



Peace Officers Research Association *of California*

April 6, 2016

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
House Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte and Ranking Member Conyers,

On behalf of the Peace Officers Research Association of California (“PORAC”), the nation’s largest statewide public safety association, representing over 66,000 members in California and Nevada, I write to oppose H.R. 699, the “the Email Privacy Act,” which seeks to update the Electronic Communications Privacy Act (“ECPA”) for the digital age.

PORAC supports reforming ECPA and acknowledges the need for renewing this outdated law, but H.R. 699 is not the answer. The ability to access electronic communications is critical for law enforcement to ensure public safety efficiently and effectively. As written, H.R. 699 places an undue burden on law enforcement’s ability to gather digital evidence, providing significantly more protection for stored electronic communications than would be provided to evidence in the physical world. There should not be greater protections for a particular piece of evidence simply because it is stored electronically as opposed to in a kitchen drawer.

H.R. 699 would require a law enforcement officer who has established probable cause before an independent magistrate and obtained an ECPA warrant to notify a subject of investigation that the officer has obtained electronic evidence about that individual. Such a requirement is without precedent.

Rule 41 of the Federal Rules of Criminal Procedure requires a warrant to be served on the place from which the records are to be seized. In the case of emails acquired with an ECPA warrant, the warrants have always been served on the email provider. In its 30 year history, ECPA has never required the warrant to also be served on the customer, and no court has ever held that this in any way diminishes the customer’s Fourth Amendment rights.

Moreover, this is an overly burdensome accountability measure that would negatively impact law enforcement’s ability to gather digital evidence, as it would increase the risk that a suspect may try to flee or destroy evidence. It also may place the investigating officer’s safety in peril. While the legislation does provide a mechanism by which a law enforcement officer could request a notification delay, the officer must request such a delay from the court, a requirement that would create additional hurdles to conducting a thorough investigation.

Today, law enforcement is at the mercy of third party service providers when it comes to obtaining content during a crisis or other exigent circumstance. While third party service providers may voluntarily provide access to stored content, they are not required to do so—this often delays law enforcement’s receipt of the digital evidence necessary to continue a comprehensive investigation or to respond to an emergency.

Unfortunately, the legislation overlooks the fact that third party service providers are often unresponsive to warrants and other legal documents issued by law enforcement. ECPA should be updated to address modern Americans’ digital privacy as well as the many non-technical barriers that law enforcement deal with on a day-to-day basis, namely the unwillingness of the third party entities that retain these records to respond to law enforcement’s demands in a timely manner.

Thus, while we support requiring a warrant to obtain the content of an electronic communication, if Congress decides to require such a warrant it should also provide for historically recognized exceptions to warrant requirements. Such exceptions include instances when an individual provides consent for law enforcement to obtain the data, in cases of exigent circumstances, or emergencies.

As we have learned since the passage of California’s ECPA, law enforcement concerns about investigation integrity and access are not exaggerated. As you prepare for the upcoming markup of H.R. 699, we hope that you will consider the barriers to access that this bill creates and the negative impact it will have on law enforcement’s ability to effectively and reliably protect the innocent and bring the guilty to justice.

We look forward to working with you on this and future issues. Should you have any questions, please do not hesitate to contact me personally at the PORAC Headquarters at (916) 928-3777 or contact our federal legislative advocates at Steptoe & Johnson LLP at (202) 429-6457.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Durant", written in a cursive style.

Mike Durant
President
Peace Officers Research Association of California

cc: The Honorable Jim Sensenbrenner
The Honorable Lamar Smith
The Honorable Steve Chabot
The Honorable Darrell Issa
The Honorable Randy Forbes
The Honorable Steve King
The Honorable Trent Franks
The Honorable Louie Gohmert
The Honorable Jim Jordan
The Honorable Ted Poe
The Honorable Jason Chaffetz
The Honorable Tom Marino
The Honorable Trey Gowdy
The Honorable Raul Labrador
The Honorable Blake Farenthold
The Honorable Doug Collins
The Honorable Ron DeSantis
The Honorable Mimi Walters
The Honorable Ken Buck
The Honorable John Ratcliffe
The Honorable Dave Trott
The Honorable Mike Bishop

The Honorable Jerry Nadler
The Honorable Zoe Lofgren
The Honorable Sheila Jackson Lee
The Honorable Steve Cohen
The Honorable Hank Johnson
The Honorable Pedro Pierluisi
The Honorable Judy Chu
The Honorable Ted Deutch
The Honorable Luis Gutierrez
The Honorable Karen Bass
The Honorable Cedric Richmond
The Honorable Suzan DelBene
The Honorable Hakeem Jeffries
The Honorable David Cicilline
The Honorable Scott Peters