



Testimony for the House Judiciary Committee

February 21, 2023

HB 533 - Criminal Procedure - Location Information – Exigent Circumstances (Kelsey Smith Act for Maryland)

UNFAVORABLE

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The American Civil Liberties Union of Maryland respectfully urges an unfavorable report on HB 533, The Kelsey Smith Act for Maryland. HB 533 would require service providers to provide the location information of an electronic device belonging to an individual who has been reported missing.

While we understand and are sympathetic to the circumstances that predicated the creation of this law, mandated compliance on behalf of service providers is unnecessary and raises multiple privacy concerns. Under current law, providers are able to exercise discretion when presented with law enforcement requests for location information in exigent circumstances. The law allows for compliance while also permitting providers to refuse to fulfill what they suspect or know to be bogus requests. There are numerous procedural safeguards in place should companies need to be compelled to provide such information through a court order. Such orders must be justified by probable cause. In recent years, providers have instituted effective processes for quickly evaluating and responding to emergency requests, meaning that difficulties that police may have encountered a decade or more ago are highly unlikely to occur today.

Law enforcement has been known to abuse emergency request systems. Instances of blatant abuse of emergency requests have been documented in California, Texas, New York, and Maryland. A police officer in Princess Anne County, Maryland, used an emergency request form to obtain records from Sprint- but later conceded in sworn testimony that “there was no such emergency at the time he requested the records.”¹ Additionally, the Department of Justice’s Inspector General found systemic misuse of emergency requests for call record information by the FBI.²

¹ Eric Lichtblau, More Demands on Cell Carriers in Surveillance, N.Y. Times, July 8, 2012, <http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html>

² Dep’t of Justice, Office of the Inspector General, A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records 257–72 (2010) [1]

Law enforcement already has the ability to obtain location information in exigent circumstances without a court order. But, they do so at their own risk if a judge later determines that there were not actually exigent circumstances. The burden of proving the need for such information to companies is on law enforcement, but companies can and do comply if law enforcement presents valid reasoning. From July to December 2020, Apple received 1,162 emergency requests and provided data in response to 93% of those requests. Meta, the parent company of Facebook, received 21,700 emergency requests from January to June 2021 and provided data in response to 77% of the requests.³ This bill would require companies to comply with what they suspect to be unlawful requests and essentially force them to facilitate the violation of someone's Fourth Amendment rights.

Moreover, in 2021, Apple Inc., Meta Platforms, Inc., Discord, and Snap, Inc. were targeted by hackers who masqueraded as law enforcement officials and sent forged emergency data requests to the companies.⁴ Some of these companies actually fulfilled these forged data requests. Mandated disclosure would only empower the hackers who forged these emails and diminish the provider's willingness to refuse dubious requests, putting users at risk.

Additionally, the bill does not include any penalties for law enforcement officers who request location information of individuals they "know" have not been reported missing. This leaves ample room for law enforcement to wrongfully claim they did not know an individual was not reported missing. Moreover, this bill provides victims of these violations no routes for legal redress and eliminates any judicial oversight of these requests.

There are already effective and timely mechanisms in place for companies to share location information with law enforcement. This legislation will not improve on those mechanisms, but instead simply expand the number of wrongful disclosures. For the foregoing reasons, the ACLU of Maryland respectfully urges an unfavorable report on HB 533.

³ Turton, William. "Apple and Meta Gave User Data to Hackers Who Used Forged Legal Requests." Bloomberg.com. Bloomberg, March 30, 2022.
<https://www.bloomberg.com/news/articles/2022-03-30/apple-meta-gave-user-data-to-hackers-who-forged-legal-requests?sref=y1v224K8>.

⁴ Ibid.