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Opinion No. 09-71

Subpoena for Records Relevant to Investigating the Offense of Sexual Exploitation of a Minor

QUESTIONS

1. Would a proposed amendment to HB1257/ SB1529 authorizing a prosecutor to subpoena records or documentation relevant to investigating the offense of sexual exploitation of a minor, when there is reasonable cause to believe that an internet service account has been used in the commission of the offense, violate Article I, Section 7 of the Tennessee Constitution or the Fourth Amendment of the United States Constitution?

2. Would federal law on internet service providers preempt this proposed amendment?

OPINIONS

1. The proposed amendment is constitutional since any individual subject to an investigation utilizing the subpoena would have no reasonable expectation of privacy in the information sought by the subpoena.

2. Federal law would not preempt this proposed amendment.

ANALYSIS

1. The proposed amendment would authorize a district attorney general or an assistant district attorney general in an investigation relating to the offenses of sexual exploitation of a minor, aggravated sexual exploitation of a minor, or exploitation of a minor to subpoena certain records or documentation if there is reasonable cause to believe that an internet service account has been used in the commission of the offense. The information that a prosecutor could subpoena under this proposed amendment is limited to: (1) name; (2) address; (3) local and long distance telephone connection records, or records of session times and durations; (4) length of service (including start date) and types of service utilized; (5) telephone or instrument number or other subscriber number of identity, including any temporarily assigned network address; and (6) means and source of payment for such service (including any credit card or bank account number). The amendment would require a warrant issued by a court of competent jurisdiction to gain access to other, more intrusive information.

This request asks whether the proposed amendment would violate constitutional guarantees against unreasonable searches and seizures under Article I, Section 7 of the Tennessee Constitution and the Fourth Amendment of the United States Constitution. Both constitutional provisions only protect against an unreasonable seizure of evidence in which an individual has a reasonable expectation of privacy. *See State v. Ross*, 49 S.W.3d 833, 840-41 (Tenn. 2001). In *Smith v. Maryland*, 442 U.S. 735 (1979), the United States Supreme Court concluded that an individual did not have a reasonable expectation of privacy in the telephone numbers called from an individual's telephone. As the Court reasoned,

This analysis dictates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed.

Id. at 744.

While this bill would authorize a third party's disclosure via subpoena of more information than merely a dialed telephone number, the constitutional analysis remains the same. This subpoena provision does not violate constitutional guarantees against unreasonable searches and seizures. *See United States v. Hambrick*, 55 F.Supp.2d 504 (W.D.Va. 1999), and *United States v. Valdivieso Rodriguez*, 532 F.Supp.2d 332 (D.P.R. 2007) (no reasonable expectation of privacy in personal information supplied to an internet service provider). And the analysis under these circumstances is the same under Article I, Section 7 of the Tennessee Constitution. *See, e.g., State v. Scarborough*, 201 S.W.3d 607, 622 (Tenn. 2006) (Article I, §7 is identical in intent and purpose with the Fourth Amendment).

2. Federal law would not preempt the proposed amendment under the Supremacy Clause in Article VI of the United States Constitution. According to 18 U.S.C. § 2703(c)(2), "a provider of electronic communication service or remote computing service" must disclose to a governmental entity the very information listed above at issue in this proposed amendment "when the governmental entity uses an administrative subpoena authorized by Federal or State statute . . ." Thus, federal law expressly allows a state governmental entity to utilize an administrative subpoena that is authorized by state law in order to secure this information.

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