



# MEMORANDUM

March 17, 2015

To: Members of the Senate Judiciary Committee

From: Patrick M. Allen, Director

Subject: Senate Bill 640 and Senate Bill 641

During the 2014 interim, the Senate General Government, Consumer and Small Business Protection Committee held an informational meeting regarding personal and digital privacy concerns. Discussions included potential legislation for the 2015 legislative session, including LC 208, which prohibited a public body from obtaining stored, maintained or transmitted communications by a service provider without obtaining a search warrant under Oregon's criminal procedure statutes.

Attached is a letter from the Department of Consumer and Business Services to the Department of Justice that outlined concerns with LC 208. The concept unintentionally creates burdens on state agencies carrying out civil investigations, particularly for agencies that have statutory subpoena powers and consumer protections. The concerns regarding LC 208 are similar to issues with both Senate Bill 640 and Senate Bill 641.

DCBS does not have a position on either bill, but is available to answer any questions or work with the Committee or the bills' proponents on developing amendment language.



# Oregon

John A. Kitzhaber, MD, Governor

## Department of Consumer and Business Services

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July 15, 2014

Aaron Knott  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301

Dear Aaron:

You had asked for insight on how LC 208 would affect Department of Consumer and Business Services investigations. The department agrees with DOJ's general view of the concept and concern that if enacted, LC 208 would impose substantial burdens on public bodies in carrying out a civil investigation. This policy change creates a more complex, procedurally challenging, and expensive process for obtaining electronic communications from a service provider, as well as significantly increasing the amount of time necessary for conducting investigations. Furthermore, substituting the current subpoena process as utilized by DCBS with a search warrant procedure does not substantially increase privacy protection for individuals subject to an investigation.

Currently, a public body can obtain electronic communications and other items through a subpoena process if they have express statutory authority. For example, ORS 656.726 (4)(d) allows the DCBS director or a representative to issue a subpoena for obtaining documents and records in any inquiry, investigation, proceeding, or rulemaking hearing related to carrying out workers' compensation and occupational safety laws. Ordinarily, the subject party can simply provide the records rather than make a personal appearance. As with other types of subpoenas, a person commanded to produce and permit inspection of the identified items may file an objection, in which DCBS can make a motion before a court requesting an order requiring the subpoenaed party to comply.

In contrast, only a judge can issue a search warrant, and only a district attorney, police officer, or special agent of the Governor can make an application for a search warrant. Under the search warrant procedure, a judge may only issue a search warrant if there is probable cause to believe the items sought are subject to seizure, meaning those items are associated in some way with criminal activity. These requirements are not applicable to a DCBS administrative investigation, which is designed to determine whether there has been a non-criminal violation of statutes and regulations under the department's purview. If LC 208 and existing search warrant statutes were literally applied, DCBS would never be able to obtain a search warrant as the agency is not normally alleging or investigating a criminal investigation.



Aaron Knott, Oregon Department of Justice

July 17, 2014

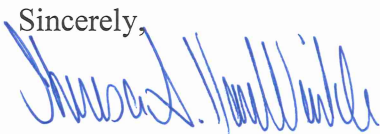
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The search warrant procedure also creates practical difficulties for its usage by administrative agencies and places a substantial burden on law enforcement and judicial entities. Given the current limitations on who can request a search warrant, DCBS would have to seek assistance every time the agency requires a search warrant. District attorneys and police officers already have significant responsibilities and workloads in their duties of investigating and prosecuting crimes, making it challenging for public bodies to obtain their assistance. Public bodies would also be subject to already extremely busy court calendars in obtaining search warrants. Collectively, this concept all but guarantees delays in conducting investigations and increased legal costs for public bodies.

Although both procedures allow for judicial review before seizure or inspection of demanded items, an administrative agency's subpoena is less intrusive in regards to privacy. While a search warrant authorizes a governmental agent to enter the subject party's property and seize personal property, a subpoena only requires the subject party to either produce demanded items at a specified location or inspect items on their property at their request. An administrative agency's subpoena is valid if it seeks information relevant to a lawful investigatory purpose and does not go beyond the particular investigation's needs.

Thank you for the opportunity to provide input. If you have any questions or would like additional information, please let me know.

Sincerely,



Theresa A. Van Winkle  
Senior Policy Advisor