

Federal Bureau of Investigation
Agents Association

September 19, 2012

The Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Reform of the Electronic Communications Privacy Act (ECPA)

Dear Chairman Leahy:

On behalf of the FBI Agents Association (FBIAA), a voluntary professional association currently representing over 12,000 active duty and retired FBI Special Agents, I write to express the FBIAA's concerns about a proposed amendment to the Electronic Communications Privacy Act (ECPA). We understand that this amendment will be offered during a Senate Judiciary Committee mark up. We urge you to work together with federal law enforcement to revise provisions that potentially undermine our ability to protect this Nation, our Constitution, and our citizens.

Some have predicated their support for this amendment on a generalized fear that technological changes yield new threats to the privacy of citizens. On behalf of the brave men and women defending this Nation as federal law enforcement officers, let me assure you that we share the important goal of protecting privacy interests. Likewise, it is clear that you share the equally important goal of thwarting terrorist attacks and ending criminal enterprises. As you previously stated, "In the fight against al-Qaida and other terrorist threats, we should give our intelligence, military, and law enforcement professionals all the tools they need—not limit those tools." Thus, to ensure that the twin goals of safety and privacy are reached, laws such as ECPA must always carefully balance federal law enforcement needs and the privacy interests of citizens.

To be specific, our concerns lie in both substance and process. On substance, the proposed ECPA changes would unnecessarily hinder law enforcement activities, examples of which are described in more detail below. On process, many key stakeholders have not had an opportunity to fully vet the proposed changes or suggest modifications. Moreover, if the Senate intends to undertake ECPA reform, then there are certainly issues that the federal law enforcement community would recommend addressing. At a minimum, we respectfully request that all stakeholders be given an opportunity to respond to what appear to be significant changes to current law that could hamstring critical law enforcement efforts.

Post Office Box 12650 • Arlington, Virginia 22219

A Non-Governmental Association

(703) 247-2173 Fax (703) 247-2175

E-mail: fbiaa@fbiaa.org

www.fbiala.org

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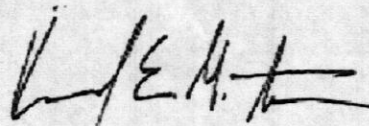
First, we urge revision of the provisions that would require law enforcement officers to obtain a probable cause warrant in order to compel the production of any stored electronic content. Requiring a probable cause warrant for access to all electronic information could add additional delays to the investigation process and could foreclose the use the subpoenas currently used to obtain information. Obtaining warrants can require more time-consuming paperwork in order to satisfy the high probable cause standard. These delays and complications could jeopardize the effectiveness of investigations that are often extremely time sensitive.

Second, we urge revision of the provision to provide notice to targets of investigations about the issuance of a warrant unless a 90-day delay order is obtained from the court issuing the warrant. Search warrants are often obtained in the early stages of investigation, and notifying the target of a search warrant about its issuance could allow for the destruction of vital evidence. Even if a delay order is obtained, limiting the delay to 90 days could undermine investigations that require more than 90 days to complete because targets would be notified of the ongoing investigation. While the orders can be renewed, an accidental failure to do so or a delay due to administrative error would alert the target to the investigation.

As FBI Agents, we understand the challenge before your Committee and stand ready to assist in addressing these issues. Every day Agents balance the interests of privacy and protection and are trained extensively to do so. As you know, the reform of ECPA is a very complicated issue. To avoid undermining sensitive investigations, the FBIAA respectfully urges you to delay offering the ECPA amendment; carefully analyze the detrimental impact of the warrant and notice provisions on investigations; and engage all stakeholders on these changes before adoption.

We greatly appreciate your consideration of these concerns, which are of critical importance to the federal law enforcement community. Please consider the FBIAA as a resource available to you and your staff as you explore the impact of ECPA changes on federal law enforcement activities.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Motyka', with a stylized flourish at the end.

Konrad Motyka
President

cc: The Honorable Charles E. Grassley