTIA Consumer Code for Wireless Service, <http://www.ctia.org/initiatives/voluntary-guidelines/consumer-code-for-wireless-service>, last accessed 2/12/2018.



and state laws and make available privacy policies concerning information collected online. The wireless industry recognizes the importance of customer privacy and takes strong measures to protect customer data.

It is important to note that recent Congressional action did not change privacy protections for wireless consumers. The Federal Communications Commission (FCC) rules had not taken effect, so the 2017 CRA changed nothing from the regulatory framework that has existed since 2015.

Moreover, the FCC's recently adopted Internet Freedom Order means that the FTC will reassert its well-established oversight and enforcement authority over ISP consumer privacy practices.⁴ Over 20 years, the FTC has developed and enforced an effective privacy framework that applies to all players in the internet ecosystem. Restoring FTC jurisdiction subjects ISPs to the same, effective regulatory framework that applies to the rest of the internet ecosystem. It is also consistent with the framework advocated for by the Obama Administration, which noted that, "uniform consumer data privacy rules are necessary to create certainty for companies and consistent protections for consumers."⁵ This legislation deviates from the privacy framework and standards that have been in place for decades and imposes unjustified restrictions on ISPs alone.

By creating two sets of rules that are different for various entities within the internet ecosystem, HB 2296 HD1 would harm competition and create consumer uncertainty about which rules apply to their data. Survey results submitted to the FCC last year showed that 94 percent of internet users believe all companies touching their online data should follow the same privacy rules.⁶ These findings indicate that HB 2296 HD1, which targets only ISPs, would in fact be a contravention to what consumers actually want. The bill would also make it very difficult – if not impossible – for ISPs to operate in Hawaii and could have a host of unintended consequences. Additionally, in recognition that the internet is not defined by state lines, the recent FCC order includes preemption language to avoid a patchwork of state laws regulating internet service.

CTIA members are absolutely committed to protecting consumer information as they value consumer trust. Existing federal and state laws and protections remain intact today rendering HB 2296 HD1 unnecessary. Moreover, CTIA members have committed to a framework to protect consumer information and privacy. For these reasons, we respectfully ask that you not move HB 2296 HD1.

⁴ See FCC Restoring Internet Freedom Report & Order ¶ 194 (adopted Dec. 14, 2017; issued Jan. 4, 2018), http://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.

⁵ "Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy," <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1096&context=jpc>, last accessed 2/12/2018.

⁶ The Progressive Policy Institute, "Consumers Want One Set of Rules Protecting Their Information," <http://www.progressivepolicy.org/press/press-releases/press-release-consumers-want-one-set-rules-protecting-information/>, last accessed 2/12/2018.

Written Statement of
Ani Menon
Director of Government & Community Affairs

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

February 13, 2018 2:00PM
State Capitol, Conference Room 329

COMMENTS FOR:

H.B. NO. 2296 H.D. 1 RELATING TO INTERNET PRIVACY

To: Chair Takumi, Vice Chair Ichiyama, and Members of the Committee
Re: **Testimony providing comments on HB2296 HD1**

Aloha Honorable Chair, Vice-Chair, and Committee Members:

Thank you for this opportunity to submit comments on HB2296 prohibiting internet service providers from using the personal information of customers for specific purposes without the prior written consent of customers.

Current and existing federal and State statutory laws provide layers of protection for consumer information, and cover issues relating to privacy, consent, data security, and necessary notifications. When State and federal laws differ in their treatment of customer information, Hawaiian Telcom follows whichever law is stricter on a particular point.

Protecting our customers' privacy is extremely important for Hawaiian Telcom. We take our responsibility as guardians of sensitive information seriously, and take proactive measures to protect information that we have obtained by virtue of provisioning services to customers.

An excerpt from our terms of service summarizes our position on this topic:

“Hawaiian Telcom does not sell or disclose individually- identifiable information obtained online, or information about you or your account or service, to anyone outside of Hawaiian Telcom Services Company, Inc. or its authorized vendors, contractors, affiliates and agents unless you specifically authorize it, disclosure is required or permitted by law, required by court order, warrant or subpoena; requested by government officials with reasonable grounds to believe that the information is a communication of a computer trespasser; or deemed necessary by Hawaiian Telcom in its sole discretion to protect the safety, rights or property of Hawaiian Telcom or any other person or entity.”

Our full terms of service describing how we protect consumer data may be found online at hawaiiantel.com. Thank you for this opportunity to provide comments on HB2296 HD1.

Written Statement of
Ani Menon
Director of Government & Community Affairs

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

February 13, 2018 2:00PM
State Capitol, Conference Room 329

COMMENTS FOR:

H.B. NO. 2296 H.D. 1 RELATING TO INTERNET PRIVACY

To: Chair Takumi, Vice Chair Ichiyama, and Members of the Committee
Re: **Testimony providing comments on HB2296 HD1**

Aloha Honorable Chair, Vice-Chair, and Committee Members:

Thank you for this opportunity to submit comments on HB2296 prohibiting internet service providers from using the personal information of customers for specific purposes without the prior written consent of customers.

Current and existing federal and State statutory laws provide layers of protection for consumer information, and cover issues relating to privacy, consent, data security, and necessary notifications. When State and federal laws differ in their treatment of customer information, Hawaiian Telcom follows whichever law is stricter on a particular point.

Protecting our customers' privacy is extremely important for Hawaiian Telcom. We take our responsibility as guardians of sensitive information seriously, and take proactive measures to protect information that we have obtained by virtue of provisioning services to customers.

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Our full terms of service describing how we protect consumer data may be found online at hawaiiantel.com. Thank you for this opportunity to provide comments on HB2296 HD1.



TESTIMONY OF CHARTER COMMUNICATIONS
House Committee on Consumer Protection and Commerce
Hawai'i State Capitol, Conference Room 329

RE: H.B. 2296, H.D.1

TUESDAY, FEBRUARY 13, 2018
2:00 PM

Aloha Chair Takumi, Vice Chair Ichiyama and Members of the Committee,

I am Myoung Oh, Director of State Government Affairs, here on behalf of Charter Communications in **opposition** to H.B. 2296, H.D. 1.

Charter Communications is a dedicated community partner in Hawai'i. We currently have over 3,500 Wi-Fi hotspots deployed throughout the islands with a commitment to provide hundreds more in 2018. We employ 1,400 Hawai'i residents and contribute to Hawai'i's economy with over \$50 million in taxes.

We have also raised our base-level broadband speed to 200 Mbps for new customers and have launched Spectrum Internet Assist, our low-cost broadband program, for low-income families and seniors, which at 30 Mbps, will be the fastest program of its kind offered by any broadband provider, and we believe will have a tremendous positive impact on the communities we serve in Hawai'i.

Charter greatly appreciates the concerns about protecting consumer online privacy and we are committed to that concept. H.B. 2296, H.D.1 proposes to regulate at the state level something that for three decades has been the purview of the federal government, specifically the Federal Trade Commission (FTC). The FTC continues to be the regulatory authority in protecting consumers.

Moreover, we believe legislation, if any, should be guided by Congress and be nationally uniform, flexible and technology-neutral, while also providing clear rules of the road for companies.

Privacy regime should apply to all sectors of the internet ecosystem. This includes national legislation that better defines the roles of the FTC and the Federal Communications Commission (FCC) that is consistent and comprehensive.

We believe this legislation is unnecessary in attempts to address a non-issue.

Mahalo for the opportunity to testify.

HB-2296-HD-1

Submitted on: 2/9/2018 2:36:27 PM

Testimony for CPC on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Margaret Maupin		Support	No

Comments:

HB-2296-HD-1

Submitted on: 2/10/2018 8:53:00 PM

Testimony for CPC on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
lynne matusow	Individual	Support	No

Comments:

I am not a commodity. I should not be treated as one. If an individual or entity wants to sell or trade my name and other information not only should they have my prior consent but they should pay me for the privilege.

I have forced organizations who sell my information to return my donations. The selling/trading etc. is an invasion of privacy and should be stopped at all costs without prior consent from the individual(s) whose privacy is being invaded.

Lynne Matusow