

BILL ANALYSIS

C.S.S.B. 112
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Homeland Security & Public Safety
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Historically, law enforcement agencies were able to request information under the cellular data portion of state law governing search warrants from companies who handled such information to locate fugitives timely and efficiently. More importantly, law enforcement officers could use this information in situations involving exigent circumstances such as kidnappings and other immediate life-threatening situations. However, companies such as Facebook in the last few years have started ignoring or denying warrants, claiming that the cellular data portion of the law does not cover immediate cell site location information. This has resulted in some serious offenders remaining at large longer than if that information was readily available to law enforcement. C.S.S.B. 112 makes changes to state law governing search warrants in order to protect individuals' privacy while allowing for location information to be available to law enforcement agencies.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

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.S.B. 112 amends the Code of Criminal Procedure to require a warrant to obtain the disclosure of location information that is held in electronic storage in the possession, care, custody, or control of an electronic communications service provider or a remote computing service provider and that is created after the issuance of the warrant. The bill subjects such a warrant to statutory provisions governing the execution of and compliance with a warrant for access to electronic customer data held in electronic storage and the authentication of related records by a service provider.

C.S.S.B. 112 defines "location information" as data, records, or other information that is created by or accessible to a provider of an electronic communications service or a provider of a remote computing service and may be used to identify the geographic physical location of a communication device, including the current, real-time, or prospective geographic physical location of a communication device. The bill specifies that data or records that contain location information are included in the definition of "electronic customer data" for purposes of provisions governing access to such information.

C.S.S.B. 112 limits the filing of an application for the warrant to a prosecutor or a prosecutor's assistant with jurisdiction in a county within the judicial district containing the headquarters of

the office of the prosecutor or of the law enforcement agency that requests the application for the warrant to be filed or proposes to execute the order. The application must be supported by a sworn affidavit setting forth substantial facts establishing probable cause and filed with a district judge in the applicable judicial district on the prosecutor's or assistant's own motion or the request of an authorized peace officer of a designated law enforcement office or agency or an authorized peace officer commissioned by the Department of Public Safety (DPS). The bill authorizes a district judge to issue the warrant to obtain the disclosure of location information by a provider that is a domestic entity or a company or entity otherwise doing business in Texas under a contract or a terms of service agreement with a Texas resident regardless of whether the location information is held at a location in Texas or another state. The bill prohibits the issuance of the warrant unless the sworn affidavit provides sufficient and substantial facts to establish probable cause that:

- the disclosure of the location information sought will produce evidence of an offense under investigation or result in the apprehension of a fugitive from justice; and
- the location information sought is held in electronic storage in the possession, care, custody, or control of the service provider on which the warrant is served.

C.S.S.B. 112 establishes the period allowed for the execution of the warrant at 10 whole days from the issuance of the warrant but provides for an exception with respect to a magistrate who directs a shorter period in the warrant for its execution. The bill establishes that the warrant is valid for a period not to exceed 60 days after the date the warrant is issued, unless the prosecutor or prosecutor's assistant applies for and obtains an extension of that period from the court before the warrant expires. The bill limits each extension to a period of 60 days. The bill requires a district court that issues the warrant to order the warrant and the application for the warrant sealed and prohibits the court from unsealing the warrant and application until after the warrant expires.

C.S.S.B. 112 authorizes an authorized peace officer of a designated law enforcement office or agency or an authorized peace officer commissioned by DPS to require the emergency disclosure of the applicable location information without a warrant under the following conditions:

- the officer reasonably believes an immediate life-threatening situation, as defined by law, exists that is within the officer's territorial jurisdiction and that requires the disclosure of the location information before a warrant can, with due diligence, be obtained; and
- there are sufficient grounds under the bill's provisions on which to obtain a warrant requiring the disclosure.

The bill requires the peace officer, not later than 48 hours after requiring the disclosure of location information without a warrant, to obtain a warrant for that purpose.

C.S.S.B. 112 prohibits the state from using as evidence in a criminal proceeding any information obtained through the required disclosure of location information, unless a warrant is obtained before requiring the disclosure or, if emergency disclosure is required before a warrant can be obtained, the authorized peace officer who required that disclosure obtains a warrant within the required period.

C.S.S.B. 112 changes from a reasonable suspicion to probable cause the evidentiary standard to which a peace officer applying for an order for the installation and use of a mobile tracking device must affirm the following:

- criminal activity has been, is, or will be committed; and
- the installation and use of a mobile tracking device is likely to produce information that is material to an ongoing criminal investigation of that criminal activity.

C.S.S.B. 112 removes a specification that the return of a search warrant to the proper magistrate by the applicable peace officer is forthwith.

C.S.S.B. 112 repeals Article 18B.151(a), Code of Criminal Procedure.

EFFECTIVE DATE

September 1, 2021.

COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE

While C.S.S.B. 112 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute includes the following provisions, all of which were absent in the engrossed:

- a requirement for a warrant to obtain the disclosure of location information that is held in electronic storage in the possession, care, custody, or control of an electronic communications service provider or a remote computing service provider and that is created after the issuance of the warrant;
- provisions subjecting such a warrant to statutory provisions governing the execution of and compliance with a warrant for access to electronic customer data held in electronic storage and the authentication of related records by a service provider;
- a definition for "location information" and a specification that data or records that contain location information are included in the definition of "electronic customer data" for purposes of provisions governing access to such information;
- a provision limiting the filing of an application for the warrant to a prosecutor or a prosecutor's assistant with jurisdiction in a county within the judicial district containing the headquarters of the office of the prosecutor or of the law enforcement agency that requests the application for the warrant to be filed or proposes to execute the order;
- a requirement for the application to be supported by a sworn affidavit setting forth substantial facts establishing probable cause and filed with a district judge in the applicable judicial district on the prosecutor's or assistant's own motion or the request of an authorized peace officer of a designated law enforcement office or agency or an authorized peace officer commissioned by DPS;
- an authorization for a district judge to issue the warrant to obtain the disclosure of location information by a provider that is a domestic entity or a company or entity otherwise doing business in Texas under a contract or a terms of service agreement with a Texas resident regardless of whether the location information is held at a location in Texas or another state;
- a prohibition against the issuance of the warrant unless the sworn affidavit provides sufficient and substantial facts to establish certain probable cause;
- a provision establishing the period allowed for the execution of the warrant at 10 whole days from the issuance of the warrant and providing for an exception with respect to a magistrate who directs a shorter period in the warrant for its execution;
- a provision establishing that the warrant is valid for a period not to exceed 60 days after the date the warrant is issued, unless the prosecutor or prosecutor's assistant applies for and obtains an extension of that period from the court before the warrant expires;
- a provision limiting each extension to a period of 60 days;
- a requirement for a district court that issues the warrant to order the warrant and the application for the warrant sealed;
- a prohibition against the court from unsealing the warrant and application until after the warrant expires;
- an authorization for an authorized peace officer of a designated law enforcement office or agency or an authorized peace officer commissioned by DPS to require the emergency disclosure of the applicable location information without a warrant under certain conditions;
- a requirement for the peace officer, not later than 48 hours after requiring the disclosure of location information without a warrant, to obtain a warrant for that purpose;

- a prohibition against the state from using as evidence in a criminal proceeding any information obtained through the required disclosure of location information, unless a warrant is obtained before requiring the disclosure or, if emergency disclosure is required before a warrant can be obtained, the authorized peace officer who required that disclosure obtains a warrant within the required period;
- a provision removing a specification that the return of a search warrant to the proper magistrate by the applicable peace officer is forthwith;
- the repeal of a Code of Criminal Procedure provision defining "immediate life-threatening situation" for purposes of the emergency installation and use of a pen register or trap and trace device; and
- a saving provision.