

SENATE BILL REPORT

SHB 2483

As of February 25, 2016

Title: An act relating to protecting minors from sexual exploitation.

Brief Description: Protecting minors from sexual exploitation.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Sawyer, Orwall, Jinkins, Tarleton, Kilduff, Sells, McBride, Bergquist, Ormsby, Santos and Goodman).

Brief History: Passed House: 2/15/16, 97-0.

Committee Activity: Law & Justice: 2/24/16.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Lindsay Erickson (786-7465)

Background: The criminal laws addressing the sexual exploitation of children establish a number of specific crimes, including:

- Sexual Exploitation of a Minor;
- Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Sending or Bringing into State Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct;
- Communication with Minor for Immoral Purposes;
- Commercial Sexual Abuse of a Minor;
- Promoting Commercial Sexual Abuse of a Minor;
- Promoting Travel for Commercial Sexual Abuse of a Minor; and
- Permitting Commercial Sexual Abuse of a Minor.

Under a federal statute known as the Stored Communications Act, enacted in 1986 as part of the Electronic Communications Privacy Act, a provider of electronic communication services or remote computing services must disclose certain information about a subscriber or customer to a governmental entity when requested by an administrative subpoena authorized under either federal or state statute. The government can obtain the following basic subscriber information, and not content of communications: name and address; local and long distance telephone connection records, or records of session times and durations; length

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and types of service, including start date and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment for such service, including any credit card or bank account number.

Summary of Bill: Definitions. "Electronic communication service" means any service that provides users the ability to send or receive wire or electronic communications. "Provider" means a provider of electronic communication services or remote computing services. "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

Administrative Subpoena Authority. In any criminal investigation of an offense involving the sexual exploitation of children, the Attorney General or a prosecuting attorney may issue a subpoena to a provider of electronic communication services or remote computing services requiring the production of relevant records where the Attorney General or prosecuting attorney has reason to suspect a crime of sexual exploitation of a child has been committed. A subpoena must specify the records or information required to be produced and specify a return date within a reasonable period.

The subpoena may not require a provider to produce any customer or subscriber records or information other than the following:

- name;
- address;
- local and long distance telephone connection records, or records of session times and durations;
- length of service and types of service utilized;
- telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
- means and source of payment for such service, including any credit card or bank account number.

Disclosure. A provider is prohibited from disclosing the existence of a subpoena to the subscribers or customers whose records or information are requested or released under the subpoena for 90 days from the date of receipt of the subpoena. After the 90 day period, a provider is permitted, but not required, to notify a subscriber or customer whose information or records were disclosed. A governmental entity receiving records or information under the subpoena is not required to notify a subscriber or customers.

Modifying or Quashing Orders. At any time before the return date specified in the subpoena, the provider to whom a subpoena is directed may petition the superior court for an order modifying or quashing the subpoena on the grounds that it is oppressive or unreasonable. A petition may be filed: in the county of the prosecuting attorney, if the subpoena was issued by a prosecuting attorney; in Thurston County superior court, if the subpoena was issued by the Attorney General; or where the person subject to the subpoena resides, is found, or carries on business.

Enforcement of Subpoenas. The Attorney General or a prosecuting attorney may seek an injunction from the superior court to compel compliance with a subpoena. A person who

neglects or refuses to comply with a subpoena may be punished for contempt of the court. An injunction may be filed: in the county of the prosecuting attorney, if the subpoena was issued by a prosecuting attorney; in Thurston County superior court, if the subpoena was issued by the Attorney General; or where the person subject to the subpoena resides, is found, or carries on business.

Civil Liability. Any person receiving a subpoena, including his or her officers, agents, and employees, who complies in good faith with the subpoena, may not be liable to any customer or other person for production of the materials sought, or for not disclosing to the customer that the materials were produced.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill is justified and gives prosecutors new tools to use in quick fashion. This allows prosecutors to use an administrative subpoena and would speed up the process so they are not having to wait on judges. This process parallels the federal procedure allowing for administrative subpoenas. Washington State has the highest rate of people who are downloading pictures of children who are being raped. Data shows that people downloading these images are hands-on offenders. One problem for prosecutors on these cases is that they must go through the subpoena process, in front of a judge, multiple times before they are successful in obtaining information. Some companies are even notifying customers of subpoenas, so the customers have opportunities to destroy evidence. Prosecutors are also spending a lot of time trying to figure out who the information belongs to - is it the company, the data center, etc. - and are slowed down by the administrative burden. By the time the source of the images is known, the children are more at risk for additional harm.

CON: The existing process with judicial oversight is the appropriate safeguard. These are the sorts of things that should be reviewed by a judge before such subpoenas are issued. This is too broad and would erode the Fourth Amendment of the U.S. Constitution and article I section 7 of the Washington Constitution. Subpoenas can even be obtained over the phone, so availability of judge should not be an issue. Typically these investigations are happening for a period of months before a charging decision is made, so the rationale that these decisions need to be made quickly is not supported. This bill also provides an unclear legal standard. It does not appear to require probable cause or reasonable suspicion, but rather if the attorney has reason to suspect a crime of sexual exploitation of a child has been committed. The records need only be relevant to an investigation.

Persons Testifying: PRO: Representative Sawyer, Prime Sponsor.

CON: Shankar Narayan, ACLU-WA; Amy Muth, WA Assoc. of Criminal Defense Lawyers & WA Defender Assoc.

Persons Signed In To Testify But Not Testifying: No one.