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W. SCOTT THORPE

April 24, 2013

The Honorable Mark Leno

California State Senate

State Capitol

Sacramento, CA 95814

RE: SB 467 – Oppose

Dear Senator Leno:

On behalf of the California District Attorneys Association (CDAА), I regret to inform you that we are opposed to your measure, SB 467. This bill creates an unnecessary and duplicative state requirement that a governmental entity obtain a search warrant in order to access the contents of electronic communications from service providers. This is already required under federal law.

In 1986, the United States Congress enacted the Electronic Communications Privacy Act (18 USC 2701 et seq.). In brief terms, the Act effectively requires, with limited exception, a governmental entity to obtain a search warrant if it seeks the contents of a wire or electronic communication from an electronic communication service or remote computing service. In 1999, the California Legislature added Penal Code Section 1524.2 to make clear its authority to reach the out-of-state corporations doing business in California to provide "electronic communications services" or "remote computing services."

SB 467 attempts to graft onto California law more of the federal statute without adopting the full federal legislation, which would be unnecessary because it already applies to state and local law enforcement. The piecemeal approach will simply cause confusion about how to reconcile the two statutory schemes.

Federal law applies only to those electronic communication services available to the general public and California law mirrors that limitation. The proposed amendments to Penal Code Section 1524.2 eliminate this restricted coverage. Thus, the federal statutes do not regulate access to a closed system service such as that provided by a corporate information technology (IT) system or the IT system of a county government. SB 467 would extend coverage to private systems. This change will be the first item to cause confusion about how to proceed to legally obtain Intranet contents of communications.

The amended section also requires that law enforcement must give notice to the person whose electronic messages are obtained by search warrant within three days of law enforcement receiving the messages. This is not required at all under the federal law if a search warrant is used (18 USC 2703(b)(1)(A)). Prior notice to the customer of the service is only required if law enforcement proceeds by way of what is referred to as a "d" order (from sec. 2703(d)). A "d" order can be issued on less than probable cause. (See 18 USC 2703(b)(1)(B) for the notice requirement.) Thus, this bill will impose a new burden on law enforcement.

Proposed new section 1524.5 lists the information law enforcement must provide to the person whose electronic communications are obtained. The list comes directly from the federal statute requiring the same information be released when a "d" order is used, but not a search warrant. Under the proposed state law, law enforcement would have to provide the person with a copy of the search warrant, state with "reasonable specificity the nature of the governmental inquiry," state that information about the person's communications were received by the government entity and the date received or requested, whether notification to the person was delayed and, if so, the justification for the delay and which provision of state law authorized the delay.

Proposed new section 1524.6 prohibits a person or entity providing "electronic communications services" or "remote computing services" from knowingly divulging the contents of any communications stored, held, or maintained by those services. The federal statute has the same type of prohibition but applies only to services available to the general public. They do not govern a closed communication system within a corporation or governmental entity. SB 467 would extend the prohibition to both the public and private systems which will add to the confusion.

The federal statutes provide a number of exceptions to the nondisclosure rule. The bill copies those verbatim (except that it eliminates the federal exception for reports to the National Center for Missing and Exploited Children). Because the bill would govern private systems, a problem arises because none of those exceptions appears to allow IT in the private system to disclose to management (corporate or governmental) communications of an employee who is abusing the e-mail system. Obviously, this could be disruptive of business or government operations.

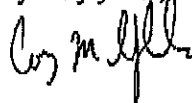
In addition, proposed section 1524.7 imposes civil penalties, including punitive damages, for illegal disclosures with a minimum recovery of \$1,000 plus costs and attorney's fees. The bill does not include the federal statute giving additional defenses against civil lawsuits (18 USC 2707(e)), nor does it provide for a statute of limitations as the federal law does (18 USC 2707(f)).

A final potential legal obstacle for this bill is the issue of federal preemption. In *Quon v. Arches Wireless Operating Co.*, 445 F. Supp. 2d 1116 (CD Cal. 2006) at page 1138, the federal district court judge found that the federal statute preempted any additional state remedies for violations of the federal act. That issue disappeared as the case wound its way up to the U.S. Supreme Court. Nonetheless, if the district court judge was correct, California may not apply punitive damages to violations.

In short, this bill appears to be completely unnecessary in view of the extensive federal statutes on this subject. It will inject confusion into the matter by applying different rules to private communications systems and, in fact, may be preempted by federal law.

Thank you for your consideration of our concerns. If you would like to discuss these issues further, please do not hesitate to contact me.

Very truly yours,



Cory M. Salzillo
Director of Legislation

cc: Members and Staff of the Senate Committee on Public Safety
Eric Csiznar, Republican Consultant