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Testimony to the House Committee on Government, Technology and Security
In Opposition to HB2332 - Disclosure of Electronic Communication
March 6, 2017

Chairman DeGraaf and Committee Members,

This testimony is offered on behalf of the three associations listed in the header. Our associations have conducted extensive research on HB2332. For foundation purposes, subsection (a) states that electronic communications service providers "shall not knowingly divulge…the contents of an electronic communication or electronic storage provided or maintained by that service." Page 1, Lines 9–11. This does not apply to the subscriber or customer; the service provider may provide the electronic communications or "remote computing services" to the subscriber or customer.

Subsection (b)(1)(A) provides repercussions for contents of any electronic communications service or remote computing service that are divulged in violation of subsection (a). Page 1, Lines 17–19 states that the contents shall not be subject to discovery, subpoena, or other means of legal compulsion and shall not be admissible in evidence in any *judicial or administrative proceeding*. A judicial proceeding would apply to both civil and criminal cases because a judicial proceeding has been defined as "'[a]ny proceeding wherein judicial action is invoked and taken…Any proceeding to obtain such remedy as the law allows…A proceeding in a legally constituted court.'" Purdum v. Purdum, 301 P.3d 718, 725 (Kan. Ct. App. 2013) (quoting Black's Law Dictionary 849 (6th ed. 1990)).

Furthermore, the meaning of the phrase "solely due to the release of such electronic communications or electronic storage" is unclear. Page 1, Lines 19–20. If this is meant to say that the information is not subject to discovery, subpoena, or other means of legal compulsion based on the fact that it was improperly divulged per subsection (a) and for no other reason, it should be reworded. For example: *"(b)(1)(A) The contents of any electronic communications service or remote computing service that are divulged in violation of subsection (a) shall not be subject to discovery, subpoena, or other means of legal compulsion to any person or entity and shall not be admissible in evidence in any judicial or administrative proceeding based on the improper release pursuant to subsection (a)."* This also causes (b)(1)(A) and (b)(1)(B) to read more consistently.

Subsection (b)(1)(B) appears to allow disclosure, via any legal means, of the contents of any electronic communications service or remote computing service so long as the contents were not improperly divulged in violation of subsection (a). However, subsection (b)(1)(B) also includes "in a civil action" on Line 25. This arguably excludes criminal proceedings because of language in subsection (b)(1)(A) making the information inadmissible in "any judicial or administrative proceeding." As previously stated, judicial proceedings would include criminal proceedings. For clarity and consistency, Page 1, Lines 21–25 would better read as: "*(b)(1)(B) The contents of any electronic communications service or remote computing service shall remain subject to legal means of discovery, subpoena, or other means of legal compulsion in any judicial or administrative proceeding so long as the contents have not been previously divulged in violation of subsection (a).*"

Subsection (c) provides an exception referenced in subsection (a). Per subsection (c), the service provider may divulge the contents of an electronic communication or electronic device under certain circumstances. Page 2, Lines 3–4. Subsection (c) does not include any limiting language such as "civil action" as used in (b)(1)(B). This makes it the only subsection that allows for divulgence for a criminal case. Under subsection (c)(2), the contents may be divulged "as otherwise authorized by a search warrant." Page 2, Line 7. Because subsection (b)(1)(A) and (b)(1)(B) includes "legal means of discovery, subpoena, or other means of legal compulsion," it could be interpreted that the only method to compel release of the information in a criminal case is through a search warrant. In order to consistently apply the provisions to all judicial proceedings, subsection (c)(2) (Page 2, Line 7) should be changed to: *"(2) as otherwise authorized by any legal means of discovery, subpoena, or other legal means of compulsion."* The "other legal means of compulsion" would include a search warrant.

Subsection (d) limits the application of the bill to individuals located in this state or accessing the information while located within the state. This would prevent discovery in cases where the case involves an individual who may be located in another state during the investigation. In order to allow for discovery for judicial proceedings pending in Kansas, subsection (d), Page 2, Lines 17–21 would better read as follows: *"(d) The provisions of this section shall apply to any individual connected to, named, or otherwise involved in any judicial or administrative proceeding located within this state regardless of the route or physical location of any such electronic communications or remote computing service."*

Due to all of the inconsistencies in the language of the bill and the possibility of this bill applying to criminal procedures, our associations are opposed to HB2332.

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