

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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Senate President Ron Kouchi
Senate Majority Leader Kalani English
Senate Vice President Michelle Kidani

House Speaker Scott Saiki
House Majority Leader Della Au Belatti
Representative Sylvia Luke, Chair, House Finance Committee

415 South Beretania Street
Honolulu, HI 96813

RE: Opposition to HB 2572

Having spent the last decade working on privacy laws and applying them, I know all too well that writing privacy legislation is a highly complex, nuanced, and intricate process that cannot be done in haste.

We therefore ask that the committee **not pass** HB 2572, which has technical and substantive flaws that endanger the privacy of Hawaiians and harm their ability to use key online services.

We have already seen how broad privacy legislation in other states and countries has unintended effects. Indeed, even the “gold standard” in privacy laws, the European General Data Protection Regulation (GDPR), is proving to do more harm than good.

In the past two years of GDPR, experts from around the world have realized that this top-down style regulation, which HB 2572 mirrors, doesn’t work. Just last month, for example, a Dutch court found a grandmother violated GDPR when she posted pictures of her grandchildren on Facebook.¹ A similar suit could extend from HB 2572’s Section 4: because it disallows showing “Personal Information,” it could apply to contextual advertisements that run alongside, say, photos that include a woman’s grandson’s face.

¹ Isobel Asher Hamilton and Sophia Ankel, *A grandma in Holland has been ordered to remove pictures of her grandchildren from Facebook under a data protection law*, Business Insider (May 22, 2020).

Experts have also noted that GDPR makes it difficult for companies—and the government—to respond to unforeseen events, like a country’s ability to fight COVID-19.² The same limitations exist in HB 2572.

What is more: this rushed legislation would violate the privacy rights of Hawaiians under the Electronic Communications Privacy Act. Today, that federal law prohibits a remote computing service from disclosing the contents of communications without a warrant, exigent circumstances, or the consent of the sender or recipient of the communication.³ But HB 2572 would allow the of disclosure of private communications to law enforcement so long as a single user of the relevant service consents.

Here’s how that would play out: Imagine Adam and Betty email each other over Hotmail and law enforcement wants access to the contents of their emails. Imagine also that law enforcement cannot get a warrant and that neither Adam nor Betty consents to disclosure. Presumably, that would end the matter. But that is not what HB 2572 says; instead, Section 803-47.6 authorizes consent to come “from the customer, subscriber, or user of the service.” As written, that would allow an enterprising law enforcement agent to get consent from any Hotmail user to access Adam and Betty’s email.

Although that may seem unlikely, history has shown that courts have repeatedly interpreted statutes—including imprecise ones—in ways legislators never intended. That this result is not foreclosed by the statute underscores that this bill in particular, and privacy legislation in general, cannot be rushed to a vote.

As I mentioned at this letter’s outset, drafting privacy legislation is a challenge. Fortunately, groups like the Uniform Laws Commission are actively working on model state privacy legislation that addresses private collection and use issues. This legislation reflects the thinking of leading attorneys from the private, public, and civil sectors, and will be thoroughly vetted so that no provision or line invites the possible unintended consequences like we see in HB 2572.

With that in mind, we ask that you **not** move on HB 2572. Of course, we welcome the opportunity to work with you on reasonable privacy requirements.

Sincerely,

Carl Szabo
Vice President and General Counsel
NetChoice

NetChoice is a trade association promoting free speech and free enterprise. www.netchoice.org

The views of NetChoice do not necessarily represent the views of its members.

² Simon Sharwood, *Vint Cerf suggests GDPR could hurt coronavirus vaccine development*, The Register (May 15, 2020).

³ See 18 USC § 2701.