

## **BILL ANALYSIS**

C.S.H.B. 1608  
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Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Modern cellular phones and smart phones have the ability to transmit a user's location to the user's service provider numerous times a day, creating a virtual road map of the user's whereabouts. Interested parties note that while the U.S. Constitution guarantees the right to be secure against unreasonable searches and seizures, current Texas law allows this personal location information to be released by service providers to government agencies without a warrant or a showing of probable cause. In an effort to ensure that this right is not outpaced by advancing technology and to extend protections against unreasonable searches and seizures to location-tracking data, C.S.H.B. 1608 seeks to provide for the application for and issuance of a search warrant for location information generated by or derived from the operation of a cellular telephone or other wireless communications device.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 1608 amends the Code of Criminal Procedure to authorize the issuance of a search warrant to search for and seize location information, defined in the bill as 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 that device. The bill authorizes, rather than requires, a district court to seal an application and order for the installation and use of a pen register, trap and trace device, ESN reader, or similar equipment and conditions such authorization on the request of a prosecutor or authorized peace officer. The bill restricts the sealing of the application and order to an initial period not to exceed 180 days, and, for circumstances in which good cause is shown, the bill authorizes the court to grant one or more additional one-year periods. The bill requires the court to retain a record of any such application made or order granted and submit the record to the Department of Public Safety (DPS) in accordance with the bill's provisions. The bill requires the court, with respect to any application that is or becomes subject to disclosure, on a judicial determination that the disclosure of identifying information for a person who is a victim, witness, peace officer, or informant would cause a specified adverse result, to redact the identifying information from the application and from the record of the application retained and submitted to DPS. The bill authorizes the court to permanently seal the application on a showing of clear and convincing evidence that disclosure of identifying personal information would cause an adverse result.

C.S.H.B. 1608 authorizes a district judge to issue a warrant for location information provided by the mobile tracking features of a cellular telephone or other wireless communications device and limits the issuance of such a warrant to the same judicial district as, or in a judicial district that is contiguous to the same judicial district as, the site of either 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. The bill 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 Texas if the warrant applicant reasonably believes that the device is located within the district at the time the warrant is issued.

C.S.H.B. 1608 authorizes the district judge to issue the warrant for location information only on the application of a peace officer that is written, signed, and sworn to or affirmed before the judge and that contains specified information. The bill requires the warrant to be executed within a specific time frame by properly serving the warrant on a communication common carrier, an electronic communications service, or a remote computing service, establishes an expiration date for such a warrant, prohibits location information from being obtained after such expiration without an extension of the warrant, and provides for the extension of the warrant by a judge for good cause shown. The bill authorizes the district court, at the request of a peace officer, to seal an application and warrant for an initial period not to exceed 180 days, and, for circumstances in which good cause is shown, the bill authorizes the court to grant one or more additional one-year periods. The bill requires the court to retain a record of any application made or warrant issued and to submit the record to DPS in accordance with the bill's provisions. The bill requires the court to redact identifying information from an application that is or becomes subject to disclosure and from the record retained and submitted to DPS on a judicial determination that the disclosure of the identifying information for a victim, witness, peace officer, or informant would cause a specified adverse result. The bill authorizes the court to permanently seal the application on a showing of clear and convincing evidence that disclosure of identifying personal information would cause an adverse result.

C.S.H.B. 1608 authorizes location information to be obtained from a wireless communications device without a warrant by a private entity or a peace officer if the device is reported stolen by the owner or to be so obtained by a peace officer if there exists an immediate, life-threatening situation, as statutorily defined, or if the officer reasonably believes the device is in the possession of a fugitive from justice for whom an arrest warrant has been issued for committing a felony offense. The bill authorizes a peace officer to apply for, and a district court to issue, an order authorizing the officer to obtain location information from a wireless communications device on the officer's showing that there are reasonable grounds to believe that the device is in such a fugitive's possession. The bill requires a peace officer, regardless of whether an order has been issued with respect to those reasonable grounds, to apply for a warrant to obtain location information from the device believed to be in such a fugitive's possession or in an immediate life-threatening situation as soon as practicable and prohibits any evidence obtained from being admissible in a criminal action if a district judge finds that the applicable situation did not occur and declines to issue the warrant.

C.S.H.B. 1608 includes a remote computing service among the entities for which certain law enforcement and criminal justice officials may issue an administrative subpoena to compel the production of certain business records. The bill authorizes a district court, on application by the public safety director of DPS, the inspector general of the Texas Department of Criminal Justice, or the sheriff or chief of a law enforcement agency, or those persons' designees, to issue a search warrant to a communication common carrier, an electronic communications service, or a remote computing 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 will provide evidence in a criminal investigation.

C.S.H.B. 1608 requires a court, not later than the 60th day after the expiration of a warrant or order for certain tracking devices or of the order extending the period of such warrant or order, or not later than the 60th day after the date the court denies an application for such warrant or order, to submit to DPS certain specified information relating to the application and warrant or order. The bill requires each prosecutor, not later than March 15 of each year, that submits an application for or extension of such a warrant or order to submit to DPS for the preceding

calendar year that same specified information required to be submitted by a court with respect to each application submitted by the prosecutor for the warrant or order or extension, a general description of information collected under each warrant or order, and other information relating to arrests made, criminal trials commenced, and number of convictions obtained in connection with such an issued warrant or order. The bill makes the information submitted to DPS under these provisions public information that is subject to disclosure under state public information law.

C.S.H.B. 1608 requires the public safety director of DPS, not later than June 1 of each year, to submit to certain state officers and legislative committees a report containing specified information for the preceding calendar year relating to instances of tracking or monitoring of pen register, ESN reader, trap and trace, and location information and applications for warrants or orders for such tracking and monitoring and the offenses, arrests, and convictions associated with the warrants or orders.

### **EFFECTIVE DATE**

September 1, 2013.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 1608 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

#### INTRODUCED

SECTION 1. Article 18.02, Code of Criminal Procedure, is amended.

SECTION 2. Section 1, Article 18.21, Code of Criminal Procedure, is amended.

SECTION 3. Section 2(g), Article 18.21, Code of Criminal Procedure, is amended to read as follows:

(g) At the request of the prosecutor or an authorized peace officer, the [The] district court may [shall] seal an application and order granted under this article.

The application and order may be sealed only for an initial period not to exceed 180 days, except that for good cause shown the court may grant an additional 180-day period.

#### HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Same as introduced version.

SECTION 2. Same as introduced version.

SECTION 3. Section 2, Article 18.21, Code of Criminal Procedure, is amended by amending Subsection (g) and adding Subsection (g-1) to read as follows:

(g) At the request of the prosecutor or a peace officer, the [The] district court may [shall] seal the [an] application and order as provided by [granted under] this subsection.

The application and order may be sealed for an initial period not to exceed 180 days. For good cause shown, the court may grant one or more additional one-year periods. With respect to any application that is or becomes subject to disclosure, on a judicial determination that the disclosure of identifying information for a person who is a victim, witness, peace officer, or informant would cause an adverse result as defined by Section 7(c), the court shall redact the identifying information from the application

The court shall retain a record of any application made or order granted under this article and submit the record to the department in accordance with Section 17.

SECTION 4. Article 18.21, Code of Criminal Procedure, is amended by adding Section 14A to read as follows:

Sec. 14A. WARRANT FOR LOCATION INFORMATION FROM CELLULAR TELEPHONE OR OTHER WIRELESS COMMUNICATIONS DEVICE. (a) A district judge may issue a warrant for location information provided by the ~~preinstalled~~ mobile tracking features of a cellular telephone or other wireless communications device. A warrant under this section may be issued ~~only~~ in the same judicial district as the site of:

- (1) the investigation; or
- (2) 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) The warrant may 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) A district judge may issue the warrant only on the application of an ~~authorized~~ peace officer. An application must be written and signed and sworn to or affirmed before the judge. The affidavit must:
  - (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;

~~and from the record of the application retained and submitted as described by Subsection (g-1). On a showing of clear and convincing evidence that disclosure of identifying personal information would cause an adverse result, the court may permanently seal the application [article].~~

(g-1) The court shall retain a record of any application made or order granted under this section and submit the record to the department in accordance with Section 17.

SECTION 4. Article 18.21, Code of Criminal Procedure, is amended by adding Section 14A to read as follows:

Sec. 14A. WARRANT FOR LOCATION INFORMATION FROM CELLULAR TELEPHONE OR OTHER WIRELESS COMMUNICATIONS DEVICE. (a) A district judge may issue a warrant for location information provided by the mobile tracking features of a cellular telephone or other wireless communications device. A warrant under this section may be issued in the same judicial district as, or in a judicial district that is contiguous to the same judicial district as, the site of:

- (1) the investigation; or
- (2) 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) The warrant may 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) A district judge may issue the warrant only on the application of a peace officer. An application must be written and signed and sworn to or affirmed before the judge. The affidavit must:
  - (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) A warrant issued under this section must be executed within the period provided by Article 18.07 by properly serving the warrant on a communication common carrier or an electronic communications service. A warrant issued under this section expires not later than the 90th day after the date the warrant is issued, and location information may not be obtained after the expiration date without an extension of the warrant. For good cause shown, the judge may grant an extension for an additional 90-day period.

The court shall retain a record of any application made or order granted under this section and submit the record to the department in accordance with Section 17.  
(e) A wireless communications device may be monitored without a warrant by a private entity or authorized peace officer if:

(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) A warrant issued under this section must be executed within the period provided by Article 18.07 by properly serving the warrant on a communication common carrier, an electronic communications service, or a remote computing service. A warrant issued under this section expires not later than the 90th day after the date the warrant is issued, and location information may not be obtained after the expiration date without an extension of the warrant. For good cause shown, the judge may grant an extension for an additional 90-day period.

(e) At the request of a peace officer, the district court may seal the application and warrant as provided by this subsection. The application and warrant may be sealed for an initial period not to exceed 180 days. For good cause shown, the court may grant one or more additional one-year periods. With respect to any application that is or becomes subject to disclosure, on a judicial determination that the disclosure of identifying information for a person who is a victim, witness, peace officer, or informant would cause an adverse result as defined by Section 7(c), the court shall redact the identifying information from the application and from the record of the application retained and submitted as described by Subsection (f). On a showing of clear and convincing evidence that disclosure of identifying personal information would cause an adverse result, the court may permanently seal the application.  
(f) The court shall retain a record of any application made or warrant issued under this section and submit the record to the department in accordance with Section 17.  
(g) Notwithstanding any other law, location information may be obtained from a wireless communications device without a warrant

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

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

(f) An authorized peace officer must apply for a warrant for monitoring a wireless communications device under Subsection (e)(2) as soon as practicable. 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. Section 15(a), Article 18.21, Code of Criminal Procedure, is amended to read as follows:

(a) The director of the department or the director's designee, the inspector general of the Texas Department of Criminal Justice 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 may issue an administrative subpoena to a communication [~~communications~~] common carrier or an electronic communications service to compel the production of the carrier's or service's business records that:

(1) disclose information, excluding any location information, about:

(A) the carrier's or service's customers; or  
(B) users of the services offered by the carrier or service; and

(2) are material to a criminal investigation.

by:

(1) a private entity or a peace officer if the device is reported stolen by the owner; or

(2) a peace officer if:

(A) there exists an immediate life-threatening situation, as defined by Section 1(22), Article 18.20; or

(B) the officer reasonably believes the device is in the possession of a fugitive from justice for whom an arrest warrant has been issued for committing a felony offense.

(h) A peace officer may apply for, and a district court may issue, an order authorizing the officer to obtain location information from a wireless communications device on the officer's showing that there are reasonable grounds to believe that the device is in the possession of a fugitive from justice for whom an arrest warrant has been issued for committing a felony offense.

(i) Regardless of whether an order has been issued with respect to the matter under Subsection (h), a peace officer must apply for a warrant to obtain location information from a wireless communications device under Subsection (g)(2) as soon as practicable. If the district judge finds that the applicable situation under Subsection (g)(2) did not occur and declines to issue the warrant, any evidence obtained is not admissible in a criminal action.

SECTION 5. Section 15(a), Article 18.21, Code of Criminal Procedure, is amended to read as follows:

(a) The director of the department or the director's designee, the inspector general of the Texas Department of Criminal Justice 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 may issue an administrative subpoena to a communication [~~communications~~] common carrier, ~~or~~ an electronic communications service, or a remote computing service to compel the production of the carrier's or service's business records that:

(1) disclose information, excluding any location information, about:

(A) the carrier's or service's customers; or  
(B) users of the services offered by the carrier or service; and

(2) are material to a criminal investigation.

SECTION 6. Article 18.21, Code of Criminal Procedure, is amended by adding Section 15A to read as follows:

Sec. 15A. COMPELLING PRODUCTION OF BUSINESS RECORDS DISCLOSING LOCATION INFORMATION. On application by the director of the department or the director's designee, the inspector general of the Texas Department of Criminal Justice 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, the district court may issue a warrant pursuant to Article 18.02 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. Article 18.21, Code of Criminal Procedure, is amended by adding Section 17 to read as follows:

Sec. 17. ANNUAL REPORT OF WARRANTS AND ORDERS. (a) Not later than January 15 of each year, a communication common carrier or electronic communications service doing business in this state shall report to the department 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 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) Not later than the 30th day after the date of expiration of a warrant or order issued under this article or an order

SECTION 6. Article 18.21, Code of Criminal Procedure, is amended by adding Section 15A to read as follows:

Sec. 15A. COMPELLING PRODUCTION OF BUSINESS RECORDS DISCLOSING LOCATION INFORMATION. On application by the director of the department or the director's designee, the inspector general of the Texas Department of Criminal Justice or the inspector general's designee, or the sheriff or chief of a law enforcement agency or the sheriff's or chief's designee, the district court may issue a warrant pursuant to Article 18.02 to a communication common carrier, an electronic communications service, or a remote computing 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. Article 18.21, Code of Criminal Procedure, is amended by adding Section 17 to read as follows:

Sec. 17. ANNUAL REPORT OF WARRANTS AND ORDERS.

(a) Not later than the 60th day after the date of expiration of a warrant or order issued under this article or an order extending the

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, the court shall submit to the department the following information, as applicable:

- (1) the receipt of an application for a warrant or order under this article;
- (2) the type of warrant or order for which the application was made;
- (3) whether any application for an order of extension was granted, granted as modified by the court, or denied;
- (4) the period of monitoring authorized by the warrant or order and the number and duration of any extensions of the warrant or order;
- (5) the offense under investigation, as specified in the application for the warrant or order or an extension of the warrant or order; and
- (6) the law enforcement agency or prosecutor that submitted an application for the warrant or order or an extension of the warrant or order.

(c) Not later than January 15 of each year, each prosecutor that submits an application for a warrant or order or an extension of a warrant or order under this article shall submit to the department the following information for the preceding calendar year:

- (1) 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;
- (2) 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;
- (3) the number of arrests made as a result of information obtained under a warrant or order issued under this article;
- (4) the number of criminal trials commenced as a result of information obtained under a warrant or order issued under this article; and
- (5) the number of convictions obtained as a result of information obtained under a

period of a warrant or order issued under this article, or not later than the 60th day after the date the court denies an application for a warrant or order under this article, the court shall submit to the department the following information, as applicable:

- (1) the receipt of an application for a warrant or order under this article;
- (2) the type of warrant or order for which the application was made;
- (3) whether any application for an order of extension was granted, granted as modified by the court, or denied;
- (4) the period of monitoring authorized by the warrant or order and the number and duration of any extensions of the warrant or order;
- (5) the offense under investigation, as specified in the application for the warrant or order or an extension of the warrant or order; and
- (6) the law enforcement agency or prosecutor that submitted an application for the warrant or order or an extension of the warrant or order.

(b) Not later than March 15 of each year, each prosecutor that submits an application for a warrant or order or an extension of a warrant or order under this article shall submit to the department the following information for the preceding calendar year:

- (1) the information required to be submitted by a court under Subsection (a) with respect to each application submitted by the prosecutor for the warrant or order or an extension of the warrant or order;
- (2) 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;
- (3) the number of arrests made as a result of information obtained under a warrant or order issued under this article;
- (4) the number of criminal trials commenced as a result of information obtained under a warrant or order issued under this article; and
- (5) the number of convictions obtained as a result of information obtained under a



warrant or order issued under this article.

(d) Information submitted to the department under this section is public information and subject to disclosure under Chapter 552, Government Code.

(e) Not later than March 1 of each year, the public safety director of the department shall 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. The report must contain the following information for the preceding calendar year:

(1) an assessment of the extent of tracking or monitoring by law enforcement agencies of pen register, trap and trace, ESN reader, and location information;

(2) 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;

(3) identification of the types of offenses investigated under a warrant or order issued under this article; and

(4) 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. This Act takes effect September 1, 2013.

warrant or order issued under this article.

(c) Information submitted to the department under this section is public information and subject to disclosure under Chapter 552, Government Code.

(d) Not later than June 1 of each year, the public safety director of the department shall 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. The report must contain the following information for the preceding calendar year:

(1) an assessment of the extent of tracking or monitoring by law enforcement agencies of pen register, trap and trace, ESN reader, and location information;

(2) 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; and

(3) identification of the types of offenses investigated under a warrant or order issued under this article.

SECTION 8. Same as introduced version.