



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

April 19, 2013

Chair Loni Hancock and Committee Members
Senator Mark Leno
Senate Public Safety Committee
State Capitol, Room 2031
Sacramento, CA 95814
Via fax: (916) 445-4688
Via fax: (916) 445-4722

Re: SB 467 (Leno) –Support

Dear Honorable State Senator Loni Hancock:

The Electronic Frontier Foundation (“EFF”) is proud to sponsor SB 467, a sensible bill that updates the state’s electronic privacy laws to the realities of the 21st century.

EFF is a member supported civil liberties organization based in San Francisco working to protect privacy rights in the online world. With more than 21,000 dues-paying members nationwide, EFF represents the interests of technology users in courts and legislatures, and has played a crucial role in broader policy debates surrounding legal rights in the digital age both in California and nationally.

Communicating online is a way of life, especially for Californians. E-mail is now a ubiquitous form of communication for friends, family, businesses and educators. California companies like Twitter, Facebook and Linked In are creating new forms of online communication beyond traditional e-mail. As the popularity of “cloud” storage has soared in recent years, we live in a reality where years of electronic correspondence are now stored online for extended periods of time.

Although technological changes have had a profound impact on how we talk to loved ones and do business, electronic privacy laws have failed to keep up. The Electronic Communications Privacy Act (“ECPA”), the federal law that governs access to electronic communications stored by online service providers – and which California’s law is modeled after – was enacted in 1986, long before the advent of the World Wide Web as we know it, let alone smartphones and e-mail inboxes with infinite storage capacity.

ECPA’s age shows most dramatically when examining how it regulates law enforcement access to the contents of electronic communications. Under ECPA, law enforcement can obtain the contents of electronic communications stored online with a service provider for less than 180 days only with a search warrant. But once a message has been stored for more than 180 days, law enforcement can obtain its contents without a search warrant.

815 Eddy Street • San Francisco, CA 94109 USA

voice +1 415 436 9333

fax +1 415 436 9993

web www.eff.org

email information@eff.org

This 180-day dividing line was born out of the technological realities of 1986, when people didn't have the capacity or need to store years of electronic correspondence online. Online storage was limited and Congress presumed people would download important electronic messages onto their own personal computers. Any message sitting on a server for more than 180 days was considered abandoned. And of course there was no such thing as Gmail, Facebook or Twitter in 1986.

The opposite is true today. With bigger online storage capacity and the prevalence of smartphones and tablets, people are leaving more of their electronic correspondence online in order to access them on any device wherever they are. But under ECPA the only way to take advantage of this convenience is to surrender your right of privacy.

Courts are starting to recognize this tension. In 2010, the Sixth Circuit Court of Appeals ruled in *United States v. Warshak* that people have a reasonable expectation of privacy in email, meaning that any portion of ECPA that authorizes warrantless access to electronic communications violates the Fourth Amendment.

SB 467 codifies these principles and ensures that California's statutory regime stays compliant with the Fourth Amendment. SB 467 protects emails and other electronic communications content from warrantless government intrusion when stored online and in the cloud, regardless of how long it is stored online or whether it has been opened or unopened.

But it's not just these principles that will be codified by SB 467: it also codifies the practices some of California's biggest technology companies. Google, Facebook, Microsoft and Yahoo! have all publicly indicated they require a search warrant before they disclose the contents of electronic communications to law enforcement. SB 467 makes these practices apply to all electronic communications providers and all law enforcement officers in the state.

Ultimately, this means SB 467 will not harm law enforcement's ability to investigate and solve crimes with the aid of electronic communications. Even the federal Department of Justice recently testified before Congress that it now supports a search warrant requirement before law enforcement can access the contents of electronic communications from a service provider.

SB 467 creates an easy rule that balances the needs of law enforcement with the right to privacy inherent in the Constitution in a way that reflects today and tomorrow's technological reality. For that reason, EFF is proud to sponsor SB 467.

Respectfully,

Hanni Fakhoury, Esq.
Staff Attorney