March 6, 2020

Dear Chairman Graham and Ranking Member Feinstein,

On behalf of the undersigned representatives of the law enforcement and prosecutor community, we write to update you on our efforts to find a solution to the problem of lawful access to encrypted smartphone data. At your December 10, 2019 hearing on "Encryption and Lawful Access," you asked technology companies and law enforcement agencies to deliver a compromise on smartphone device encryption that balanced public safety and consumer privacy. In addition, you made expressly clear that if technology companies did not work swiftly to set forth a compromise, a solution would be legislated by the Senate Judiciary Committee.[1]

On December 12, 2019, District Attorney Vance sent the attached letters to the Chief Executive Officers and the companies' respective Boards to move forward on your call to find a middle-ground solution, expressing his desire to meet to achieve that end. Within a few weeks, Google and Apple accepted DA Vance's invitation. The District Attorney's Office agreed to meetings at the companies' offices on February 24, 2020 and was accompanied by the undersigned: leaders of the Santa Clara County District Attorney's Office, the National District Attorneys Association, New York City Police Department, and the United States Secret Service.

With the meetings now completed, we write to share that although we have opened improved avenues of dialogue, our meetings did not result in a solution to the fundamental problem of device inaccessibility. It is our conclusion, therefore, that federal legislation remains the only path forward.

At the conclusion of both meetings, we asked both companies what we could report back to you given your admonition to develop a non-legislated solution. Google's representative shared that he hoped we would convey the company's sincere appreciation of the problem law enforcement is facing, but that Google defines the issue of security differently than we do. In the end, while Google expressed a willingness to continue a dialogue, there was no solution offered other than increased law enforcement training. While we agreed that increased technical training had value, we shared that it was not a solution to the separate issue of inaccessible devices and the resulting impact on crime victims. Lastly, Google confirmed that it would be charging fees for compliance, referencing its statutory right to do so.

Similarly, Apple did not present a proposed solution to the device inaccessibility issue. Although Apple's representatives acknowledged that devices could theoretically be designed in a way that would allow for lawful access by upon receipt of a court order – as existed up through 2014 --

Apple has not yet developed a method that would not, in its view, impermissibly weaken security. Our discussion did, however, touch on ways in which Apple might facilitate law enforcement access to iCloud data; these options would not involve extracting data directly from devices, and therefore would not require so-called "exceptional access" to devices. For example, Apple could design its systems so that, with a court order, Apple could force a

[1] Chairman Graham: "My advice to you is to get on with it, because this time next year, if we haven't found a way that you can live with, we will impose our will on you."
Ranking Member Feinstein: "I'm determined to see that there is a way that phones can be unlocked when major crimes are committed."

device to back its data up. Apple could also expand an existing iCloud account's storage, to enable backups that would otherwise not occur. Apple expressed a willingness to look into some of these options. Apple also expressed its continued desire to support national and international law enforcement with its thirty-member compliance team. While solutions involving iCloud data might enable law enforcement to access information that is currently beyond our reach, they are not a substitute for access to devices, which often contain data (such as third-party app content) that is not backed up to iCloud. Moreover, any satisfactory solutions, whether they involve device data or cloud data, will require federal legislation.

Apple and Google articulated their reasons differently, but the common theme was that in their estimation, any compromise that interferes with maximizing device security was undesirable and unacceptable. Furthermore, the net result of the "arms race" between their security and efforts by law enforcement to access the devices through the use of third party tools is that Apple and Google are using those efforts as a proxy for the efforts of bad actors, thus they respond by patching the vulnerabilities we discover that enable us to access devices after obtaining a lawful search warrant from a judge. While they may not see law enforcement as the intended target of their efforts, and expressed that to us, we are certainly a direct (even if unintended) target. As such, while the companies and law enforcement both believe that their efforts and objectives are in the public interest, it is incumbent upon our elected representatives to find a balance between device security and the need to protect the public with investigations into serious crimes that include court-authorized searches of electronic devices.

In sum, we are grateful to Google and Apple for accepting our invitation to meet and providing us the opportunity to discuss the issue of lawful access for law enforcement. However, we return from our visit without a satisfactory compromise to the escalating public safety risk presented by warrant-proof smartphone devices. We respectfully ask for additional hearings that may prompt a greater willingness to find a middle-ground solution.

We continue to make ourselves available to provide you and the Committee members with additional assistance or information.

Sincerely,

Cyrus R. Vance, Jr., District Attorney,
New York County

Jeff Rosen, District Attorney,
Santa Clara County

Duffie Stone, President,
National District Attorneys Association

Gustavo Rodriguez, Lt.,
New York City Police Department