



January 26, 2012

The Honorable Angus McKelvey
Chairman
Committee on Economic Revitalization and Business
House of Representatives
State of Hawaii

Re: Opposition to HB 2288

Hearing: 8:30 a.m., January 26, 2012

Location: Hearing Room 312

Dear Chairman McKelvey:

Thank you for the opportunity to provide comment on HB 2288, a bill to require Internet service providers to retain customer records.

The United States Internet Service Provider Association ("US ISPA") is a national trade association that was founded ten years ago to focus on law enforcement compliance and security matters common to major Internet service, network and portal providers. Our membership includes AOL, AT&T, Comcast, Earthlink, United Online, Verizon and Yahoo!.

With our focus on law enforcement compliance issues, it is only natural that US ISPA members are interested in discussing data retention. We have participated in numerous efforts seeking to address data retention, including extensive dialogues with the Department of Justice, the National Association of Attorneys General, state and local law enforcement, and the privacy and civil liberties communities, and we have provided testimony before the United States Congress. As such, US ISPA is uniquely positioned to comment on HB 2288 and we welcome this opportunity to present our view to your committee.

Mandatory data retention presents complex challenges and risks

US ISPA has carefully examined past, more narrowly drafted, data retention proposals and each time has concluded that a uniform retention mandate is certain to present enormous

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challenges to the Internet service provider (ISP) industry. These challenges include regulatory burdens, technical complications, significant capital and expense costs, and diversion of capital from innovation. HB 2288 raises all of these concerns.

HB 2288 is over-broad and raises myriad privacy concerns

Data retention as mandated by HB 2288 would require an entire industry to retain billions of discrete electronic records: records tracking every Internet user's online activities, every online movement. The requirements of HB 2288 go far beyond the data retention legislation currently pending in the U.S. Congress, and well beyond the information which law enforcement would need to conduct investigations into the majority of online criminal activity. The scope of the data retention requirements under HB 2288 are dramatically disproportionate to the utility of the data that would be collected. The impact on consumer privacy of such a mandate is clear.

From a practical perspective, the sheer volume of data makes the task of gathering, storing and retrieving such data impracticable. Many providers have hundreds of thousands of users, some millions, and others hundreds of millions. By requiring ISPs to retain "each subscriber's information and Internet destination history," including IP addresses, domain names and host names, the bill would force companies to retain a broad swath of private data about consumers, their private communications, location and web-surfing activity. This creates serious constitutional concerns and the very real expectation of legal challenges.

The mandate would disproportionately burden Hawaii's local ISPs

HB 2288 would reach beyond Hawaii's borders and apply to many companies offering Internet access service across the nation and the costs to comply with this new law would greatly affect small and local Hawaiian ISPs. Smaller companies do not have the operational resources and capital held by their larger, national competitors. As a result, these regulations divert capital to data retention and away from other uses.

We do not have a cost estimate in dollars to propose to the Committee due to the sheer breadth of the legislation, but in looking at much narrower, national proposals in the past, US ISPA has estimated that narrower requirements would cost our membership well over \$500 million in short-term compliance costs. Members of the Committee should carefully take into account the financial impact of HB 2288 on all providers, especially local Hawaiian companies, and consider whether such companies can absorb the compliance costs that will inevitably flow from the onerous data retention requirements in the bill.

Powerful tools for law enforcement already exist

Law enforcement has long had mechanisms at its disposal to preserve electronic evidence that might be useful for criminal or civil investigations. Use of these tools is far preferable from the industry's perspective than the imposition of burdensome data retention requirements.

The preservation authority in the Stored Communications Act (18 U.S.C. § 2701 *et seq.*) was enacted into law in 1996 and has been used in a wide range of criminal investigations ever since. Section 2703(f) allows law enforcement, including state and local law enforcement, by letter, fax, or email to direct ISPs to preserve records and other electronic evidence in their possession pending the issuance of appropriate legal process. Upon request, providers must retain the records requested for up to 180 days. Thus, today, information and evidence believed to be important to a law enforcement investigation can be **preserved** without the requirement to issue formal legal process or even demonstrate relevance.

Preservation authority is a powerful, targeted tool available to law enforcement today that, from the perspective of US ISPA's members, strikes the appropriate balance between the government's legitimate need to preserve evidence for a pending investigation and the avoidance of undue burden on ISPs or consumer privacy.

In Conclusion

US ISPA remains committed to continuing a dialogue with policymakers and law enforcement about how we can contribute to the fight against online crime. We do not believe that a broad data retention requirement, such as that in HB 2288, is the right way to address the issue of cybercrime, however. Broad data retention mandates raise serious questions about breadth, scope, duration, liability and costs – costs that go well beyond mere dollars. These costs include the impact on innovation, privacy, and the ability of ISPs to afford the investments in data retention that HB 2288 would impose. Finally, the data retention debate is presently taking place in the U.S. Congress, which we believe is the proper forum for discussion of an issue of such wide-spread policy importance and that carries with it such significant cost and compliance implications.

For all these reasons, US ISPA respectfully urges this Committee not to proceed with HB 2288.

We thank you for this opportunity to present US ISPA's views on this topic and look forward to continuing to work with the Committee Members and your staff on these issues.

Respectfully,

Kate Dean
Executive Director