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MEMORANDUM

DATE: March 17, 2015

TO: Honorable Floyd Prozanski, Chair
Senate Committee on Judiciary

FROM: Aaron Knott, Legislative Director

SUBJECT: SB 641 – Prohibition against Search of Portable Electronic Devices

This testimony is presented in opposition to SB 641.

BACKGROUND

The Supreme Court of the United States recognized in *Riley v. California*, 573 U.S. ____ (2014) that it is an impermissible search for a law enforcement officer to search a smartphone solely upon a search incident to arrest absent a search warrant. SB 641 expands this decision in three ways: First, SB 641 includes all portable electronic devices, not just smart phones. Secondly, SB 641 prohibits searches of these devices by all public bodies, not just law enforcement. Finally, SB 641 eliminates all exceptions to the warrant requirement except upon a showing of an imminent threat to public safety. Because neither of the latter two changes are legally coherent as currently written, the Department of Justice must oppose SB 641.

PUBLIC BODIES

SB 641 would prohibit public bodies from searching any portable electronic device for any reason. Public bodies are defined broadly by ORS 174.109 to include state and local government bodies, including the executive department, the judicial department and the legislative department. This includes all agencies, commissions, counties and municipalities. SB 641 requires a public body to obtain a search warrant in order to access a portable electronic device. Almost all public bodies are prohibited from applying for a search warrant by ORS 133.545(4)(*"Application for a search warrant may be made only by a district attorney, a police officer or a special agent employed under ORS 131.805*). As written, SB 641 imposes a legal impossibility on public bodies.

SB 641 precludes legitimate searches of portable electronic devices. Because SB 641 disallows any search without a showing of an imminent threat to public safety, any other rationale for searching a portable electronic device would be insufficient. This would include legitimate employment purposes or any response to a public records request. It is not possible to obtain a search warrant for these purposes because a search warrant can only be issued upon a

finding of the probable existence of a crime. Any non-criminal rationale for searching a phone would be utterly prohibited.

LAW ENFORCEMENT

SB 641 eliminates all exceptions to the warrant requirement except imminent threat to public safety. There are at least 14 exceptions to the warrant requirement. These are well established principles developed by the court in response to state and federal constitutional protections against search and seizure and refined by decades of case law. These include long standing exceptions for the imminent destruction of evidence, emergency aid, community caretaking, consent, lost and abandoned property, plain view, and persons with diminished privacy rights such as prisoners. While it is impossible to outline all fact patterns which would be impacted by this proposal, a few object examples are highlighted here:

Consent. A police officer will not be able to examine a phone even when a suspect wants them to do so, even if the information contained has the potential to be exculpatory – i.e. when disproving mistaken identity.

Community caretaking. A police officer will not be able to examine a phone, even when it would assist in caring for a person in need of immediate assistance but not the subject of a criminal prosecution – i.e. locating the phone of a person known to be suicidal and attempting to ascertain their last known location through correspondence.

Plain view. An officer who sees a text message appear on a portable electronic device will not be able to use that information at any judicial proceeding or to establish reasonable suspicion or probable cause – i.e. reading a text that says "the gun is in the trunk" or "please don't tell them I was driving."

Lost and abandoned property. An officer is theoretically prohibited from looking at a portable electronic device in an attempt to return the device to their owner. If the officer chooses to violate the statute in an attempt to return the phone and discovers evidence of criminal conduct, that information would be inadmissible and could not form reasonable suspicion or probable cause.

SB 641 eliminates the requirement of standing to object to a search. Because the statute explicitly overrules case law and creates an absolute statutory bar to admissibility except under narrow circumstances, a person could object to the search of someone else's phone – i.e. a defendant could object to the admissibility of texts sent to a victim and shown by the victim to a police officer.

SB 641 makes sweeping and unprecedented changes to search and seizure law. Many of these changes are harmful to victims, unfair to law enforcement or simply disconnected from any identifiable policy purpose. The Dept. of Justice urges that SB 641 not be passed as written.

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