

SUBJECT: Subpoena deadlines for Internet service providers for sexual offenses

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Peña, Riddle, Escobar, Hodge, Mallory Caraway, Pierson, Talton
0 nays
2 absent — Vaught, Moreno

SENATE VOTE: On final passage, March 26 — 29-0

WITNESSES: For — (*Registered, but did not testify:* Karen Amacker, Texas Association Against Sexual Assault)

Against — Samuel J. England, ACLU of Texas

On — *Registered, but did not testify:* Shannon Edmonds, Texas District and County Attorneys Association

BACKGROUND: Penal Code sec. 33.021 makes it an offense for a person 17 years old or older, with intent to arouse or gratify the sexual desire of anyone, to use the Internet, electronic mail, or commercial online service to intentionally communicate in a sexually explicit manner with a minor or to distribute sexually explicit material to a minor. This offense is a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000)

It also is an offense to use the Internet, electronic mail, or a commercial on-line service to knowingly solicit a minor to meet another person with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse. This offense is a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000)

Both offenses are a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) if the minor was younger than 14 or believed to be younger than 14 by the defendant.

The Crime Stoppers Advisory Council is housed in the criminal justice division of the Governor's Office. Its duties include assisting in the creation of crime stoppers organizations, fostering the detection of crime, encouraging persons to report information about criminal acts, and helping law enforcement agencies detect and combat crime by increasing the flow of information to law enforcement agencies.

DIGEST:

SB 6 would establish timelines for Internet service providers to respond to subpoenas, search warrants, or other court orders relating to the crime of on-line solicitation of a minor, increase penalties for this crime, allow sentences for the crime to be served consecutively, and expand the duties of the Crime Stoppers Advisory Council.

Response to subpoenas by Internet service providers. Within 10 days of being served with a subpoena, search warrant, or other court order relating to the investigation or prosecution of the crime of on-line solicitation, an Internet service provider (ISP) would have to fully comply or petition the court to excuse it from complying.

If the subpoena or other order indicated that full compliance was necessary to address a threat of death or serious bodily injury, the service provider would have to comply as soon as practicable, but no later than the second business day after receiving the order. The bill would define full compliance as producing or providing requested documents and information or providing access to documents or information, both to the extent allowed under federal law.

The bill would authorize service providers that disobey subpoenas, search warrants, or other orders to be punished in any manner allowed by the law.

Internet service providers would be required to preserve certain information upon a written request by a state or federal law enforcement agency, pending a subpoena issued under SB 6. The service providers would have to take all steps necessary to preserve records or other potential evidence in a criminal trial. The information would have to be preserved for 90 days after the written request, with another 90-day extension if requested by the law enforcement agency.

The attorney general would be required to establish a computerized database with contact information for all Internet service providers in Texas. The attorney general would have to allow prosecutors access to the

database to expedite information gathering for the crime of on-line solicitation of a minor. The database would have to be operational by April 1, 2008, and by June 1, 2008, prosecutors would have to be allowed access to it.

Penalties for on-line solicitation of a minor. SB 6 would increase the penalties for on-line solicitation of a minor. Offenses involving communicating in a sexually explicit manner or distributing certain material would be raised from a state jail felony to a third-degree felony, unless the minor was younger than 14 years old, in which case it would remain a second-degree felony. All offenses involving soliciting a minor to a meeting would be made second-degree felonies.

These penalties would apply only to offenses committed on or after September 1, 2007.

Consecutive sentences. SB 6 would add the crime of on-line solicitation of a minor to the list of those offenses for which sentences for more than one offense from the same criminal episode can run concurrently or consecutively. This would apply if the victims were younger than 17, regardless of whether the offenses were the same crime or different ones. This would apply only to offenses committed on or after September 1, 2007.

Duties of Crime Stoppers Advisory Council. The bill would add new duties to the Crime Stoppers Advisory Council, including programs to detect specific types of crimes, including those that encourage the reporting of sex offenders who have failed to register under the state's sex offender registration laws, and programs that financially reward persons who make these reports if they lead to the apprehension of a sex offender. Its duties also would include encouraging, advising, and assisting local crime stoppers organizations in implementing these programs.

**SUPPORTERS
SAY:**

SB 6 is necessary to give law enforcement officers an additional tool to quickly obtain information to combat the serious crime of on-line solicitation of a minor. Because predators are using the Internet to find and groom children for sex crimes, it is important to address the problem that some law enforcement authorities have encountered of slow responses from some ISPs to produce subpoenaed documents. The speed at which these crimes can progress warrants the establishment of a specific set of deadlines for their responses to subpoenas. ISPs are the industry that

directly facilitates this unique crime so it appropriate to limit these deadlines to subpoenas issued to them.

When a subpoena is issued to any entity to produce documents or records, there is no deadline to comply. The only deadline is the court date in the subpoena, which indicates when the person must appear and present the documents. Generally, people reach agreement with prosecutors to produce the documents before the court date in exchange for not appearing in court. If a person does not produce the documents in court as required, the only remedies are contempt procedures or writs of attachment, which are similar to arrest warrants.

In some instances, Internet service providers have been reluctant to cooperate with law enforcement authorities. If prosecutors proceed with the contempt proceedings or a writ of attachment, alleged offenders can continue their crime while the proceedings take place. This is potentially dangerous as many sex offenders soliciting minors on-line try to bring their crimes to fruition by enticing the minor to meet them. SB 6 would help address this problem by imposing deadlines for ISPs to meet the demands of subpoenas.

The 10-day deadline in SB 6 would balance the needs of law enforcement authorities to get information quickly and the needs of ISPs to have the time to obtain the information. The bill would give ISPs an option to petition the court to excuse the subpoenas. The two-day deadline would be imposed only in the most serious situations that threaten death or serious bodily injury. The bill's deadlines for preserving records upon request of law enforcement authorities would be reasonable and necessary to protect information from being purged and lost to law enforcement authorities.

Because some ISPs are based outside of Texas, it can be difficult and time consuming for law enforcement officers to determine who to contact when they need information for an investigation. SB 6 would address this problem by having the attorney general establish a clearinghouse of information about ISPs similar to the way corporations register their agents.

The punishments that could be imposed on an ISP that failed to comply with the subpoena deadlines in SB 6 would only be those allowed under current law, mainly contempt proceedings or a writ of attachment. SB 6

would not make failing to meet the requirements in the bill a crime or create any new punishments.

SB 6 also would increase the penalties for on-line solicitation of a minor to better reflect the seriousness of these crimes. Raising the penalties would institute a more appropriate punishment would be in line with punishments for similar crimes. Higher penalties also would help deter the crime, something that could stop a progression to a more serious offense.

It is appropriate to allow sentences for on-line solicitation of a minor to be served consecutively, or “stacked” because of the seriousness of the crime. Current law already allows stacked sentences for the similar crimes of indecency with a child, sexual assault, and sexual performance by a child.

SB 6 would help create special crime stoppers programs to combat the problem of sex offenders who are not complying with the registry requirements. For the registry to be effective and the public to be protected, it is important that it be up to date, and SB 6 would help achieve this goal. While some crime stoppers programs already target sex offenders and may offer rewards similar to those described by the bill, additional training and rewards would help emphasize these types of programs, which could lead to a more accurate sex offender registry.

**OPPONENTS
SAY:**

It is unnecessary and unfair to establish a unique set of deadlines for one industry to respond to subpoenas. Internet service providers should not be held to a different standard than others. If there are problems with responses to subpoenas, a more effective system that would apply to all entities could be crafted.

Law enforcement authorities have tools at their disposal if an ISP — or anyone — does not respond to a subpoena, and these should be used. SB 6 could have little effect on cases of an on-line solicitation of a minor that has progressed to a life threatening situation, such as a meeting between a predator and a minor, because these situations would be handled differently than by subpoenaing documents.

Raising the penalty for the offense of communicating in a sexually explicit manner with 14 to 16 year olds from a state jail felony to a third-degree felony would be inappropriate since it does not involve the type of violent behavior that often defines other third-degree felony offenses.

NOTES:

Rep. Pena plans to offer a floor amendment that would add electronic communication services and remote computing services to certain requirements of compliance with subpoenas, search warrants, and other court orders. It also would require ISPs, electronic communication services, and remote computer services to take steps to preserve evidence for 90 days after written notice from a law enforcement agency and pending the issuance of a subpoena or court order. Additionally, it would require online dating services to disclose to their Texas members whether they screen applicants through a sex offender database.

According to the fiscal note, SB 6 would cost the state \$284,738 in fiscal 2008-09, with \$92,369 for two staff members in the Governor's Office and \$50,000 for training programs for local crime stoppers organizations.