

June 20, 2011

The Hon. Lincoln Chafee
Governor
State House
Providence, RI 02903

RE: 11-S 781A AND H-5093A

Dear Governor Chafee:

On behalf of the Rhode Island ACLU, I am writing to urge you to veto S-781A and H-5093A, duplicate bills which would allow police to obtain subscriber Internet service information without the need of a warrant or other judicial oversight. We believe its enactment would not only lead to a very serious erosion of privacy rights, but will also have a chilling impact on freedom of speech.

This bill has been introduced for many years, and was always touted as an essential tool to find and prosecute on-line purveyors of child pornography. Police claimed that the need to obtain a warrant to obtain internet service provider (ISP) information was too time-consuming and hampered the need for expeditious action. However, that purpose, and the arguments as to why the approach contained in this bill was necessary, has morphed significantly over time. More recently, police have acknowledged that the subpoena process does not lead to immediate responses from ISPs. In any event, in its current form, this bill creates a disturbing concentration of power in law enforcement and is almost certain to lead to dangerous abuses.

The major effect of this legislation is to circumvent the critical safeguards that the search warrant process currently provides. This circumvention is proposed merely for the administrative convenience of police. While ignoring the warrant process certainly does make police work easier, it does so at enormous expense to individual liberties and the safeguards that the warrant process protects. Those safeguards are many: they require that probable cause be determined to exist before an individual's privacy is invaded by the state; they require that a neutral third-party, a magistrate, review the request for information in order to make that determination; and they ensure that the person whose privacy is being invaded is aware of the intrusion. None of these safeguards exist under the self-certifying, internal administrative subpoena procedures of this bill, where police become the judges of the propriety of their own requests.

Although a warrant may impose an administrative burden in investigating offenses, police are required to obtain a warrant when they are conducting investigations of much more serious crimes, including murder and sexual assault. If police are freed from the administrative burdens of the search warrant process, it is undoubtedly true they will be able to obtain information from ISPs in many more instances since they will not have to prioritize their investigations in the same way they do now. From our perspective, that is precisely one of the

problems with giving police this broad authority. Freed from the constraints of any third party oversight, police will inevitably seek ISP information in many more dubious situations than they would now. Without casting any aspersions on the police and their view that we should trust them not to abuse this authority, Fourth Amendment principles are based on the fundamental notion that safeguards should be in place to protect the citizenry from overreaching by police.

Just as troubling, the bill that is going to your desk is *much more expansive* than previous versions of this legislation. As I noted, the legislation had previously been promoted as necessary to deal with the very serious offense of child pornography. However, this year's bill eliminates any such pretense. It gives police the power to issue these subpoenas for just about *any* offense involving computers. Among other things, the bill proposes to include within its scope broadly-designated misdemeanor offenses such as "cyberharassment," which will open the door for wide-ranging subpoenas, without any court oversight, based directly on a computer user's free speech activity. The expansion of this bill demonstrates that law enforcement is seeking these broad powers for investigations far beyond what they have consistently claimed to be their goal.

I have enclosed for your information a letter from the Rhode Island Press Association opposing the bill for this very reason, pointing out its potentially chilling impact on free speech rights. Indeed, we are aware of at least two cases in the past year where police sought to obtain ISP information based solely on online comments made about political figures. Last August, for example, police sought to obtain from the *Barrington Times* the ISP address of an online commenter critical of the Town Manager. A clearly rhetorical aside that the official should be careful what was in "that meatball sandwich you are eating" was deemed "potentially threatening." See: http://www.projo.com/news/content/barrington_police_chief_08-11-10_55JGN8U_v19.237e370.html. In a second case, Narragansett police brought cyberstalking charges (later dropped) against two individuals who posted admittedly crude remarks about political figures. See: http://www.projo.com/news/content/Police_digest_5_10-05-10_0PK7AU4_v9.2153456.html. Passage of this bill would make investigations like these even more prevalent, creating a truly chilling effect on online speech. When one considers that police have also expressed interest in using this bill to investigate crimes of "cyberharassment" in the school setting, the impact of this power becomes even more troubling.

Finally, it is worth noting that Rhode Island is not alone in demanding court oversight of these subpoenas. Indeed, in at least one state – New Jersey – the state Supreme Court ruled that it was unconstitutional for police to be able to issue administrative subpoenas on their own for precisely this type of Internet information. *State v. Reid*, 954 A.2d 503 (N.J. 2008). Other states, including Connecticut, establish a formal statutory process for court approval of administrative subpoenas by police for this Internet information. See, e.g., C.G.S. §54-47aa.

Proponents, in seeking to minimize the true impact this bill will have on privacy and free speech rights, state that the only information that law enforcement will be able to directly obtain under this bill from Internet service providers is so-called non-content information. That may be true, but indirectly, obtaining that information will lead to wide-ranging searches of people's computers and their contents. That is the whole point of obtaining the subscriber information in the first place. Further, in this wireless age, the targeted computers may often not even be the computer for which the information was sought.

Page Three
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For all these reasons, we respectfully urge your veto of this legislation.

Sincerely,

Steven Brown
Executive Director

cc: Patrick Rogers
Stephen Hourahan
Brian Daniels
Kenneth Procaccini

Enclosure

June 20, 2011

The Hon. Lincoln Chafee
Governor
State House
Providence, RI 02903

**RE: 11-S 781A AND H-5093A
11-S 732A AND H-5941A**

Dear Governor Chafee:

On behalf of the Rhode Island ACLU, I am writing to urge you to veto the above bills, which are expected to be transmitted to your desk by the General Assembly sometime this week. Because these two pairs of bills could have a serious impact on the exercise of freedom of speech, an issue about which I know you care deeply, we wanted to make you aware of their ramifications for First Amendment rights.

The first pair of bills would give police wide-ranging power to obtain Internet subscriber information without any judicial oversight. That power could be used – and attempts have already been made to do this – to track down individuals who exercise their free speech rights online, creating a chilling effect on that type of speech. The second pair significantly expands the definition of what constitutes school “bullying,” raising serious constitutional concerns and subjecting students to both school discipline and potential law enforcement involvement for their exercise of free speech rights.

I have enclosed separate letters that explain in more detail our concerns about these bills. We hope you will give those concerns your careful consideration. If you have any questions about our views, I hope you will feel free to let me know.

Thank you in advance for your attention to this.

Sincerely,

Steven Brown
Executive Director

cc: Patrick Rogers
Stephen Hourahan
Brian Daniels
Kenneth Procaccini