86R102 JCG-D

By:  Blanco H.B. No. 352

A BILL TO BE ENTITLED

AN ACT

relating to warrants issued to obtain cell site information through the use of a cell site simulator device and to public access to certain information relating to investigatory equipment; creating a criminal offense.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.  Article 18.02(a), Code of Criminal Procedure, is amended to read as follows:

(a)  A search warrant may be issued to search for and seize:

(1)  property acquired by theft or in any other manner which makes its acquisition a penal offense;

(2)  property specially designed, made, or adapted for or commonly used in the commission of an offense;

(3)  arms and munitions kept or prepared for the purposes of insurrection or riot;

(4)  weapons prohibited by the Penal Code;

(5)  gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;

(6)  obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;

(7)  a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;

(8)  any property the possession of which is prohibited by law;

(9)  implements or instruments used in the commission of a crime;

(10)  property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense;

(11)  persons;

(12)  contraband subject to forfeiture under Chapter 59 [~~of this code~~];

(13)  electronic customer data held in electronic storage, including the contents of and records and other information related to a wire communication or electronic communication held in electronic storage; [~~or~~]

(14)  a cellular telephone or other wireless communications device, subject to Article 18.0215; or

(15)  cell site information as defined by Article 18B.221.

SECTION 2.  Chapter 18B, Code of Criminal Procedure, is amended by adding Subchapter E-1 to read as follows:

SUBCHAPTER E-1. CELL SITE SIMULATOR DEVICES

Art. 18B.221.  DEFINITIONS. In this subchapter:

(1)  "Cell site information" means any information, including the content of a wire communication or electronic communication, that is obtained from a cellular telephone or other wireless communications device by operation of a cell site simulator device and that concerns the location of the telephone or device or reveals the identity of the subscriber or customer of a communication common carrier, an electronic communications service, or a remote computing service.

(2)  "Cell site simulator device" means an international mobile subscriber identity catcher or other device or equipment that mimics a cellular telephone tower by transmitting to cellular telephones or other wireless communications devices within range of the device a signal that causes those cellular telephones or other wireless communications devices to send cell site information to the device.

Art. 18B.222.  WARRANT FOR CELL SITE INFORMATION. (a) A district judge may issue a warrant for the use of a cell site simulator device to obtain cell site information from a cellular telephone or other wireless communications device.

(b)  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 cellular telephone or other wireless communications device to be monitored;

(3)  state the name of the owner or possessor of the cellular telephone or other wireless communications device to be monitored;

(4)  state the judicial district in which the cellular telephone or other wireless communications 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 being, or will be committed; and

(B)  acquisition of cell site information from the cellular telephone or other wireless communications device is likely to produce evidence in a criminal investigation of the criminal activity described in Paragraph (A).

Art. 18B.223.  JURISDICTION. (a) A warrant under this subchapter may be issued in the same judicial district as the site of:

(1)  the investigation;

(2)  the person who owns or possesses the cellular telephone or other wireless communications device with respect to which the warrant is sought; or

(3)  the cellular telephone or other wireless communications device with respect to which the warrant is sought.

(b)  The warrant may authorize the acquisition of cell site information obtained from a cellular telephone or other wireless communications device that, at the time the cell site information is acquired, is located outside the judicial district but within the state if the applicant for the warrant reasonably believes the telephone or device to be located within the district at the time the warrant is issued.

Art. 18B.224.  DURATION OF WARRANT. (a) A warrant issued under this subchapter expires not later than the 90th day after the date the warrant is issued, and cell site information may not be obtained after the expiration date without an extension of the warrant.

(b)  For good cause shown, the judge may grant an extension for an additional 90-day period.

Art. 18B.225.  NOTIFICATION OF OWNER OR POSSESSOR. Not later than the seventh day after the date of the expiration of a warrant or the date of the expiration of any additional period, as applicable, the authorized peace officer who requested the warrant shall deliver a copy of the warrant to the owner or possessor of the cellular telephone or other wireless communications device searched by the cell site simulator device.

Art. 18B.226.  ACCESS TO CELL SITE INFORMATION WITHOUT WARRANT. (a) Notwithstanding any other law, an authorized peace officer may obtain cell site information from a cellular telephone or other wireless communications device by operation of a cell site simulator device and without a warrant if:

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

(2)  there exists an immediate life-threatening situation, as defined by Article 18A.201, that:

(A)  is in the territorial jurisdiction of the law enforcement agency that employs:

(i)  the authorized peace officer operating the device; or

(ii)  a peace officer the authorized peace officer operating the device is assisting; and

(B)  to prevent death or serious bodily injury, necessitates the use of the device before a warrant may be obtained under this subchapter.

(b)  An authorized peace officer must apply as soon as practicable for a warrant to obtain cell site information from a cellular telephone or other wireless communications device under a circumstance described by Subsection (a)(2). If the district judge finds that an immediate life-threatening situation, as defined by Article 18A.201, did not occur and declines to issue the warrant, any evidence obtained is not admissible in a criminal action.

Art. 18B.227.  PROHIBITED ACTS BY PEACE OFFICER. A peace officer may not obtain or use cell site information to assist with, participate in, provide material support or resources for, or enable or facilitate an investigation conducted by a law enforcement agency of the federal government or of another state:

(1)  without:

(A)  the effective consent of the owner or possessor of the cellular telephone or other wireless communications device; or

(B)  a warrant obtained under this subchapter; or

(2)  unless Article 18B.226 or another exception to the warrant requirement under state or federal law applies.

Art. 18B.228.  CONTROL OF CELL SITE SIMULATOR DEVICE. Except as otherwise provided by this subchapter, only the department or a county or municipal law enforcement agency is authorized to own, possess, install, operate, or monitor a cell site simulator device.

Art. 18B.229.  POLICY FOR DELETING EXTRANEOUS CELL SITE INFORMATION REQUIRED. A state or local law enforcement agency that obtains or uses a cell site simulator device shall adopt a written policy for promptly deleting any cell site information collected by the device that:

(1)  is not relevant to a warrant issued under this subchapter authorizing the use of the device; or

(2)  does not provide the agency with a reasonable suspicion that other criminal activity has been, is being, or will be committed.

SECTION 3.  Article 39.14(c), Code of Criminal Procedure, is amended to read as follows:

(c)  Except as otherwise provided by this subsection, if [~~If~~] only a portion of the applicable document, item, or information is subject to discovery under this article, the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and may withhold or redact that portion. The state shall inform the defendant that a portion of the document, item, or information has been withheld or redacted. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law. The state may not withhold on a claim of confidentiality arising under a contract with any party, including under a nondisclosure agreement, any portion of a document, an item, or information that was obtained as a result of the execution of a warrant under Subchapter E-1, Chapter 18B, and that is otherwise discoverable under this article.

SECTION 4.  Section 552.022(a), Government Code, is amended to read as follows:

(a)  Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1)  a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2)  the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3)  information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(4)  the name of each official and the final record of voting on all proceedings in a governmental body;

(5)  all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

(6)  the name, place of business, and the name of the municipality to which local sales and use taxes are credited, if any, for the named person, of a person reporting or paying sales and use taxes under Chapter 151, Tax Code;

(7)  a description of an agency's central and field organizations, including:

(A)  the established places at which the public may obtain information, submit information or requests, or obtain decisions;

(B)  the employees from whom the public may obtain information, submit information or requests, or obtain decisions;

(C)  in the case of a uniformed service, the members from whom the public may obtain information, submit information or requests, or obtain decisions; and

(D)  the methods by which the public may obtain information, submit information or requests, or obtain decisions;

(8)  a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

(9)  a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations;

(10)  a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

(11)  each amendment, revision, or repeal of information described by Subdivisions (7)-(10);

(12)  final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

(13)  a policy statement or interpretation that has been adopted or issued by an agency;

(14)  administrative staff manuals and instructions to staff that affect a member of the public;

(15)  information regarded as open to the public under an agency's policies;

(16)  information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;

(17)  information that is also contained in a public court record; [~~and~~]

(18)  a settlement agreement to which a governmental body is a party; and

(19)  information regarding the purchase, sale, receipt, possession, or use of investigatory equipment by a state or local law enforcement agency or by a criminal justice agency of the state or of a political subdivision of the state.

SECTION 5.  Section 552.108, Government Code, is amended by adding Subsection (d) to read as follows:

(d)  This section does not except from the requirements of Section 552.021 information regarding the purchase, sale, receipt, possession, or use of investigatory equipment by a state or local law enforcement agency or by a criminal justice agency of the state or of a political subdivision of the state.

SECTION 6.  Subchapter C, Chapter 552, Government Code, is amended by adding Section 552.1086 to read as follows:

Sec. 552.1086.  INVESTIGATORY EQUIPMENT. (a) Information described by Section 552.022(a)(19) remains subject to the requirements of Section 552.021 regardless of whether that information is included in a contract in which one of the parties is the state, a state agency, a political subdivision of the state, or an agency of a political subdivision of the state.

(b)  A term included in a contract described by Subsection (a) or in any nondisclosure agreement between the parties to that contract is not effective to except from disclosure information described by Section 552.022(a)(19).

SECTION 7.  The heading to Section 16.03, Penal Code, is amended to read as follows:

Sec. 16.03.  UNLAWFUL USE OF CELL SITE SIMULATOR DEVICE, PEN REGISTER, OR TRAP AND TRACE DEVICE.

SECTION 8.  Section 16.03, Penal Code, is amended by amending Subsections (a), (b), as effective January 1, 2019, and (c), as effective January 1, 2019, and adding Subsections (a-1), (c-1), and (c-2) to read as follows:

(a)  A person commits an offense if the person knowingly installs or uses:

(1)  a cell site simulator device to obtain cell site information from a cellular telephone or other wireless communications device; or

(2)  a pen register or trap and trace device to record or decode electronic or other impulses for the purpose of identifying telephone numbers dialed or otherwise transmitted on a telephone line.

(a-1)  A person commits an offense if the person knowingly obtains or uses cell site information to assist with, participate in, provide material support or resources for, or enable or facilitate an investigation conducted by a law enforcement agency of the federal government or of another state.

(b)  In this section:

(1)  "Authorized peace officer," "pen register," "remote computing service," and "trap and trace device" have the meanings assigned by Article 18B.001, Code of Criminal Procedure.

(2)  "Cell site information" and "cell site simulator device" have the meanings assigned by Article 18B.221, Code of Criminal Procedure.

(3)  "Communication common carrier" and "electronic communications service" have [~~has~~] the meanings [~~meaning~~] assigned by Article 18A.001, Code of Criminal Procedure.

(c)  It is an affirmative defense to prosecution under Subsection (a) that the actor is:

(1)  an officer, employee, or agent of a communication common carrier or of the provider of an electronic communications service or remote computing service and the actor installs or uses a device or equipment to obtain information from a cellular telephone or other wireless communications device or to record a number dialed from or to a telephone [~~instrument~~] in the normal course of business of the carrier or service provider for purposes of:

(A)  protecting property or services provided by the carrier or service provider; or

(B)  assisting another who the actor reasonably believes to be a peace officer authorized to install or use a cell site simulator device, pen register, or trap and trace device under Chapter 18B, Code of Criminal Procedure;

(2)  an officer, employee, or agent of a lawful enterprise and the actor installs or uses a device or equipment while engaged in an activity that:

(A)  is a necessary incident to the rendition of service or to the protection of property of or services provided by the enterprise; and

(B)  is not made for the purpose of gathering information for a law enforcement agency or private investigative agency, other than information related to the theft of communication or information services provided by the enterprise; or

(3)  a person authorized to install or use a cell site simulator device, pen register, or trap and trace device under Chapter 18B, Code of Criminal Procedure.

(c-1)  It is an affirmative defense to prosecution under Subsection (a) for the use of a cell site simulator device that the owner or possessor of a cellular telephone or other wireless communications device gave effective consent to the actor's retrieval of cell site information from the telephone or device.

(c-2)  It is an affirmative defense to prosecution under Subsection (a-1) that the actor is an authorized peace officer and:

(1)  the actor obtained the effective consent of the owner or possessor of the cellular telephone or other wireless communications device;

(2)  a warrant authorizing the conduct has been obtained under Subchapter E-1, Chapter 18B, Code of Criminal Procedure; or

(3)  Article 18B.226, Code of Criminal Procedure, or another exception to the warrant requirement under state or federal law applies.

SECTION 9.  The changes in law made by this Act to Article 18.02 and Chapter 18B, Code of Criminal Procedure, apply only to a warrant issued on or after the effective date of this Act. A warrant issued before the effective date of this Act is governed by the law in effect on the date the warrant was issued, and the former law is continued in effect for that purpose.

SECTION 10.  The change in law made by this Act to Article 39.14(c), Code of Criminal Procedure, applies only to the prosecution of an offense committed on or after the effective date of this Act. The prosecution of an offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

SECTION 11.  The changes in law made by this Act to Chapter 552, Government Code, apply to information, records, and notations collected, made, assembled, or maintained on, before, or after the effective date of this Act.

SECTION 12.  The change in law made by this Act to Section 16.03, Penal Code, applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 13.  This Act takes effect September 1, 2019.