



## Cybercrimes Advisory Committee

July 27, 2006 10:00 a.m.

Senate Leadership Conference Room, 6th Floor General Assembly Building

### Meeting Summary

- **Call to order, roll call:** *Roll call, chairman's welcome, introduction of legislative and citizen members of the advisory committee.*

Delegate Cosgrove served as chair in Senator Stolle's absence.

- **Overview of the role of JCOTS advisory committees:** *JCOTS staff will provide an overview of the role of JCOTS & its advisory committees, the advisory committee process, and other administrative matters.*

Staff Attorney Patrick Cushing briefed the advisory committee on JCOTS and its advisory committees.

- **Introduction of HB 1354 and HB 254:** *JCOTS Staff will review HB 1354 and HB 254.*

#### HB 1354 Discussion

Patrick introduced HB 1354 and explained to the committee what types of messages are preempted by federal law. This conclusion, as well as other background information, can be found in the memorandum presented to the advisory committee.

Charles Curren (AOL) asked the committee if they were aware of any statistics prepared on the incidence of cell phone spam afflicting Virginia residents. Although there were no prepared statistics, there was a general consensus that this was a problem in Asian countries and this legislation would be a pre-emptive strike against this newer form of spam. He also expressed concern over the remedies provided in HB 1354: should industry pursue bad actors through civil remedies or would state enforcement of criminal penalties be a better approach?

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In answer, Tom McCrystal, Creative Perspectives, Inc., analogized the current interest in outlawing cell phone spam to the interest in outlawing email spam in the mid-1990's. In 1999, a civil penalty system was erected to help eliminate e-mail spam through Virginia's Computer Crimes Act (§ 18.2-152.1 et. sec.). Five years later, advancing technology and a more pervasive problem had revealed criminal penalties were necessary as well. The advisory committee ultimately concluded that developing legislation that will help prevent cell phone spam would be good policy.

In discussing what type of legislation would be needed Patrick Cushing drew the Committee's attention to the Arizona case cited in his memo that broadly construed the TCPA to apply to software. The court in that case interpreted "automatic dialers" broadly to include software that could randomly generate phone numbers and call those numbers. Therefore messages sent through SMS Gateways would fall under the TCPA. Even though the TCPA applies to text messages sent to cell phones, the TCPA specifically authorizes states to further regulate this practice. The question posed to the advisory committee was whether the Commonwealth needs to take action to provide increased criminal or civil penalties and access to state courts. The committee responded that providing access to state courts would be very beneficial.

Mr. Curren questioned what kind of challenges falsified routing information (Internet protocols) would present and whether telephone company efforts to filter their own lines already address the issue. Though the companies certainly have the ability to block mass messages, the process is unclear and there may be gaps between the different systems a message may travel on before being delivered to an end-user. Rusty McGuire, Office of the Attorney General, pointed out that Virginia's current anti-spam statute prohibits the falsification of routing information of an email.

Mr. McGuire informed the committee that Virginia's spam law may cover text messages, but it could be very helpful to more clearly spell out 'cell phone' in the definition of a computer. The committee discussed the problems associated with technology centric regulation. Because newer technologies have the ability to send emails, SMS messages, and instant messages, Mr. McGuire proposed reviewing the definition of "computer" in the Computer Crimes Act.

Delegate Cosgrove proposed the cell phone spam bill be pro-active and preventative. There is a monetary cost associated with receiving text messages and cell phone spam could potentially cost consumers a lot of money. Michael Aisenberg of VeriSign, Inc. agreed with Mr. McGuire's approach for considering legislation to accommodate a moving technological target. Patrick



Cushing asserts that the bill landed in JCOTS for study in part because it was drafted so broadly. A question yet to be answered was which technologies should be covered?

Mr. DelBianco proposed developing a bad behavior matrix that could serve as a useful framework for addressing cybercrimes, rather than a more technology centric approach. Del. Cosgrove asked Charles Curren, Tom McCrystal, Steve DelBianco, and Rusty McGuire to participate in a workgroup to pull together some potential language. Del. Cosgrove asked Mr. McGuire to posit the 'black robe' perspective in interpreting the Code so that what needs to be done to effectively thwart cell phone spam in the view of the Committee will in fact be done in practice.

Patricia Boggs of Cyveillance questioned why the bill would not address text messages with objectionable content (both text and graphics), instead of the current focus on commercial messages. Mr. McCrystal suggested the bill was drafted in such a way to clearly confront a concrete bad business behavior, which would make for an enforceable and effective law while sending the broader message that cell phone spam is indeed illegal.

#### HB 254 Discussion

Del. Cosgrove shifted gears and advised the group that while he carried the spyware bill for the 2006 Session, he is behind the policy the bill represents and he is open to alternate language that would more effectively address his policy concerns.

Patrick Cushing introduced HB 1354 and the proposed 'good Samaritan amendment' offered during the 2006 session. Delegate Cosgrove began by asking Rusty McGuire what his thoughts were on the bill. Mr. McGuire readily admitted that extradition is a costly process and considering the offense is only a Class 6 misdemeanor, indictment would probably not be a priority for the Attorney General's Office

Mr. DelBianco suggests 'surgical improvements' to the bill and Mr. McGuire mentions he had drafted sample language for a keyboard logging (an interception of typed communications) bill in response to one of his cases from a few years ago.

Mr. McCrystal and Mr. Aisenberg discussed a practical concern with the bill's language. Currently, the computer trespass section criminalizes acts performed "...without permission of the user". The end-user licensing agreements (EULA) that typify consumer use of computer software



contain blanket provisions giving the provider permanent authority to access a computer, e.g. Microsoft's automatic Windows updates. Should providers be required to request authority at later dates or for specific functions? Del. Cosgrove asked Rusty McGuire to look to the Computer Crimes Act, HB 254, and a software provider exemption and develop language to strengthen the computer trespass statute.

Charles Curren questioned whether, in attempting comprehensively catch bad behaviors, the bill reaches innocent behaviors to the detriment of the legitimate computer user. Mr. Aisenberg agreed that perhaps the bill was a little broad.

- **Discussion & formulation of work plan:** *This is an opportunity for a "round table" discussion by the members of the advisory committee. Members may use this opportunity to state issues that they would like to see addressed by the group during its study, as well as formulate a work plan for future meetings.*

The committee expanded the discussion to consider other potential issues for the Cybercrimes Advisory Committee. One potential idea was to look at educating parents on certain cybercrimes. Parents are often the first line of defense in preventing crimes against children but many parents are often uninformed on how computers can be used and what can be done to protect their children. The main issue the advisory committee discussed was the growing concern among parents that websites such as MySpace are portals for sexual predators.

Delegate Cosgrove shared with the group an alarming program he had seen that simulated an actual conversation between a sexual predator posing as a teenage boy and a young girl. The group thought they might produce or find a one page informative document on Internet safety for distribution to school PTAs and other parents' organizations.

Steven Woda of buySAFE, Inc. identified an issue on behalf of small e-commerce businesses, which are often targets for pharming and phishing. Rusty McGuire informed Mr. Woda that the Attorney General's office was eager to hear more cases like his. Mr. DelBianco and Mr. Aisenberg agreed that the state could step into a role of discrediting false websites, and Mr. DelBianco pointed out that many times these phishing cases are actually pharming. Del. Cosgrove thought state verification of websites might face coordination difficulties in that corporations are certified by the state but businesses are certified by the Registrar in their city or county. Mr. McCrystal also supported the idea of maintaining a state database of verified keys and digital signatures to verify

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websites for businesses located in Virginia. Del. Cosgrove ended the discussion by requesting a report on phishing, pharming, and what tools the Attorney General would require to target these behaviors in the Commonwealth.

Tom McCrystal also discussed using trademark infringement as a potential cause of action against phishing and pharming. Patrick will look into this issue and brief the committee at the next meeting.

Before adjourning, Delegate Cosgrove looked to Patrick Cushing to poll dates for the next Committee meeting, by which time the subgroup would have submitted their report for review by the other members.

- **Public comment:** *Members of the public be given the opportunity to express their views about the advisory committee and its work.*

During public comment Bill Ashworth from Yahoo, expressed his view that industry does not feel the software provider exemption is necessary.

- **Actions for next meeting:** *The chairman may wish to direct staff and members of the advisory committee to follow up on particular items for the next meeting of the group.*

HB 1354 Workgroup: Rusty McGuire, Steve DelBianco, Tom McCrystal, Michael Aisenberg, and Charles Curran will look at Virginia's anti-spam law and determine if any changes need to be made to reflect changes in technology over the past few years. Patrick will work with the group and contact someone from the cell phone industry to provide input on cell phone spam and what efforts cell phone service providers are doing to prevent spam.

Rusty McGuire and Patrick Cushing will meet to discuss potential language to update the computer trespass statute to better protect individuals from spyware and similar threats.

Mr. McGuire will provide a brief update on the Youth Internet Safety Task Force at the next meeting.

Patrick Cushing will locate and post information on the JCOTS website to help educate parents on how to protect their children from online predators.

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Tom McCrystal also discussed using trademark infringement as a potential cause of action against phishing and pharming. Another question was whether Virginia's anti-phishing law would apply to pharming. Patrick will look into these issues and brief the committee at the next meeting.