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February 10, 2016

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Senate Bill 546 and Assembly Bill 666: Internet Crimes Against Children

Senate Bill 546 (SB 546) and Assembly Bill 666 (AB 666) are companion bills. The bills authorize the Attorney General or his or her designee to issue an administrative subpoena to a provider of an electronic communication service or remote computing service that would compel the provider to produce documents or records helpful to an investigation of an Internet crime against a child. The bills also create an Internet crimes against children (ICAC) surcharge totaling $20 for each misdemeanor conviction and $40 for each felony conviction. Revenue from the surcharge would be received in a new appropriation within the Department of Justice (DOJ) for criminal investigative operations and law enforcement relating to Internet crimes against children, prosecution of Internet crimes against children, and activities of state and local Internet crimes against children task forces.

Assembly Bill 666 was introduced on January 11, 2016, and referred to the Assembly Committee on Criminal Justice and Public Safety. On January 13, 2016, Assembly Amendment (AA) 3 to AB 666 was introduced. Assembly Amendment 3 to AB 666 modifies the provisions of the bill related to the Attorney General's administrative subpoena authority. On January 13, 2016, the Assembly Committee adopted AB 666, as amended by AA 3, by a vote of 12 to 1. On February 3, 2016, Assembly Amendment 4 to AB 666 was introduced. Assembly Amendment 4 deletes the provisions of the bill related to the ICAC surcharge and makes a one-time transfer of $1,000,000 PR in 2015-16 from base resources within DOJ to the ICAC appropriation. On February 4, 2016, Assembly Amendment 5 to AB 666 was introduced. Assembly Amendment 5 would delete the ICAC surcharge and appropriation in DOJ created under AB 666 and in its place create a GPR appropriation in DOJ for ICAC investigations and provide the new GPR appropriation $30,000 GPR annually. Assembly Amendment 4 and Assembly Amendment 5 to AB 666 were introduced subsequent to action taken by the Assembly Committee on Criminal Justice and Public Safety.

Senate Bill 546 was introduced on January 8, 2016, and referred to the Senate Committee on

Judiciary and Public Safety. Senate Amendment (SA) 1 to SB 546 was introduced on January 14, 2016, and contains the same provisions as AA 3. On January 28, 2016, SA 2 to SB 546 was introduced. Senate Amendment 2 to SB 546 contains the same provisions as AA 4. On February 1, 2016, the Senate Committee recommended SB 546 for passage by a vote of 5 to 0, as amended by SA 1 and SA 2. On February 2, 2016, SB 546 was referred to the Joint Committee on Finance.

The following summary identifies: (a) the provisions of SB 546/AB 666, as introduced; (b) changes to SB 546/AB 666 under SA 1 and AA 3 related to administrative subpoena authority; (c) changes to SB 546/AB 666 under SA 2 and AA 4 related to the ICAC surcharge and funding for ICAC investigations; and (d) changes to SB 546/AB 666 made by other amendments submitted after action taken by the Assembly and Senate Committee on Judiciary and Public Safety. In addition, the summary provides background information relevant to the bills and a discussion of the fiscal effect of SB 546/AB 666.

## BACKGROUND

### Review of Internet Crimes against Children Investigations

Local units of government are primarily responsible for providing law enforcement protection and investigating potential crimes. In addition, state statute requires DOJ to investigate crimes that are statewide in nature, importance or influence. Section 165.70 of the statutes specifically require DOJ to enforce, among other crimes, the following: (a) use of a computer to facilitate a child sex crime; and (b) soliciting a child for prostitution.

The Department's Division of Criminal Investigation (DCI) is generally charged with fulfilling DOJ's criminal investigatory responsibilities. Within DCI, DOJ's Internet Crimes Against Children (ICAC) unit is responsible for investigating Internet crimes against children in conjunction with other law enforcement partners in the Internet Crimes Against Children Task Force. The Wisconsin ICAC task force was created in 1998 with federal funding to counter the threat of offenders using online technology to sexually exploit children. The task force conducts investigations, provides investigative, forensic and prosecutorial assistance to police agencies and prosecutors, encourages statewide and regional collaboration, and provides training for law enforcement, prosecutors, parents, teachers, and other community members. The task force also coordinates with the Wisconsin Clearinghouse for Missing and Exploited Children to support services to children and families that have experienced victimization. As of February, 2016, there were 221 law enforcement agencies, including DOJ, and 12 Boys and Girls Clubs participating in the Wisconsin ICAC task force.

Internet crimes against children cases generally fall into four broad categories: (a) investigations of cyber-tips received from individuals and Internet service providers through the National Center for Missing and Exploited Children; (b) online child enticement investigations; (c) "peer-to-peer" investigations; and (d) cases involving other law enforcement agencies. According to DOJ, the Division of Criminal Investigation opened 2,597 ICAC investigations in the two-year calendar period 2014 and 2015. This includes cases from cyber tips from the National Center for Missing and Exploited Children and cases that were referred to affiliate agencies.

All law enforcement agencies participating in the Wisconsin ICAC task force have a capacity to conduct "reactive" ICAC investigations, responding to tips or information that an Internet crime against a child may have occurred. In 2000, Congress mandated that all Internet service providers register and report any child pornography on their servers to the cyber-tipline program at the National Center for Missing and Exploited Children (NCMEC). According to the Department, DOJ received 1,275 cyber tips from NCMEC in 2014. Of these 1,275 tips, 611 were directly referred to other law enforcement agencies in the ICAC task force. In 2015, DOJ received 1,300 cyber tips from NCMEC. Of these 1,300 cyber tips, 661 tips were directly referred to other law enforcement agencies in the ICAC task force. [The National Center for Missing and Exploited Children is a non-profit corporation primarily supported by the federal government that serves as a national resource center and clearinghouse on issues related to missing and sexually exploited children.]

In addition, many agencies can also conduct "proactive" investigations, such as peer-to-peer investigations and online child enticement investigations. Online child enticement investigations involve investigations of chat rooms and other web-based communication sites to identify adults who want to meet children for the purpose of engaging in sexual activity, or adults who are willing to make their children available for adult sexual contact. These investigations also include cases in which adults direct obscenity towards minors. "Peer-to-peer" investigations identify the illegal sharing of child pornography images and videos over the Internet. Finally, cases involving other law enforcement agencies include: (a) child exploitation initiatives with other law enforcement agencies, such as following up on customer information from web-based companies identified as illegally trafficking images of child pornography; (b) assisting local law enforcement agencies with investigations of Internet-based or other child exploitation cases; and (c) assisting other ICAC task forces around the country.

The Department indicates that the ICAC task force made 272 arrests in calendar year 2014. Of these 272 arrests, 85 arrests were made by DOJ special agents. The ICAC task force made 289 arrests in 2015. Of these 289 arrests, 80 arrests were made by DOJ special agents. [It should be noted that due to reporting issues by local law enforcement agencies, the actual number of ICAC arrests could differ.]

Funding for state activities related to Internet crimes against children are separately budgeted for within DOJ. In 2015-16, funding and position authority for ICAC totals $3,198,200 (all funds) and 36.0 positions. Funding for ICAC activities is comprised of $2,695,000 GPR, $317,300 PR, and $185,900 FED. Program revenue funding for ICAC is generated from the crime laboratory and drug law enforcement surcharge ($13, imposed with a violation of most state laws and county and municipal ordinances) as well as the DNA surcharge ($200 for each misdemeanor conviction and $250 for each felony conviction). The 36.0 positions are comprised of 30.0 GPR positions, 5.0 PR positions, and 1.0 FED position. Positions for the state's ICAC program include special agents, criminal analysts, program and policy analysts, a criminal investigation director, and other supervisory and support personnel.

**Subpoenas**

In criminal proceedings, under s. 968.135 of the statutes, upon the request of the Attorney

General or a district attorney and upon a showing of probable cause, a court must issue a subpoena requiring the production of documents. Documents include, but are not limited to, books, papers, records, recordings, tapes, photographs, films, or computer or electronic data. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, are addressed by the court that issued the subpoena. Any person who unlawfully refuses to produce documents may face a potential penalty, such as being held in contempt of court.

Under s. 968.375 of the statutes, if the Attorney General or a district attorney makes a showing of probable cause, a judge may issue a subpoena requiring a person who provides electronic communication service or remote computing service to disclose, within a reasonable time period that is established in the subpoena, a record or other information pertaining to a subscriber or customer of the service, including any of the following information relating to the subscriber or customer: (a) name; (b) address: (c) local and long distance telephone connection records, or records of session times and duration; (d) length of service, including start date, and types of service utilized; (e) telephone or instrument number or other subscriber number or identity, including any temporary assigned network address; and (f) means and source of payment for the electronic communication service or remote computing service, including any credit card or bank account number.

In addition to subpoenas signed by a court, state and federal law provides certain agencies the authority to issue administrative subpoenas when investigating specific criminal and civil violations. State agencies with administrative subpoena authority may issue such subpoenas without judicial oversight. However, the individual required to produce records as a result of the subpoena may challenge the subpoena in court. The statutes specify the instances in which an agency may issue an administrative subpoena.

For example, under s. 100.18(11)(c) of the statutes, the state Department of Trade, Agriculture and Consumer Protection (DATCP) has the authority to issue an administrative subpoena when conducting an investigation into fraudulent representations under Chapter 100 of the statutes (Marketing; Trade Practices). Specifically, under s. 100.18(11)(c)1 of the statutes, whenever DATCP has reason to believe that a person is in possession, custody or control of any information or documentary material relevant to the enforcement of the laws pertaining to fraudulent representations, DATCP may: (a) require that person to submit a statement or report, under oath or otherwise, as to the facts and circumstances concerning any activity in the court of trade or commerce; (b) examine under oath that person with respect to any activity in the court of trade or commerce; and (c) execute in writing and cause to be served upon such person a civil investigative demand requiring the person to produce any relevant documentary material for inspection and copying.

As another example of administrative subpoena authority under state statute, s. 49.225 grants a county child support agency the authority to issue a subpoena to require a child, the child's mothers, and a male alleged to be the child's father to submit to genetic tests if there is probable cause to believe that the male had sexual intercourse with the child's mother during a possible time of the child's conception. According to the statutes, probable cause of sexual intercourse during a possible time of conception may be established by a sufficient affidavit of the child's mother or the

male alleged to be the child's father.

Federal law provides the U.S. Attorney General the authority to issue an administrative subpoena in any criminal investigation of a federal offense involving the sexual exploitation or abuse of children. The subpoena may require the production of any records or other items relevant to the investigation. The subpoena may also require the custodian of the subpoenaed records to testify concerning the production and authenticity of those records. With respect to a provider of electronic communication service or remote computing service, the administrative subpoena may only require that the provider produce the following information regarding a subscriber or a customer of service: (a) name; (b) address; (c) local and long distance telephone connection records, or records of session times and durations; (d) length of service (including start date) and types of service utilized; (e) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (f) means and source of payment for such service, including and credit card or bank account number. If an individual does not comply with the administrative subpoena, the U.S. Attorney General may request that a federal court compel compliance with the subpoena.

**Surcharges for Criminal Offenses**

Criminal violations under state statute are categorized as either a felony or a misdemeanor. The statutes define a felony as a crime punishable by imprisonment in a Wisconsin state prison. All other criminal offenses are misdemeanors. Individuals incarcerated for a misdemeanor are generally placed in county jail. Within the felony and misdemeanor categories, criminal violations are classified based on the severity of the offense. Table 1 identifies the penalties that state statutes apply to each felony and misdemeanor classifications.

## TABLE 1

### Felony and Misdemeanor Classifications and Penalties

| Classification | Penalty |
|---|---|
| | ***Felony*** |
| Class A | Life imprisonment. |
| Class B | Imprisonment not to exceed 60 years. |
| Class C | A fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both. |
| Class D | A fine not to exceed $100,000 or imprisonment not to exceed 25 years, or both. |
| Class E | A fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both. |
| Class F | A fine not to exceed $25,000 or imprisonment not to exceed 12 years and six months, or both. |
| Class G | A fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both. |
| Class H | A fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both. |
| Class I | A fine not to exceed $10,000 or imprisonment not to exceed 3 years and six months, or both. |
| | ***Misdemeanor*** |
| Class A | A fine not to exceed $10,000 or imprisonment not to exceed nine months, or both. |
| Class B | A fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both. |
| Class C | A fine not to exceed $500 or imprisonment not to exceed 30 days, or both. |

It should be noted that 1997 Act 283 created a bifurcated sentencing structure for all felony offenses. The bifurcated sentencing structure was later modified by 2001 Act 109, effective February 1, 2003. Under this structure (commonly known as truth-in-sentencing), courts are required to impose a bifurcated (two-part) sentence comprised of a term of confinement in state prison and a term of extended supervision in the community. The maximum terms of imprisonment for felony offenses identified in Table 1 include both the maximum term of confinement and the maximum term of extended supervision. Table 2 summarizes the maximum terms of confinement and extended supervision under the bifurcated sentencing structure for felony offenses that are committed on or after February 1, 2003.

## TABLE 2

### Maximum Terms of Confinement and Extended Supervision For Felony Offenses Committed On or After February 1, 2003

| Felony Classification | Maximum Term of Confinement | Maximum Term of Extended Supervision | Maximum Total Sentence |
|---|---|---|---|
| A | Life | ----- | Life |
| B | 40 years | 20 years | 60 years |
| C | 25 years | 15 years | 40 years |
| D | 15 years | 10 years | 25 years |
| E | 10 years | 5 years | 15 years |
| F | 7.5 years | 5 years | 12.5 years |
| G | 5 years | 5 years | 10 years |
| H | 3 years | 3 years | 6 years |
| I | 1.5 years | 2 years | 3.5 years |

Article X Section 2 of the Wisconsin Constitution requires that the "clear proceeds" of all fines and forfeitures be deposited in the state's common school fund. In partial reaction to this limitation, surcharges on statutory fines have been used to generate revenue for specific state or local programs, especially programs relating to the criminal justice system. Under current law, an individual charged with either a felony or a misdemeanor is assessed several fees and surcharges in addition to the fine. For example, Table 3 identifies the current law surcharges, fees, and fines that an individual is assessed with a conviction of vagrancy, a Class C misdemeanor (the lowest class of misdemeanor). In reviewing Table 3, the following should be noted: (a) the total amount an individual is assessed for a crime is partially dependent on the initial fine imposed; (b) the assessed amounts could be greater than the amounts listed in the table depending on the classification of the violation; and (c) depending on the violation and the county in which the violation occurred, additional fees, surcharges, and restitution payments not identified in Table 3 may be assessed.

## TABLE 3

### Fines, Fees, and Surcharges Assessed with a Conviction of Vagrancy

| | | | | Surcharge* | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Violation | Statute | Fine | Clerk Fee | Penalty | Jail | Victim and Witness | Crime Laboratory and Drug | DNA Analysis | Total |
| Vagrancy | 947.02 | Up to $500 | $163 | Up to $130 | $10 | $67 | $13 | $200 | Up to $1,083 |

*Depending on the violation and the county in which the violation occurred, additional surcharges may be assessed.

While current law requires that surcharges be paid within 60 days of assessment, the time limit may be extended if the court orders payments of restitution. Moreover, if an individual is

unable to pay the total amount assessed in 60 days, the courts may authorize a payment plan to allow an individual additional time to pay all of the imposed costs. It is typically the clerk of the court's responsibility to collect amounts that are owed to the court. However, if the individual is placed under the supervision of the Department of Corrections (due to either incarceration in state prison, placement under extended supervision, or probation), Corrections is responsible for collection. If an individual still owes amounts to the court after he or she is released from Corrections' supervision, the clerk of the court may file for a civil judgement to collect any outstanding amounts.

Table 4 identifies overall court collections from calendar years 2010 through 2014. [Calendar year 2015 data is not currently available.] As the table indicates, overall court collections have decreased in recent years. From 2010 to 2014, the annual amount collected decreased by 17.4%. A 2012 Legislative Audit Bureau report on crime victim and witness surcharge revenue collections identified the following factors that could limit court revenue collection: (a) trends in the number of criminal charges and convictions; (b) the extent to which assessed surcharges are unpaid; and (c) statewide economic trends.

**TABLE 4**

**Overall Court Collections, Calendar Years 2010 through 2014**

| Calendar Year | State Share* | County Share | Total** |
|---|---|---|---|
| 2010 | $124,235,900 | $39,792,100 | $164,028,000 |
| 2011 | 114,712,800 | 36,387,200 | 151,100,000 |
| 2012 | 114,942,300 | 36,545,600 | 151,487,900 |
| 2013 | 114,189,200 | 34,883,700 | 149,072,900 |
| 2014 | 104,815,200 | 30,643,200 | 135,458,400 |

*State share includes amounts utilized to support the administration of the Consolidated Court Automation Program (CCAP).

**Total collections include amounts collected from the following: (a) surcharges; (b) fees; (c) assessments; and (d) fines, forfeitures, and penalties for violations of state law and municipal and county ordinances.

In considering revenue that may be generated from a new surcharge, an individual's ability to pay all of the assessed costs may decrease revenue that the new surcharge generates. In addition, as a result of the multiple fines, fees, and surcharges currently imposed in criminal and civil cases, the courts have indicated difficulty in collecting the amounts owed. With regards to the creation of a new surcharge, the Director of State Courts Office has indicated: "The collection process in most counties is already strained from efforts to collect the statutorily-mandated restitution, fines, forfeitures and surcharges…the continued proliferation of surcharges jeopardizes access to the court system and significantly increases the amount of money a violator must pay."

It should also be noted that there is usually a delay between when a new surcharge is created and when revenue from the new surcharge is actualized. Due to the ex post facto clause in both the Wisconsin Constitution and the U.S. Constitution, newly created surcharges are typically first imposed on individuals who commit an offense after the creation of the surcharge. Subsequent to

an individual committing an offense, the individual must be charged by the district attorney and prosecuted. Depending on the length of time between when an individual commits an offense and is convicted, as well as the individual's ability to pay the assessed costs in a timely manner, the delay between the creation of a new surcharge and receipt of revenue may differ.

Current law provides an order for which assessed surcharges, fines, and other court costs must be paid. Table 5 identifies the order of surcharge payments under current law. An individual is typically not assessed all of the surcharges enumerated below. Rather, several of these surcharges are specific to certain crimes.

**TABLE 5**

**Order of Surcharges, Fines, and Other Court Costs**

| Order of Payment | Surcharge (surcharge amount)* |
|---|---|
| 1 | Penalty surcharge (26% of the fine or forfeiture) |
| 2 | Jail surcharge (1% of the fine or forfeiture, or $10, whichever is greater) |
| 3 | Crime victim and witness surcharge ($92 for each felony count, and $67 on each misdemeanor count, on which conviction occurs) |
| 4 | Crime laboratories and drug law enforcement surcharge ($13 per criminal or civil conviction) |
| 5 | DNA analysis surcharge ($250 for each felony conviction and $200 for each misdemeanor conviction) |
| 6 | Child pornography surcharge ($500 per image) |
| 7 | Drug abuse program improvement surcharge (75% of the imposed fine and penalty surcharge) |
| 8 | Drug offender diversion surcharge ($10 for each conviction) |
| 9 | Drive improvement surcharge ($435) |
| 10 | Truck driver education surcharge ($8) |
| 11 | Domestic abuse surcharge ($100 for each offense) |
| 12 | Global positioning system tracking surcharge ($200 for each offense) |
| 13 | Consumer protection surcharge (25% of the imposed fine or forfeiture) |
| 14 | Natural resources surcharge (75% of the imposed fine or forfeiture) |
| 15 | Natural resources restitution surcharge (equal to the fee that should have been paid) |
| 16 | Environmental surcharge (20% of the imposed fine or forfeiture) |
| 17 | Wild animal protection surcharge ($8.75 to $2,000, depending on the animal) |
| 18 | Wildlife violator compact surcharge ($5) |
| 19 | Weapons surcharge (75% of the imposed fine or forfeiture) |
| 20 | Uninsured employer surcharge (75% of the imposed fine or forfeiture) |
| 21 | Supplemental food enforcement surcharge (50% of the imposed fine, forfeiture, or recoupment) |
| 22 | Ignition interlock surcharge ($50) |
| 23 | Crime prevention funding board surcharge ($20 for each felony or misdemeanor count on which a conviction occurs) |
| 24 | Other assessed fines and court costs |

*Generally, these surcharges are subject to specific exceptions.

The surcharges in Table 5 all support a variety of state and local programs. When creating a new surcharge, requiring that the surcharge be paid, in full, prior to the payment of other surcharges, fines, and court costs could reduce or delay the amounts collected from those other assessments, depending on an individual's ability to pay all of the costs in a timely manner. Likewise, requiring that the new surcharge be paid after surcharges higher on the payment order could delay or reduce revenue generated from that new surcharge.

An example that illustrates some of the issues discussed above is the drug offender diversion surcharge (surcharge #8 in Table 5). A court must impose the $10 drug offender diversion surcharge if the court imposes a sentence or places a person on probation for a property crime conviction under Chapter 943 of the statutes. Under 2005 Senate Bill 142, it was estimated that if this surcharge were created, the surcharge would generate $265,000 annually, based on the number of property crime convictions under Chapter 943 of the statutes in 2004. Since creation, however, revenues have not met this original estimate. In 2013-14, the drug offender diversion surcharge generated $44,900. In 2014-15, the surcharge generated $46,000.

**The DNA Surcharge and the Crime Laboratory and Drug Law Enforcement Surcharge**

Prior to 2013 Act 20, a court was required to assess a $250 deoxyribonucleic acid (DNA) surcharge if the court imposed a sentence or placed a person on probation for a violation of: (a) sexual assault; (b) first or second degree sexual assault of a child; (c) engaging in repeated acts of sexual assault of the same child; and (d) sexual assault of a child placed in substitute care. Further, courts were authorized, but not required, to assess a $250 DNA surcharge if the court imposed a sentence or placed a person on probation for a felony conviction. Under 2013 Act 20, the DNA surcharge was modified such that the surcharge is currently assessed whenever the court imposes a sentence or places a person on probation. The DNA surcharge totals $250 for each felony conviction and $200 for each misdemeanor conviction. In addition, a court must impose the $13 crime laboratory and drug law enforcement (CLDLE) surcharge whenever the court imposes a sentence, places a person on probation, or imposes a forfeiture for a violation of most state laws or municipal or county ordinance. In 2014-15, the DNA surcharge and the CLDLE surcharge generated $14,314,700 PR. Given the significant recent change to the scope of the DNA surcharge under 2013 Act 20, it is difficult to estimate future revenues from the surcharge for the 2015-17 biennium. However, given that the surcharges generated $14,314,700 PR in 2014-15, and that actual collections through December, 2015, are similar to collections in 2014-15, it is estimated that similar amounts will be collected during the 2015-17 biennium.

Revenue generated from these two surcharges is received by DOJ's law enforcement services crime laboratories; DNA analysis continuing PR appropriation (henceforth identified as the CLDLE surcharge and DNA surcharge fund). The Department is authorized to utilize this surcharge fund to make expenditures in order to: (a) provide DNA analysis at the state's crime laboratories; (b) administer the state's DNA databank; and (c) reimburse local law enforcement, Corrections, and the Department of Health Services for the costs of submitting biological specimens to the crime labs. In addition, the surcharge fund is required to make transfers to other appropriations within DOJ and the District Attorney function to support: crime laboratory

equipment and supplies; drug law enforcement, crime laboratories, and genetic evidence activities; and a DNA resource prosecutor.

Table 6 identifies estimated fund condition of the CLDLE surcharge and the DNA surcharge during the 2015-17 biennium.

**TABLE 6**

**Estimated Crime Laboratory and Drug Law Enforcement Surcharge and DNA Surcharge Fund Condition, 2015-17**

| | 2015-16 | 2016-17 |
|---|---|---|
| Opening Balance | $3,171,700 | $3,779,400 |
| Revenue | $14,314,700 | $14,314,700 |
| Obligations | | |
| Crime laboratories; DNA analysis | $4,442,900 | $4,442,900 |
| Drug law enforcement, crime laboratories, and genetic evidence activities | 8,552,100 | 8,597,300 |
| Crime laboratory equipment and supplies | 558,100 | 558,100 |
| District Attorney's DNA prosecutor | 153,900 | 153,900 |
| Total obligations | $13,707,000 | $13,752,200 |
| Ending Balance | $3,779,400 | $4,341,900 |

As identified in Table 6, the CLDLE surcharge and DNA surcharge fund is required to transfer funding to DOJ's law enforcement services drug law enforcement, crime laboratories, and genetic evidence activities annual PR appropriation. The Department may utilize this annual PR appropriation to support activities relating to drug law enforcement, drug law violation prosecution assistance, criminal investigative operations, and activities of the state and regional crime laboratories. Annual expenditure authority for the appropriation totals $8,552,100 PR in 2015-16 and $8,597,300 PR in 2016-17. Any amounts not encumbered by DOJ's drug law enforcement, crime laboratories, and genetic evidence activities appropriation would revert to the CLDLE surcharge and DNA surcharge fund.

## SUMMARY OF BILLS

The following summary of the provisions of SB 546/AB 666 is divided into two sections. The first section identifies the provisions of the bills relating to the Attorney General's administrative subpoena authority, as introduced. This section also identifies the changes to the Attorney General's administrative subpoena authority that are provided under Senate Amendment 1 to SB 546 and Assembly Amendment 3 to AB 666. The second section identifies the provisions of the bills relating to the creation of an Internet crimes against child appropriation and surcharge. The second section also identifies the deletion of the ICAC surcharge and transfer of program

revenue funding for ICAC investigations provided under Senate Amendment 2 to SB 546 and Assembly Amendment 4 to AB 666. Finally, the second section addresses the changes to the funding mechanism for ICAC investigations provided under amendments introduced subsequent to action by the Assembly and Senate Committee on Judiciary and Public Safety (including Assembly Amendment 5).

**Administrative Subpoena Authority**

For the purposes of the Attorney General's administrative subpoena authority, an internet crime against a child would be defined as the commission of, or the solicitation, conspiracy, or attempt to commit any of the following: (a) sexual exploitation of a child; (b) use of a computer to facilitate a child sex crime; (c) exposing a child to harmful material or harmful descriptions or narrations; (d) possession of child pornography; (e) a sex offense, which includes sex offenses that would cause an individual to register with the Department of Corrections' sex offender registry; or (f) a violation of Chapter 948 of the statutes (Crimes Against Children) that involves the use of a device that permits the transmission of wire or electronic communications or images through an electronic communications service or a remove computing service.

The definition of an electronic communication service and a remote computing service would be linked to the definition provided under s. 968.27 of the statutes (Commencement of Criminal Proceedings). Accordingly, an electronic communication service would be defined as any service that provides its users with the ability to send or receive wire or electronic communications. A remote computing service would be defined as computer storage or processing that is provided to the public by means of an electronic communications system.

Senate Bill 546 and Assembly Bill 666 provide the Attorney General or his or her designee (henceforth collectively identified as the Attorney General) the authority to issue and cause to be served a subpoena on a provider of an electronic communication service or a remote computing service to compel the production of records, information, and documentary evidence if all of the following apply: (a) the subpoena relates to an investigation of an Internet crime against a child; and (b) the Attorney General has reasonable cause to believe that an Internet or electronic service account provided by an electronic communication service or a remote computing service has been used in the Internet crime against a child. The subpoena would be substantially in the form authorized for a subpoena for testimony or documents, as prescribed under s. 885.02 of the statutes. The Attorney General issuing a subpoena must ensure that the subpoena describes each record or other information pertaining to a customer or subscriber that must be produced and prescribes a reasonable return date by which the person served with the subpoena must assemble each record and make them available.

A person who is duly served a subpoena must, if requested, provide the following information about the customer or subscriber: (a) name; (b) address; (c) local and long distance telephone connection records, satellite-based Internet service provider connection records, or records of session times and durations; (d) duration of an applicable service, including the start date for the service and the type of service used; (e) telephone or instrument number or other subscriber number or identity, including a temporarily assigned network address; and (f) means

and source payment for the electronic communication service or remote computing service, including credit card and bank account number.

Before the return date identified in the subpoena, the individual served with the subpoena may petition a circuit court in the county where the subpoena was issued for an order to modify or quash the subpoena or to prohibit disclosure of information by the court.

If the investigation into the Internet crime against a child associated with the subpoena does not result in a prosecution or other proceeding against a person, the Attorney General must either: (a) return the records requested by the subpoena to the individual who produced the records; or (b) destroy the information.

The Attorney General may order a provider of an electronic communication service or remote computing service not to notify or disclose the existence of the subpoena to the customer or subscriber or any other person, except an attorney for the purpose of obtaining legal advice or a circuit court, for a period of 90 days after the provider either produces the requested records or files a petition with a court to modify or quash the subpoena or prohibit disclosure of information. The Attorney General may order a provider not to notify or disclose the existence of the subpoena if the Attorney General has reason to believe that the victim of the Internet crime against a child is under 18 years of age, and that notification or disclosure of the existence of the subpoena would do any of the following: (a) endanger the life or physical safety of an individual; (b) lead to flight from prosecution; (c) lead to the destruction or tampering of evidence; (d) lead to the intimidation of a potential witness; or (e) otherwise seriously jeopardize the investigation.

Records and information produced in response to a subpoena under SB 546/AB 666 are not subject to inspection or copying under the state's open records laws under s. 19.35(1) of the statutes, except that the Attorney General may, upon request, disclose the records and information to another law enforcement agency, ICAC task force, or district attorney.

If SB 546/AB 666 were enacted, the Attorney General's authority to issue administrative subpoenas in criminal ICAC cases would take effect on the bill's date of publication.

***Senate Amendment 1 and Assembly Amendment 3***. Senate Amendment 1 and Assembly Amendment 3 make the following modifications to the provisions of SB 546/AB 666 relating to the administrative subpoena authority of the Attorney General.

First, the amendments modify the definition of an Internet crime against a child. Under SB 546/AB 666, an Internet crime against a child is defined as the commission of, or the solicitation, conspiracy, or attempt to commit any of the following: (a) sexual exploitation of a child; (b) use of a computer to facilitate a child sex crime; (c) exposing a child to harmful material or harmful descriptions or narrations; (d) possession of child pornography; (e) a sex offense, which includes sex offenses that would cause an individual to register with the Department of Corrections' sex offender registry; or (f) a violation of Chapter 948 of the statutes (Crimes Against Children) that involves the use of a device that permits the transmission of wire or electronic communications or images through an electronic communications service or a remove computing service. Senate

Amendment 1 and Assembly Amendment 3 remove a "sex offense" (item "e" above) from the definition of an Internet crime against a child.

Second, SA 1/AA 3 specify the records for which the Attorney General may serve a subpoena. Under SB 546/AB 666, the Attorney General may issue and caused to be served a subpoena upon a provider of an electronic communication service or a remote computing service to compel the production of records, information, and documentary evidence. Senate Amendment 1 and Assembly Amendment 3 delete the provision that allows the Attorney General to issue a subpoena to compel the "production of records, information and documentary evidence." In place of this provision, SA 1/AA 3 specify that the Attorney General may issue and cause to be served a subpoena to compel the production of the following information about the customer or subscriber: (a) name; (b) address; (c) local and long distance telephone connection records, satellite-based Internet service provider connection records, or records of session times and durations; (d) duration of an applicable service, including the start date for the service and the type of service used; (e) telephone or instrument number or other subscriber number or identity, including a temporarily assigned network address; and (f) means and source payment for the electronic communication service or remote computing service, including credit card and bank account number.

Finally, SA 1/AA 3 modify the instances in which the Attorney General may serve a subpoena. Under SB 546/AB 666, the Attorney General may serve a subpoena if all of the following apply: (a) the subpoena relates to an investigation of an Internet crime against a child; and (b) the Attorney General has reasonable cause to believe that an Internet or electronic service account provided by an electronic communication service or a remote computing service has been used in the crime. In place of this provision, SA 1/AA 3 provide that the Attorney General may serve a subpoena if all of the following apply: (a) the information likely to be obtained is relevant to an ongoing investigation of an Internet crime against a child; and (b) the Attorney General has reasonable cause to believe that an Internet or electronic service account provided by an electronic communication service or a remote computing service has been used in the crime.

**Creation of an Internet Crimes Against Children Surcharge and Appropriation**

Senate Bill 546 and Assembly Bill 666 create a continuing, all monies received, Internet crimes against children surcharge PR appropriation in DOJ. Program revenue for the appropriation would be generated from the Internet crimes against children surcharge. Funding credited to the appropriation could be utilized for criminal investigative operations and law enforcement relating to Internet crimes against children, prosecution of Internet crimes against children, and activities of state and local Internet crimes against children task forces. As a continuing appropriation, DOJ could spend any available cash balances in the appropriation.

The bills create a new, court-imposed surcharge that must be assessed in criminal actions, entitled the Internet crimes against children surcharge. Whenever a court imposes a sentence or places a person on probation, the court must impose an ICAC surcharge totaling $20 for each misdemeanor conviction and $40 for each felony conviction. After determining the amount due, the clerk of the court must collect and transmit the amount to the county treasurer, who must then provide the money to the Secretary of the Department of Administration (DOA). If an inmate in a

state prison or a person sentenced to a state prison has not paid the surcharge, Corrections must assess and collect the amount owed from the inmate's wages or other moneys. Amounts collected by Corrections would be transmitted to the Secretary of DOA.

The bills do not place the ICAC surcharge in the order of surcharge payments identified under Table 5. As a result, it is anticipated that amounts owed under the ICAC surcharge would be collected after payment of the other imposed costs identified in Table 5.

If an individual who is a patient or resident of a public institution for a mental illness owes amounts under the ICAC surcharge, then wages and other property delivered for the benefit of the patient or resident would be used for payment of the surcharge. If, after payment of any applicable surcharge (such as the ICAC surcharge), money credited to the patient or resident remains uncalled for one year after the patient or resident either dies or departs from the institution, then the superintendent of the institution would be required to deposit the money in the general fund.

If an individual who is a prisoner or resident of a state correctional institution owes amounts under the ICAC surcharge, then money and other property delivered for the benefit of the prisoner or resident would be used for payment of the ICAC surcharge.

When an inmate from state prison is discharged, Corrections must restore the money and effects in the inmate's possession when the inmate was first admitted. Under SB 546/AB 666, the amount restored to the discharged inmate would be subject to amounts owed under the ICAC surcharge.

If an inmate or resident of a state prison owes an amount under the ICAC surcharge, Corrections may distribute the individual's earnings while working for prison industries to the ICAC surcharge. Corrections may distribute the inmate's earnings to the ICAC surcharge only if the inmate or resident has first provided for the reasonable support of his or her dependents.

If an inmate or resident of a state prison owes an amount under the ICAC surcharge, and the inmate or resident is employed by a private business that leases space from a state correctional institution, Corrections must distribute the individual's earnings for payment of the ICAC surcharge, subject to the order of distribution of earnings provided under s. 303.01(8)(c) of the statutes. Under SB 546/AB 666, an inmate's earnings would be distributed for payment of the ICAC surcharge after distribution for the following: (a) payment of applicable federal, state and local taxes; (b) payment for victim compensation; (c) payment for court ordered family support; (d) payment of the individual's board and a reasonable room charge, as determined by Corrections; (e) payment of the crime victim and witness assistance surcharge; (f) payment of the DNA analysis surcharge; and (g) payment of the child pornography surcharge. An inmate's earnings would be distributed for payment of the ICAC surcharge before distribution for the payment of the drug offender diversion surcharge. [It should be noted that Corrections no longer leases space from a state correction institution to private businesses.]

If a prison inmate owes an amount under the ICAC surcharge and the inmate generates earnings under Corrections' work release program, then Corrections must distribute the salaries or

wages generated by the inmate for the ICAC surcharge, subject to the order of distribution provided under s. 303.065 of the statutes. Under SB 546/AB 666, an inmate's earnings under the work release program would be distributed for payment of the ICAC surcharge after distribution for the following: (a) the board of the prisoner, including food, clothing and any fee charged for electronic monitoring; (b) necessary travel expenses to and from work and other incidental expenses of the prisoner; (c) payment of the crime victim and witness assistance surcharge; (d) payment of the DNA analysis surcharge; (e) support of the prisoner's dependents, if any; and (f) payment of the child pornography surcharge. An inmates earnings under the work release program would be distributed for payment of the ICAC surcharge before distribution for the following: (a) payment of the drug offender diversion surcharge; (b) a reasonable room charge, as determined by Corrections; (c) payment for legal representation from the State Public Defender; (d) payment, either in full or ratably, of the prisoner's obligations acknowledged by the prisoner in writing or which have be reduced to judgment; and (e) the balance, if any, to the prisoner upon the prisoner's discharge.

Under the bills, the ICAC surcharge would first apply to individuals who are sentenced or placed on probation on the effective date of the bill.

***Senate Amendment 2 and Assembly Amendment 4.*** Senate Amendment 2 and Assembly Amendment 4 would eliminate provisions of SB 546 that create an ICAC surcharge.

The amendments would retain the continuing PR appropriation created under the bill that may be utilized for criminal investigative operations and law enforcement relating to Internet crimes against children, prosecution of Internet crimes against children, and activities of state and local Internet crimes against children task forces. However, under the amendments, funding for the appropriation would no longer be supported by the ICAC surcharge. Rather, funding for the appropriation would be supported by a one-time transfer of $1,000,000 PR in 2015-16 from DOJ's law enforcement services drug law enforcement, crime laboratories, and genetic evidence activities annual PR appropriation.

It should be noted that Assembly Amendment 4 to AB 666 was introduced subsequent to action taken by the Assembly Committee on Judiciary and Public Safety. [Senate Amendment 2 to SB 546 was recommended for adoption by the Senate Committee on Judiciary and Public Safety by a vote of 5-0.]

***Other Amendments Introduced Subsequent to Action by the Assembly and Senate Judiciary Committees.***

*Assembly Amendment 5***.** Assembly Amendment 5 would eliminate provisions of AB 666 that create an ICAC surcharge. The amendment would also eliminate the continuing PR appropriation that is created in DOJ for the purposes of supporting ICAC investigations.

In place of these provisions, AA 5 would create an annual GPR appropriation in DOJ that could be utilized to support criminal investigative operations and law enforcement relating to Internet crimes against children, prosecution of Internet crimes against children, and activities of

state and local Internet crimes against child task forces. The amendment would appropriate $30,000 GPR annually to this new GPR appropriation in DOJ for ICAC investigations.

**FISCAL EFFECT**

The discussion of the fiscal effect of SB 546/AB 666 is divided into three sections. The first sections discusses the fiscal effect of the bills, as introduced (with the creation of the ICAC surcharge). The second section discusses the fiscal effect of SB 546/AB 666 as amended by AA 4 and SA 2 (where the ICAC surcharge is deleted and existing program revenue is transferred to DOJ for ICAC investigations). The third section discusses the fiscal effect of SB 546/AB 666 as amended by other amendments introduced subsequent to action by the Assembly and Senate Judiciary Committees.

***Fiscal effect under SB 546/AB 666, as introduced.*** On January 15, 2016, the Department of Justice submitted a fiscal estimate on SB 546/AB 666. Assembly Bill 666 and Senate Bill 546, as introduced, would create an ICAC surcharge totaling $20 for each misdemeanor conviction and $40 for each felony conviction. Revenue generated from the new surcharge would be credited to a continuing PR appropriation in DOJ for criminal investigative operations and law enforcement relating to Internet crimes against children, prosecution of Internet crimes against children, and activities of state and local Internet crimes against children task forces. As a continuing appropriation, DOJ could spend any available cash balances in the appropriation.

The Department estimates that the ICAC surcharge would generate $1,622,100 PR annually. The estimate is based on the average number of felony and misdemeanor cases disposed of from calendar year 2012 through calendar year 2014, not including cases that were dismissed before trial. The Courts indicate that the total number of disposed cases less cases that were dismissed before trial provides a close estimate to the number of convictions reached. The Department's estimate also assumes that 70% of the ICAC surcharges assessed would be collected.

As previously discussed, there are several factors that could affect the amount of revenue generated from the ICAC surcharge, including: trends in criminal charges and convictions; the extent to which surcharges go unpaid; the intensity of collection efforts; convicted offenders' ability to pay all of their imposed costs; and statewide economic trends. Moreover, the ICAC surcharge's placement in the order of payment precedence (identified in Table 5) could affect the amount generated by the new surcharge, as well as other existing surcharges and assessments. Surcharges placed higher on the order of payment precedence may reduce or delay revenue generated from assessments lower on the order. Likewise, revenue generated from surcharges placed lower on the order may be reduced or delayed, based on individuals' ability to pay all of the assessed costs. The bills do not place the ICAC surcharge in the order of payment precedence. As a result, it is anticipated that the amounts owed under the ICAC surcharge would be collected after payment of the other imposed costs identified in Table 5.

***Fiscal effect under SB 546/AB 666, as amended under SA 2 and AA 4.*** Senate Amendment 2 and Assembly Amendment 4 would eliminate provisions of the bill that create the ICAC surcharge.

The amendments would retain the continuing PR appropriation created under the bill that may be utilized for criminal investigative operations and law enforcement relating to Internet crimes against children, prosecution of Internet crimes against children, and activities of state and local Internet crimes against children task forces. However, under AA 4 and SA 2, funding for the appropriation would no longer be supported by the ICAC surcharge. Rather, funding for the appropriation would be supported by a one-time transfer of $1,000,000 PR in 2015-16 from DOJ's law enforcement services drug law enforcement, crime laboratories, and genetic evidence activities annual PR appropriation.

Since the ICAC appropriation would be a continuing appropriation, DOJ could spend any available cash balances in the appropriation. Further, any unencumbered amounts in the ICAC appropriation at the end of the fiscal year would remain with the appropriation and would be available for use in future fiscal years.

As discussed above, the ICAC appropriation would be supported by a transfer of $1,000,000 PR in 2015-16 from DOJ's drug law enforcement, crime laboratories, and genetic evidence activities annual PR appropriation. The drug law enforcement, crime laboratories, and genetic evidence activities appropriation is utilized to support activities relating to drug law enforcement, drug law violation prosecution assistance, criminal investigative operations, and activities of the state and regional crime laboratories. Annual expenditure authority for the appropriation totals $8,552,100 PR in 2015-16 and $8,597,300 PR in 2016-17. Funding for the appropriation is supported by a transfer from the CLDLE surcharge and DNA surcharge fund.

Any amounts not encumbered by DOJ's drug law enforcement, crime laboratories, and genetic evidence activities appropriation at the end of the fiscal year revert to the CLDLE surcharge and DNA surcharge fund. As a result, requiring that the appropriation transfer $1,000,000 PR to the ICAC appropriation in 2015-16 could decrease the amount of available monies that could revert to the fund and increase the fund's balance. As identified in Table 6, it is estimated that the CLDLE surcharge and DNA surcharge fund will conclude 2015-16 with a balance of $3,779,400 PR and conclude 2016-17 with a balance of $4,341,900 PR.

***Fiscal effect under other amendments introduced subsequent to action by the Assembly and Senate Judiciary Committees.***

*Assembly Amendment 5***.** Assembly Amendment 5 to AB 666 would eliminate provisions of the bill relating to the ICAC surcharge. The amendment would also eliminate the continuing PR appropriation created under AB 666 created to support ICAC investigations.

In place of these provisions, Assembly Amendment 5 would create an annual GPR appropriation in DOJ for purposes of supporting ICAC investigations. The amendment would appropriation $30,000 GPR annually to the GPR appropriation during the 2015-17 biennium. Funding provided under AA 5 would be included in DOJ's base resources for the 2017-19 biennium.

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