



Kansas County & District Attorneys Association

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To: Chairman DeGraaf and Members of the House Committee Government Security and Technology

From: Kim T Parker, Prosecutor Coordinator: Kansas County & District Attorney's Association

Date: March 6th, 2017

Re: Opposition to House Bill 2332

Good Afternoon Chairman DeGraaf and Committee Members,

Thank you for the opportunity to provide testimony in opposition to HB2332. I am Kim Parker and I am addressing you on behalf of the Kansas County and District Attorney's Association and the many Kansas prosecutors they represent. I have recently retired after serving the citizens of this state for over .32 years, as a prosecutor in Sedgwick County. Today I provide opposition testimony to HB2332 in its current form.

The provisions of Kansas HB 2332 mirror in tone if not in language the policy measures contemplated by Representative Kevin Yoder's bill, HR 699, the email privacy act. Members of the KCDAA board of directors traveled to Washington DC in late January 2017 and discussed personally with Rep. Yoder, Rep. Jenkins, Senator Roberts and Senator Moran and staff of Rep. Marshall (former Rep. Pompeo was in the process of transitioning to the CIA) re HR 699. Consistent with those conversations, the KCDAA's position relative to Kansas HB 2332 is as follows:

1. HB 2332 intends to keep cell phone and internet providers from sharing content information with anyone but the subscriber:

"Section 1 (a) a person or entity providing an electronic communications service or remote computing service to the public, or a third-party provider with whom such person or entity has contracted, shall not knowingly divulge to any person or entity the contents of an electronic communication or electronic storage provided or maintained by that service, except for the purposes of providing such electronic communications or remote computing services to the subscriber or customer, that is received by means of an electronic communications system from a subscriber or customer of the service."

Some might argue that law enforcement is not affected because HB 2332 as proposed reads:

(c) A person or entity may divulge the contents of an electronic communication or electronic storage . . . (2) as otherwise authorized by a search warrant;"



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However, a number of concerns remain that could seriously effect legally valid criminal investigations, and the rights of citizens to be protected from criminal activity that occurs, exists, in electronic communications; particularly in the area of sexual exploitation of children, human trafficking, elder abuse, identity theft and embezzlement.

This bill makes no provision for exceptions to the warrant requirement. Relative to the federal bill, HR 699, Steven H. Cook, president of the National Association of Assistant United States Attorneys, has said, "While the Email Privacy Act expands Fourth Amendment protections and imposes a warrant requirement to compel disclosure of stored email or text, the statute does not recognize any of the well-established exceptions to the warrant requirement that would be applicable in every other circumstance. I know of no other area of the law where this is the case."

Similarly, HB 2332 affords no exception for long establish exceptions to the warrant requirement like.

(a) Waivers - A girlfriend of a gang member wanted in a shooting, signs a waiver to access her cell phone content information or email information. Under 2332, a waiver would not be sufficient.

(b) Exigent circumstances – the murder victim’s phone found at the scene that was rendered inoperable during an attack can’t be downloaded due to the damage. We need to call Verizon to see who she was talking to before she was killed. I can’t get a warrant as I cannot articulate specific PC that fruits or instrumentalities of a crime exist on that phone.

(c) Emergency circumstances – a child abduction case. While the cops are busy tapping out a warrant application, the kid has left the state with the bad guy. Today, a call to Verizon might be sufficient to get them to release the material NOW while we continue to type up the arrant. That would not be allowed under HB2332

(d) Abandoned Property - a human trafficker often uses multiple cell phones to do business and will abandon one phone for another in order to avoid detection. The abandon phone would normally be available as an exception to the search warrant requirement but not under this measure.

(e) Communications while in a jail or prison facility or communications on devices where one has no constitutional right to privacy in the communication. Our local jail allows video chats between inmates and family (as opposed to manning a large family visitation room) and this year is beginning to allow defendants in the jail the ability to email family. If an inmates email is read or a video is watched by the jail and contains incriminating information Or a school or business



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provides internet service to employees or students, gives them a password then finds that someone was looking at child porn. Can they alert law enforcement?

HB2332 would shut down all legally obtained and court ordered subpoenas obtained through the Kansas criminal inquisition statute, K.S.A 22-3101.

2. HR 699 in the current (114<sup>th</sup>) Congress has 310 co-sponsors in the House currently and passed unanimously last year (it stalled in the Senate). Given the bipartisan support, the likelihood of success for the bill is high. It would seem appropriate for Kansas to wait and see what passes the Congress before risking the passage of a bill at the State level that could be in conflict with a pending federal law, by waiting one session, we will be better positioned to address this issue.

Thank you for the opportunity to express our concerns and opposition to HB2332. I urge you to decline the passage of HB2332.

Respectfully Submitted,

Kim T Parker

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Kansas County and District Attorneys Association