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MAINE PROSECUTORS ASSOCIATION

“An Act to Update the Laws Governing Electronic Device Information as Evidence”
Before the Joint Standing Committee on Judiciary

Public Hearing Date: May 22, 2023
Testimony in Opposition of LD 1576

Senator Carney, Representative Moonen and members of the Joint Standing Committee on Judiciary. My name is Andrew Berggren and I am an assistant district attorney in York County. I am representing the Maine Prosecutors Association and am here to testify in opposition of LD 1576.

LD 1576 represents a dramatic departure from a statutory structure that is already in place and creates confusion and complication to a process that is highly technical, in a constant state of evolution because of technological developments, and represents an ever-growing proportion of a prosecutor’s caseload.

The consistency in legal process requirements and definitions that apply to Electronic Service Providers (ESPs) and Electronic Communication Services (ECSs) is essential for prosecutors to advise law enforcement, review search warrants that are being sent to companies from around the country and addressing the constant changes presented by technology companies.

LD 1576 proposes significant changes to a statutory structure that is already in place and mirrors federal law and United States Supreme Court Case law. The proposed changes in LD 1576 are incongruent with federal law and will cause questions, uncertainty that will only further leave victims of crimes without justice, and law enforcement without the pivotal first step investigative tool that the changing landscape of technology requires.

At greatest issue with LD 1576 is the absolute restriction on an ESP to provide information to a law enforcement investigator, including by other avenues of legal process, other than with a search warrant.

With so many crimes occurring today over electronic forums, whether from one cellular phone to another, money transfer applications such as Venmo and/or PayPal, social media platforms such as Facebook or Instagram, or more elaborate scams which include Craigslist, Google and/or other email providers, identification of electronic data is the pivotal first step in many investigations. The narrow amount of information investigators can collect with the subpoena process is in many instances the first and only step available in an investigation.

Many times, an investigator will only have a tip from an ESP, an email address or account name. The process that is required to obtain the subscriber information for these accounts, name, IP address and/or an associated email address starts with an investigator requesting the local assistant district attorney working with that department to subpoena the ESP for the specific account details. After receiving the responsive materials, the investigator works to corroborate IP information, possible attached emails and a potential name of an individual associated with the account.

If the officer can establish probable cause at that point, then a warrant is drafted for specific content information of the account that probable cause supports the commission of a specified crime.

The restrictions on ESP proposed in LD 1576 will leave many victims of crimes committed over the internet or with the use of cellular phones without justice. In many other cases, the legal process placed on investigators would add complexity and a great deal of added time to the investigation process. Investigators would be unable to develop probable cause in many cases because there is just too little evidence to establish probable cause to the granting of the initial search warrant.

Further, should probable cause be established, these search warrants would need to be reviewed by prosecutors and then go through the judicial process for a judge's signature.

A word on the review process. I personally speak with the officers initially seeking subscriber records before issuing a subpoena. My signature is on the subpoena, so I want to know what is the status of the investigation and what is being sought. Once the responsive materials are received, I have to file notice with the court that responsive material has been received by the District Attorney's Office and that I have advised the law enforcement investigators that the provided records are subject to the confidentiality of the grand jury. Should the officer develop probable cause through their investigation, I will then receive at least one, if not more, search warrants for the actual digital content and/or location information associated with an account that probable cause supports being involved with the crime.

Warrants for digital information from ESPs or for phones are long. It is not uncommon for a warrant to be over 50 pages. These warrants are reviewed by an Assistant District Attorney. Each of these warrants are different. PayPal, Craigslist, Verizon, Google, Microsoft, Meta (Facebook and Instagram's parent company) all have their own proprietary products and their own language. Search warrants must accurately specify what evidence is sought. As you can imagine this takes time to review and make sure that each warrant meets the legal requirements of the warrant, the technical language and product information used by each ESP. This process is on top of a prosecutor's day-to-day obligations, which are increasing exponentially to begin with.

Given that technology by its very definition is ever changing, staying on top of the new applications, advancements in phone technology as well as being versed in the updated case law as courts tackle many of the questions that technology presents in criminal investigations, many districts have point people who try to stay as abreast of the changes as possible.

Electronic records are a challenging and technical dimension of criminal investigations. A cohesive and consistent statutory structure is necessary to best ensure the protection of citizen's rights, provide consistent structure to procedural requirements and allow for victims to find justice in the criminal justice system.

For these reasons, the Maine Prosecutors Association is in opposition of LD 1576.