

BILL ANALYSIS

Senate Research Center
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S.B. 786
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Criminal Justice
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As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Constitution of the United States and the Texas Constitution both protect citizens from unreasonable search and seizure by the government. Unfortunately, federal and state law have not kept pace with technology, and as a consequence the government can often access highly personal and revealing information without a search warrant. There is currently no requirement that state investigators seek a warrant before they access records that indicate where a cell phone was located every time it was used. The United States District Court for the Southern District of Texas has concluded that warrants are required under these circumstances. (See *In re: Applications*, 747 F.Supp.2d 827 (S.D. Tex. 2010)).

This bill requires investigators to seek a warrant from a state district judge before accessing any information that concerns the location of a cellular telephone or other wireless communications device and is wholly or partly generated by or derived from the operation of the device. This would include data stored in the device, as well as any records kept by the digital service provider.

As proposed, S.B. 786 amends current law relating to warrants issued to obtain location information from wireless communications devices and to public access to law enforcement or prosecutor requests for certain related location or communication information.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 18.02, Code of Criminal Procedure, to authorize a search warrant to be issued to search for and seize certain items, persons, or information, including location information as defined by Article 18.21 (Pen Registers and Trap and Trace Devices; Access to Stored Communications; Mobile Tracking Devices).

SECTION 2. Amends Section 1, Article 18.21, Code of Criminal Procedure, by adding Subdivision (4-a), to define "location information" in this section.

SECTION 3. Amends Section 2(g), Article 18.21, Code of Criminal Procedure, as follows:

(g) Authorizes, rather than requires, the district court, at the request of the prosecutor or an authorized peace officer, to seal an application and order granted under this article. Authorizes the application and order to be sealed only for an initial period not to exceed 180 days, except that for good cause shown the court is authorized to grant an additional 180-day period. Requires the court to retain a record of any application made or order granted under this article and submit the record to the Department of Public Safety of the State of Texas (DPS) in accordance with Section 17.

SECTION 4. Amends Article 18.21, Code of Criminal Procedure, by adding Section 14A, as follows:

Sec. 14A. WARRANT FOR LOCATION INFORMATION FROM CELLULAR TELEPHONE OR OTHER WIRELESS COMMUNICATIONS DEVICE. (a) Authorizes a district judge to issue a warrant for location information provided by the preinstalled mobile tracking features of a cellular telephone or other wireless communications device. Authorizes a warrant under this section to be issued only in the same judicial district as the site of the investigation or the person, vehicle, container, item, or object the movement of which will be tracked by the location information obtained from the wireless communications device.

(b) Authorizes the warrant to authorize the acquisition of location information obtained from a wireless communications device that, at the time the location information is acquired, is located outside the judicial district but within the state if the applicant for the warrant reasonably believes the device to be located within the district at the time the warrant is issued.

(c) Authorizes a district judge to issue the warrant only on the application of an authorized peace officer. Requires that an application be written and signed and sworn to or affirmed before the judge. Requires that the affidavit:

(1) state the name, department, agency, and address of the applicant;

(2) identify the wireless communications device to be monitored;

(3) state the name of the owner or possessor of the device to be monitored;

(4) state the judicial district in which the device is reasonably expected to be located; and

(5) state the facts and circumstances that provide the applicant with probable cause to believe that:

(A) criminal activity has been, is, or will be committed; and

(B) acquisition of location information from the device is likely to produce evidence in a criminal investigation of the criminal activity described in Paragraph (A).

(d) Requires that a warrant issued under this section be executed within the period provided by Article 18.07 (Days Allowed for Warrant to Run) by properly serving the warrant on a communication common carrier or an electronic communications service. Provides that a warrant issued under this section expires not later than the 90th day after the date the warrant is issued, and location information is prohibited from being obtained after the expiration date without an extension of the warrant. Authorizes the judge, for good cause shown, to grant an extension for an additional 90-day period. Requires the court to retain a record of any application made or order granted under this section and submit the record to DPS in accordance with Section 17.

(e) Authorizes a wireless communications device to be monitored without a warrant by a private entity or authorized peace officer if:

(1) the device is reported stolen by the owner; or

(2) there exists an immediate life-threatening situation.

(f) Requires an authorized peace officer to apply for a warrant for monitoring a wireless communications device under Subsection (e)(2) as soon as practicable. Provides that if the district judge finds that an immediate life-threatening situation did not occur and declines to issue the warrant, any evidence obtained is not admissible in a criminal action.

SECTION 5. Amends Section 15(a), Article 18.21, Code of Criminal Procedure, to authorize the director of DPS (director) or the director's designee, the inspector general of the Texas Department of Criminal Justice (inspector general; TDCJ) or the inspector general's designee, or the sheriff or chief of a designated law enforcement agency or the sheriff's or chief's designee to issue an administrative subpoena to a communication common carrier or an electronic communications service to compel the production of the carrier's or service's business records that disclose information, excluding any location information, about certain persons and are material to a criminal investigation.

SECTION 6. Amends Article 18.21, Code of Criminal Procedure, by adding Section 15A, as follows:

Sec. 15A. COMPELLING PRODUCTION OF BUSINESS RECORDS DISCLOSING LOCATION INFORMATION. Authorizes the district court, on application by the director of DPS or the director's designee, the inspector general of TDCJ or the inspector general's designee, or the sheriff or chief of a designated law enforcement agency or the sheriff's or chief's designee, to issue a warrant pursuant to Article 18.02 (Grounds for Issuance) to a communication common carrier or an electronic communications service to compel the production of the carrier's or service's business records that disclose location information about the carrier's or service's customers or users of the services offered by the carrier or service, if there is probable cause to believe the records disclosing location information will provide evidence in a criminal investigation.

SECTION 7. Amends Article 18.21, Code of Criminal Procedure, by adding Section 17, as follows:

Sec. 17. ANNUAL REPORT OF WARRANTS AND ORDERS. (a) Requires a communication common carrier or electronic communications service doing business in this state, not later than January 15 of each year, to report to DPS the following information for the preceding calendar year, disaggregated by each law enforcement agency in this state making the applicable requests:

- (1) the number of requests made for pen register or trap and trace information;
- (2) the number of requests made for an electronic serial number (ESN) reader information;
- (3) the number of requests made for location information;
- (4) the number of individuals whose location information was disclosed; and
- (5) the amount that each law enforcement agency was billed by the communication common carrier or electronic communications service for each request made under Subdivision (1), (2), or (3).

(b) Requires the court, not later than the 30th day after the date of expiration of a warrant or order issued under this article or an order extending the period of a warrant or order issued under this article, or not later than the 30th day after the date the court denies an application for a warrant or order under this article, to submit to DPS the following information, as applicable: the receipt of an application for a warrant or order under this article; the type of warrant or order for which the application was made; whether any application for an order of extension was granted, granted as modified by the court, or denied; the period of monitoring authorized by the warrant or order and the number and duration of any extensions of the warrant or order, the offense under investigation, as specified in the application for the warrant or order or an extension of the warrant or order;

and the law enforcement agency or prosecutor that submitted an application for the warrant or order or an extension of the warrant or order.

(c) Requires each prosecutor that submits an application for a warrant or order or an extension of a warrant or order under this article, not later than January 15 of each year, to submit to DPS the following information for the preceding calendar year: the information required to be submitted by a court under Subsection (b) with respect to each application submitted by the prosecutor for the warrant or order or an extension of the warrant or order; a general description of information collected under each warrant or order that was issued by the court, including the approximate number of individuals for whom location information was intercepted and the approximate duration of the monitoring of the location information of those individuals; the number of arrests made as a result of information obtained under a warrant or order issued under this article; the number of criminal trials commenced as a result of information obtained under a warrant or order issued under this article; and the number of convictions obtained as a result of information obtained under a warrant or order issued under this article.

(d) Provides that information submitted to DPS under this section is public information and subject to disclosure under Chapter 552 (Public Information), Government Code.

(e) Requires the public safety director of DPS, not later than March 1 of each year, to submit a report to the governor, the lieutenant governor, the speaker of the house of representatives, and the chairs of the standing committees of the senate and house of representatives with primary jurisdiction over criminal justice. Requires that the report contain the following information for the preceding calendar year: an assessment of the extent of tracking or monitoring by law enforcement agencies of pen register, trap and trace, ESN reader, and location information; a comparison of the ratio of the number of applications for warrants or orders made under this article to the number of arrests and convictions resulting from information obtained under a warrant or order issued under this article; identification of the types of offenses investigated under a warrant or order issued under this article; and with respect to both state and local jurisdictions, an estimate of the total cost of conducting investigations under a warrant or order issued under this article.

SECTION 8. Effective date: September 1, 2013.