

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

Senate Bill 431

(Senator Kelley, *et al.*)

Judicial Proceedings

Criminal Procedure - Cell Site Simulator Technology

This bill authorizes a court to issue an order authorizing or directing a law enforcement officer to use a specified cell site simulator device. The bill (1) establishes requirements for an application and court order and the use of any information obtained relating to the use of a cell site simulator device and (2) expands current law provisions relating to obtaining location information by law enforcement to the use of cell site simulator technology by law enforcement.

A person may not be held civilly liable for complying with the bill's provisions by providing information obtained by a cell site simulator device.

Fiscal Summary

State Effect: Minimal increase in general fund expenditures, as discussed below. No effect on revenues.

Local Effect: Minimal increase in local expenditures, as discussed below. No effect on revenues.

Small Business Effect: None.

Analysis

Bill Summary:

Issuance of Order

A court may issue an order by application on a determination that there is probable cause to believe that (1) a misdemeanor or felony has been, is being, or will be committed by the user/owner of the electronic device or the individual about whom electronic location information is being sought and (2) the information obtained by the cell site simulator device is evidence of, or will lead to evidence of, the misdemeanor or felony being investigated or will lead to the apprehension of an individual for whom an arrest warrant has previously been issued.

Application for Order

An application for an order, in addition to compliance with existing law provisions, must be sufficiently informative to describe (1) the nature and capabilities of the cell site simulator device that will be used and the manner and method of its deployment, including whether the cell site simulator device will obtain data from nontarget communications devices and (2) the procedures that will be followed to protect the privacy of nontargets during the investigation, including the deletion of data obtained from nontarget communications devices. The application for an order must also be accompanied by an affidavit that (1) describes how the applicant or the applicant's agency intends to address deletion of data not associated with the target electronic device and (2) states that no investigative use of nontarget data will be made absent further order of the court, except to identify and distinguish the target device from other devices.

Order Issued

For the device to which the cell site simulator device is to be used, an order issued must name or describe with reasonable particularity:

- the identity, if known, of the subscriber of the electronic communications service used by the targeted device and the person who possesses the targeted device;
- the telephone number or other unique subscriber account number identifying the wire or electronic communications service account used by the targeted device;
- if known, the communications protocols found or known to be used by the target device;
- the geographic area that will be covered by the cell site simulator device;

- all categories of metadata or information to be collected by the cell site simulator device from the targeted device;
- whether the cell site simulator device will incidentally collect specified information from any other parties or devices not specified in the court order, and if so, what categories of metadata or information will be collected;
- any disruptions to access or use of a communications or Internet access network that may be created by use of the device;
- the grounds for obtaining the information sought;
- the name of the applicant on whose application the order was issued; and
- affirmation that specified information and metadata will be deleted on return of the search warrant.

Scope of Collected Information

A law enforcement agency authorized to use a cell site simulator device must take all steps necessary to (1) limit the collection of any information or metadata to the target specified in the court order, as specified, and (2) permanently delete information or metadata collected from any party not specified in the applicable order immediately, or within 48 hours, and refrain from the transmission of such data. A law enforcement agency also must verify the deletion of that information and metadata and delete any collected information or metadata within 30 days if there is no longer probable cause to support the belief that such information or metadata is evidence of a crime.

Admissibility of Evidence

Except as proof of a violation of the bill's provisions, evidence, and evidence derived from such evidence, obtained in violation of the bill's provisions is not admissible in a criminal, civil, administrative, or other proceeding. Under no circumstances is information collected on a nontarget device admissible in a criminal, civil, administrative, or other proceeding.

Exceptions to Order Requirement

No later than 48 hours after a law enforcement officer obtains information without an order in an exigent circumstance or with the express consent of the user/owner of the electronic device, that officer must file with the appropriate court an application for an order, together with an affidavit providing the exigent circumstances relied on to excuse the need to obtain a court order before obtaining the information. If the court denies the order or finds that the alleged exigency is insufficient to excuse the need for a court order, the evidence obtained or derived from the evidence is not admissible in a criminal, civil, administrative, or other proceeding.

Reporting

By February 1 each year, each law enforcement agency must report to the Department of State Police (DSP) the number of times a cell site simulator was used by the agency during the previous calendar year. By April 1 each year, DSP must compile the information collected from each law enforcement agency and post the compilation on its website.

Current Law: Chapter 191 of 2014 authorizes a court to issue an order authorizing or directing a law enforcement officer to obtain “location information” from an “electronic device.” “Location information” means real-time or present information concerning the geographic location of an electronic device that is generated by or derived from the operation of that device.

Issuance of Order

A court may issue an order on a determination from an application that there is probable cause to believe that (1) a misdemeanor or felony has been, is being, or will be committed by the user/owner of the electronic device or the individual about whom electronic location information is being sought and (2) the location information being sought is evidence of, or will lead to evidence of, the misdemeanor or felony being investigated or will lead to the apprehension of an individual for whom an arrest warrant has previously been issued.

Application for Order

An application for an order must be in writing, signed and sworn to by the applicant, and accompanied by an affidavit that sets forth the basis for the probable cause and contains facts within the personal knowledge of the affiant. The order must (1) contain specified information; (2) authorize the executing law enforcement officer to obtain the location information without giving notice to the user/owner of the electronic device or to the individual about whom the location information is being sought for the duration of the order; (3) specify the period of time for which the disclosure of information is authorized; and (4) if applicable, order the service provider to disclose to the executing law enforcement officer the location information associated with the electronic device for the period of time for which disclosure is authorized and refrain from notifying the user/owner of the electronic device or any other person of the disclosure of location information for as long as the notice is authorized to be delayed.

Duration of Order

In general, the period of time during which location information may be obtained under a location information order may not exceed 30 days. Within 10 calendar days after an order is issued, law enforcement must begin to obtain location information or, if applicable,

deliver the order to the service provider. If neither of these two events occurs within 10 calendar days after the issuance of the order, the order is void.

A location information order may be extended beyond 30 calendar days on a finding of continuing probable cause. An extension may not exceed an additional 30 calendar days unless the court finds continuing probable cause and determines that good cause exists for a longer extension.

Notice of Order to Owner or User of Electronic Device

Notice of the location information order must be delivered to the user and, if known and if the owner is a person or an entity other than the user, the subscriber of the applicable electronic device. The notice must state the general nature of the law enforcement inquiry and inform the user/owner (1) if applicable, that location information maintained by the service provider was supplied to a law enforcement officer; (2) if applicable, the identifying number associated with the electronic device; (3) the dates for which the location information was supplied; (4) whether notification was delayed; and (5) which court authorized the order.

The notice must be delivered within 10 calendar days after the expiration of the order. However, a court, on a finding of good cause, may order that the application, affidavit, and order be sealed, and that the required notification be delayed for a period of 30 calendar days. A finding of good cause may be established by evidence that (1) the criminal investigation to which the affidavit is related is of a continuing nature and likely to yield further information that could be of use in prosecuting alleged criminal activities and (2) failure to maintain confidentiality of the investigation would jeopardize the use of information already obtained in the investigation, impair the continuation of the investigation, or jeopardize the safety of an information source. A court may order that notification be delayed beyond 30 calendar days if a law enforcement officer provides continued evidence of good cause and the court makes a finding of good cause based on evidence that notice should be further delayed to preserve the continuation of the investigation.

Exceptions to Order Requirement

A law enforcement officer may obtain location information without an order for up to 48 hours in exigent circumstances or with the express consent of the user/owner of the electronic device.

Civil Liability

A person may not be held civilly liable for complying with these provisions by providing location information.

Background: According to the American Civil Liberties Union (ACLU), 72 law enforcement agencies in 24 states and the District of Columbia use cell site simulator technology to track the locations of cell phones. In Maryland, the ACLU indicates that Anne Arundel, Baltimore, Harford, Howard, Montgomery, and Prince George's counties; the Baltimore City Police Department (BPD); the Annapolis City Police Department; and DSP have the technology. These devices, often referred to by their trade names of Stingray or Hailstorm (the latest version of Stingray), mimic cell phone towers and trick cell phones within range to connect with them, allowing law enforcement to determine which cell phones are in the area and where they are located.

Determining which law enforcement agencies are deploying cell site simulator technology has been hindered by nondisclosure agreements with the Federal Bureau of Investigation and Harris Corporation, the manufacturer of the device, entered into as a condition of sale of the devices. As revealed by court documents, BPD's nondisclosure agreement precluded disclosure of any information related to the cell site simulator technology, even in court documents or during judicial hearings.

State Expenditures: General fund expenditures increase minimally for the Judiciary to accommodate the bill's requirements. The Judiciary advises that the bill is likely to result in an increase in applications for court orders and requests for extensions submitted by law enforcement personnel to judges and additional judicial time necessary for the review and issuance of cell site simulator technology related orders. However, the operational and fiscal impact of this effect is difficult to project because of uncertainty with respect to the number of additional filings the courts will receive. An order issued under the bill has a shorter duration than other available options and may require law enforcement to file for extensions more frequently.

Based on information provided by DSP and the Natural Resources Police (NRP), it is assumed that all State law enforcement agencies can implement the bill with existing budgeted resources. DSP advises that it can implement the bill with existing resources. NRP advises that it does not possess or use cell site simulator technology; however, if NRP obtains such technology in the future, it can implement the bill with existing resources.

The Office of the Public Defender (OPD) advises that the bill's requirements create a substantial burden and result in increased workloads. However, the Department of Legislative Services disagrees and advises that the bill's requirements can be handled with

existing resources, as any litigation related to the use of cell site simulator technology is likely be a part of the overall case accepted for representation offered by OPD.

Local Expenditures: Expenditures increase minimally for the circuit courts to comply with the bill's requirements. The extent of the fiscal impact depends on the volume of requests for applicable orders filed in the jurisdiction.

Additional Information

Prior Introductions: HB 917 of 2017, a similar bill, received an unfavorable report by the House Judiciary Committee. Its cross file, SB 878, was withdrawn after being heard by the Senate Judicial Proceedings Committee. HB 904 of 2016, a similar bill, received an unfavorable report from the House Judiciary Committee.

Cross File: HB 314 (Delegate Sydnor, *et al.*) - Judiciary.

Information Source(s): Anne Arundel, Frederick, Montgomery, and Prince George's counties; cities of Frederick and Havre de Grace; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of Natural Resources; Department of State Police; American Civil Liberties Union; Department of Legislative Services

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