



DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

MEMORANDUM

DATE: February 5, 2014

TO: Honorable Chip Shields, Chair  
Senate Committee on General Government, Members

FROM: Aaron Knott, Legislative Director

SUBJECT: SB 1583

**RECOMMENDED ACTION**

This testimony is presented in present opposition of SB 1583. We understand that this bill may be subject to further amendment and have appreciated the opportunity to provide substantive feedback throughout the process, we cannot support the bill at this time. These comments are meant to incorporate our understanding of changes that have already been made within the -2 Amendments.

**NATURE OF CONSEQUENCES TO FOLLOW FROM PASSAGE**

- **Background:** The Department of Justice has circulated this bill concept throughout all divisions. This concept has generated separate complaints from our criminal, civil, crime victim services, charitable activities, trial and appellate divisions. The most significant of these will be summarized here.
- **“Public Bodies.”** SB 1583 routinely refers to “public bodies.” Despite frequent references to police, district attorneys and the warrant process, this definition is not confined to law enforcement but encompasses any public body. This definition theoretically ranges from the Department of Transportation to the Umatilla Water District to the City of Grants Pass.
- **Impact on Civil Litigation.** As written, SB 1583 requires any “public body” to petition a court for a warrant in order to access any “personal electronic data”. Under existing law, a public body involved in a court action may request personal electronic data via resort to the subpoena process under the Oregon Rules of Civil Procedure. These requests for a subpoena are made transparently, under the supervision of a judge, and may be challenged via a motion to quash. This procedure is also available to private litigants. SB 1583 imposes on all public bodies the obligation to resort to a warrant process subject to the requirements expressed within Section 3. This essentially upends

our current rules of civil discovery, disadvantages public bodies engaged in litigation, and increases the burden on the court by requiring judges to process warrants. The warrant system has historically been applied only to criminal process and this bill suggests a drastic and poorly considered shift of that requirement. Public bodies will also be required to articulate the facts sufficient to demonstrate that probable cause exists. This requirement does not exist, and has no precedent, in civil litigation.

- **Impact on Administrative Processes.** Similarly, this bill requires all state agencies engaged in any administrative activities which implicate personal electronic data to resort to a warrant within present administrative processes. This exists nowhere in administrative law and has no clear precedent. All agencies presently rely on subpoena power within the administrative system. They will thereby be forced, *en masse*, to move to the circuit court system. This will result in significant cost to both the court systems and all agencies required to accommodate this unprecedented shift.
- **“Tips.”** The use of tips is the backbone of many different types of prosecution. At the Department of Justice, we rely most heavily on “tips” in the areas of anti-child prostitution and counter terrorism. Our Internet Crimes Against Children (ICAC) Division receives and processes hundreds of cybertips per year. This often occurs when an internet service provider becomes aware of child pornography being housed on one of their servers. They notify ICAC, who then work backward through a series of subpoenas in an attempt to identify the location and identity of the person possessing the child pornography. Many of the requirements in the current bill – to know the identity of the person for whom electronic data is being requested, to notify that person within 3 days – makes the use of cybertips impractical. Even if the ICAC unit is statutorily exempted, there are many other types of crimes that operate along similar lines of inquiry.
- **Undercover information.** Officers who are “undercover” would be theoretically subjected to this bill as soon as they were exposed to telephonic or electronic data. This could compromise lengthy investigations of complex or organized criminal operations.

## SUMMARY

It is the concern of the Department of Justice that many of the effects likely to be caused by this extremely far reaching proposal are unpredictable. This short statement of concerns is not comprehensive and does not fully capture every significant issue raised by our child support, crime victims services and appellate divisions. The Department of Justice is increasingly concerned that a bill of this magnitude, particularly with so much work left to be done, is not appropriate for consideration in the short session. We would be enthusiastic participants in any interim workgroup.

## DOJ CONTACT

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