ACLU
AMERICAN CIVIL LIBERTIES UNION of VERMONT

1/6/16 Allen Gilbert

ACLU-VT Testimony on S. 155, Jan. 6, 2016, Senate Judiciary Committee

You generously devoted extensive time this fall to review the various portions of the omnibus privacy bill, now numbered S. 155. The ACLU appreciates the time given to us then, and now, to express our views on the bill. I will not reiterate our comments of this fall. Instead, I wish to make several points about the remaining conflicts that appear to exist around several of the provisions.

Private right of action for unauthorized access to individuals' medical records.

- We believe there is great need for more robust protection of personal medical records. National Public Radio and the investigative journalism site ProPublica in 2015 "reported on loopholes in HIPAA [the federal Health Insurance Portability and Accountability Act] and the federal government's lax enforcement of the law." One story in December "detailed how the Office for Civil Rights only rarely imposed sanctions for small-scale privacy breaches that caused lasting harm."
- You heard testimony this fall about aggressive OCR enforcement. But nearly all of that enforcement activity has been around large breaches – sophisticated online hacking of hundreds or thousands of files. What ProPublica investigators found was that "the Office for Civil Rights only rarely imposed sanctions for small-scale privacy breaches that caused lasting harm."
- Vermont's health information exchange has weak front-end protections against unauthorized access to personal medical records; the watchdog agency to which patients can complain about unauthorized access hardly ever punishes small-scale breaches. Vermonters deserve to have tools they can use to protect their medical information privacy. Providers who operate networks that are private and secure should have no concern about a provision such as this.

Regulation of law enforcement use of drones.

- The ACLU believes this section of S. 155 allows the responsible use of drones by police, in both regular police work as well as emergency situations.
- We also believe the bill correctly leaves to the Federal Aviation Administration (FAA) the regulation of the use of drones by private operators, with reference to the Academy of Model Aeronautics National Model Aircraft Safety Code.

Use of automated license plate readers (ALPRs) by law enforcement.

As was the case two years ago when the ALPR bill was originally drafted, the retention period of data collected by the system has become the sticking point in consideration of the S. 155 ALPR section. The current retention period of 18 months is on the high side of retention periods nationally. The ACLU continues to

AMERICAN CIVIL LIBERTIES UNION OF VERMONT
137 ELM STREET
MONTPELIER, VT 05602
(802) 223-6304 [v/f]
info@acluvt.org
www.acluvt.org

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believe that ALPRs should be used as intended – to catch drivers with outstanding warrants, suspended licenses, or unpaid traffic tickets. ALPRs should not be used as a statewide surveillance system. Data should be deleted after 24 hours. Police can request preservation orders to retain data for longer periods.

- Retention up to the current 18 months or even longer has been advocated as an exculpatory tool – a tool for innocent people to prove their innocence. This creates what some term a "rainy day" data pool that's there "just in case." This is offensive on two levels: government is not supposed to be collecting and retaining information on people not suspected of criminal activity, and it is a basic right in our criminal justice system to be presumed innocent. Government has the burden to prove someone's guilt; an individual does not have the burden to prove his or her innocence.
- Once government premises the collection and retention of information about people on exculpatory grounds, there is no end to what information government might collect about us – "just in case." It is a rationale for broad, comprehensive video surveillance, drone surveillance, internet surveillance, or any other dragnet approach to recording citizens' actions. The ACLU believes such a rationale is the antithesis of protecting individuals' privacy.

Protection of electronic communications through a requirement that police obtain a warrant before accessing a person's communications, whether held by a service provider or on the person's electronic device.

This portion of the bill has been difficult to resolve. Competing drafts have been provided by the ACLU and the state's attorneys association and attorney general. There are four main points of contention:

- The ACLU follows the California law in requiring a warrant before police may obtain a user's IP (internet protocol) address. The state's attorneys allow access with only a subpoena.
- The ACLU follows the California law in requiring a warrant to access information contained on a person's electronic device. The state's attorneys fold this information in with all other kinds of electronic information, which generally is held by service providers such as Google or Yahoo and may not require a warrant. Without this protection, Vermont law enforcement could use devices such as "stingrays" to capture information directly from a person's cell phone.
- The ACLU follows the California law in using "government entity" to describe who is seeking the information. The state's attorneys instead use "law enforcement officer," which limits which government officers are covered by the law.
- The ACLU and state's attorneys disagree over reporting requirements following the issuing of a warrant or subpoena.

We believe that the electronic communications privacy protections are an important part of the bill. We hope they can be added back to S. 155. Agreement is close on the two competing drafts. If the committee accepts the conscientious work done in California (and similarly proposed here by the ACLU), the first three items can be resolved. The fourth item, the reporting requirement, would be the only remaining area of contention, and we believe a compromise can be found on that.