

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 308

(Senators Waldstreicher and Smith)

Judicial Proceedings

**Criminal Procedure - Providing Electronic Device Location Information -
Historical Data**

This bill expands the definition of “location information” under the electronic device location information court order statute to include historical information concerning the geographic location of an electronic device that was generated by or derived from the operation of that device. The bill specifies that, except as proof of a violation, evidence obtained in violation of the statute, and evidence derived from evidence obtained in violation of the statute, are not admissible in a criminal, civil, administrative, or any other proceeding.

Fiscal Summary

State Effect: The bill is procedural in nature and does not materially affect State finances.

Local Effect: The bill is procedural in nature and does not materially affect local finances.

Small Business Effect: None.

Analysis

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 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 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: In June 2018, the U.S. Supreme Court held that, in general, law enforcement must obtain a warrant to get historical cell-site location information. *Carpenter v. United States*, 585 U.S. ___ (2018). In the case, law enforcement used court orders under the federal Stored Communications Act to obtain more than 127 days' worth of historical cell-site information from a robbery suspect's cell phone provider. Court orders under the Act are not subject to a probable cause standard. Instead, applicants must only demonstrate specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation. 18 U.S.C. § 2703(d).

According to the court, there is a reasonable expectation of privacy in this type of information, and the request for these records by prosecutors in the *Carpenter* case constituted a search under the Fourth Amendment.

The court determined that the “third-party doctrine” does not apply to historical cell-site location records. Under that doctrine, the Fourth Amendment does not protect information voluntarily given to a third party because there is no reasonable expectation of privacy in that information. Historically, the doctrine has been applied to business records. In making its determination, the court distinguished cell phone location records from other types of records and noted the breadth of information and the intimate nature of the information that can be gleaned from cell-site location data, the ubiquitous presence of and need for cell phones in modern society, the constant close proximity of cell phones to their owners, and the default collection of this information by service providers from all users through the mere operation of phones (rather than an affirmative act by a cell phone user to a service provider).

The court limited the ruling’s application to the circumstances in the *Carpenter* case and specified that it does not apply to real-time location information, information about all cell phones connected to a particular cell tower during a specific time period, other types of surveillance and records, and exigent circumstances.

Additional Information

Prior Introductions: HB 510 of 2018 received a hearing in the House Judiciary Committee but was later withdrawn. HB 998 of 2017 received a hearing in the House Judiciary Committee but was later withdrawn. HB 257 of 2016, a substantially similar bill, received a hearing in the House Judiciary Committee but was subsequently withdrawn. Its cross file, SB 476, received a hearing in the Senate Judicial Proceedings Committee but was subsequently withdrawn.

Cross File: HB 143 (Delegate Moon, *et al.*) - Judiciary.

Information Source(s): Garrett County; City of Laurel; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State’s Attorneys’ Association; Department of State Police; U.S. Supreme Court; SCOTUS Blog; Electronic Frontier Foundation; Department of Legislative Services

Fiscal Note History: First Reader - February 1, 2019
md/kdm

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510