ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

May 23, 2016

VIA EMAIL

Judge Samuel A. Thumma, *Chair*
Arizona Court of Appeals, State Courts Bldg.
1501 W. Washington St.
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Dennis D. Hirsch, *Reporter*
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RE: Employment and Student Online Privacy Protection Act

Dear Judge Thumma and Mr. Hirsch:

I am writing to you on behalf of the Electronic Frontier Foundation ("EFF") to express serious concerns about the April 13, 2016 version of the draft Employee and Student Online Privacy Protection Act ("ESOPPA"). The bill—which we learned about just last week—grants school administrators unprecedented authority to procure the social media account information of students. These provisions do not comport with the Fourth Amendment. Furthermore, the privacy community has been excluded from the drafting process, leading to constitutional deficiencies that must be taken into account. We urge you to put ESOPPA on hold until guidance from the privacy community has been considered and reflected in the proposed bill.

Three of ESOPPA's current provisions are especially problematic. Each of them creates power for schools that violate the constitutional rights of students.

The bill authorizes educational institutions to require a student to turn over information related to their social media account, including login information, if (i) the institution reasonably suspects that the student has, is, or will use the account to violate a law or school policy, (ii) to take adverse action against a student for violating a law or school policy, or (iii) to "protect against . . . a credible threat to health or safety." These provisions are not only unconstitutionally vague, but also fail to require the level of suspicion constitutionally necessary to justify searches of electronic devices or data.

The U.S. Supreme Court made clear in *Riley v. California*, 134 S. Ct. 2473 (2014), that searches involving technology and electronic devices implicate grave invasions of personal privacy. That case involved cell phones, which the court recognized as especially important due

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to the many kinds of information they contain: "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. . . . The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone." *Id*. at 2488–89. Social media accounts contain similarly vast amounts of personal information and implicate the very same concerns.

Students do not "shed their constitutional rights . . . at the schoolhouse gate[,]" as the U.S. Supreme Court famously held in the landmark case *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Courts have permitted *physical* searches on school premises of a student "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985). But where *electronic* data is at issue, *Riley* requires a judicial warrant in order to gain access.

Even if mere reasonable suspicion were sufficient to compel a student to turn over their social media account information, the vague provisions of ESOPPA do not satisfy even this minimal standard.

In order to ensure that the proposed bill does not impermissibly infringe on students' Fourth Amendment rights, we urge the Committee to revise ESOPPA to address these and other privacy concerns—and to engage the privacy community in that process.

Thank you for your time and attention to this matter.

Sincerely,

Jamie Williams
Frank Stanton Legal Fellow
Electronic Frontier Foundation

CC: Liza Karsai, ULC Executive Director, lkarsai@uniformlaws.org