

Response to FBI Agents Association Letter

In an April 24, 2013 letter, the FBI Agents Association (FBIAA) raised three concerns about S. 607, the Leahy-Lee ECPA Amendments Act, scheduled to be marked up on April 25. It is clear that the FBIAA has misinterpreted the bill.

Point 1: “[T]he FBIAA believes that S.607 should include explicit exceptions to the warrant requirement for emergencies and investigations of crimes such as child pornography.”

RESPONSE

ECPA already includes explicit exceptions that allow service providers to disclose content without a warrant in emergency situations and it requires them to make disclosures in child pornography cases, and S. 607 does **not** affect those exceptions.

- This includes child pornography reports that are made to NCMEC, which electronic communication service providers and remote computing services are statutorily obligated to make notwithstanding any warrant for content rule created by S. 607. *See* 18 U.S.C. 2702(b)(6).
- This also includes other emergency situations involving a risk of death or serious physical injury to any person. *See* 18 U.S.C. 2702(b)(8).

Point 2: “[W]e urge you to revise the provisions of S. 607 requiring notice to targets of investigations about the issuance of a warrant unless a delay order is obtained from the court issuing the warrant.”

RESPONSE

The notice requirements in S. 607 would actually lessen the burden on law enforcement and lessen the risk to ongoing investigations. Currently, when the government seeks to use a subpoena, it must give prior notice to the target or exercise delays of 90 days. In requiring warrants instead of subpoenas, S. 607 carries over the notice provisions and changes them in two ways to benefit law enforcement.

- Whereas current law requires notice of subpoenas **before** communications are turned over to the government, with the option for delay, S. 607 requires only notice **after** the content has been delivered to the government, with the option for delay.
- Whereas current law allows the government in a criminal case to delay notice for periods of 90 days at a time, S. 607 doubles the period of each delay, to 180 days, thus reducing by half the government’s burden in criminal cases of reasserting its need for delay.
- S. 607 does not change the standard for delayed notice. Under S. 607, the court “shall grant” the request if the court finds that one of the criteria for delay is met.
- The criteria under current law expressly include “seriously jeopardizing an investigation.”

Pont 3: Service providers should be required to respond to law enforcement in a timely manner.

RESPONSE

- Under current law, every subpoena can include a deadline set by the government and every warrant can include a deadline set by a judge.
- The Federal Rules of Criminal Procedure (FRCP) already provide a mechanism for government entities to enforce deadlines for compliance and to seek judicial remedies for providers that fail to comply.
- Courts, not legislatures, are better positioned to determine what timeframe is appropriate in particular cases based on the needs of law enforcement and the underlying facts of cases.
- If there is an arbitrary deadline to produce, service providers will be forced to treat all requests the same, working exclusively on a first-in, first-out basis, even when law enforcement might want service providers to focus on more recent requests that have greater urgency.
- When response times are slow, it is often because the law enforcement agency has made a mistake in the demand, such as serving the wrong process, serving process on the wrong provider, serving it on the right provider but at the wrong address, or failing to furnish information the provider needs to identify the subscriber whose information is sought. A statutory deadline would divert provider resources from responding to proper law enforcement requests to litigating delays caused by mistakes in disclosure demands.
- For example, a rigid time limit would significantly weaken the flexibility that service providers currently have to address emergency requests, including child safety cases, diverting their attention instead to the longest outstanding requests, even if there is far less urgency attached to such requests.
- Service providers that now expedite emergency requests from law enforcement in the absence of a rigid timeframe for production would be constrained if they faced civil or criminal penalties for failing to comply with an arbitrary time limit codified under ECPA.
- The proposal to codify a specific time limit does not appear to be based on any identifiable need, data, or other evidence that suggests law enforcement entities aren't receiving properly requested data in a timely manner. Senator Grassley's Comptroller General study amendment will provide real data about whether this is truly a problem.

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