

# D R A F T

## SUMMARY

Modifies definitions of “pen registers” and “trap and trace devices.”

Authorizes law enforcement agency to install pen register or trap and trace device without warrant or court order in certain circumstances.

Prohibits law enforcement agency from obtaining personal electronic data of electronic communication device without warrant except in certain circumstances.

Prohibits law enforcement agency from obtaining historical location data of electronic communication device without warrant or court order except in certain circumstances.

Prohibits law enforcement agency from obtaining subscriber information or transactional information of electronic communication device without subpoena, warrant or court order except in certain circumstances.

Establishes procedures for application by peace officer for court order to obtain historical location data, subscriber information or transactional information of electronic communication device. Authorizes court to issue order.

Authorizes law enforcement agency to install mobile tracking device without warrant in certain circumstances. Requires that application for warrant to install mobile tracking device be authorized by certain persons.

## A BILL FOR AN ACT

1

2 Relating to privacy; creating new provisions; and amending ORS 133.545,  
3 133.617, 133.619 and 165.657.

4 Whereas the Seventy-eighth Legislative Assembly finds that our current  
5 privacy laws have not kept pace with new technology; and

6 Whereas the people of Oregon and Oregon law enforcement value the  
7 personal privacy of people; and

8 Whereas Oregon law enforcement needs clear, uniform, consistent and  
9 modern standards and procedures for accessing electronic data of all types

1 to prevent crime, apprehend criminals and reduce victimization for juveniles  
2 and adults; and

3 Whereas Oregon law enforcement has limited resources and must care-  
4 fully maximize the use of new technologies to be as efficient and effective  
5 as possible in interdicting crime while, at the same time, protecting the pri-  
6 vacy rights of law-abiding people; and

7 Whereas criminals increasingly use technology to assist them in commit-  
8 ting crimes; and

9 Whereas it is appropriate and desirable that Oregon law enforcement  
10 agencies and Oregon courts keep and maintain records of the use of tech-  
11 nology by law enforcement; now, therefore,

12 **Be It Enacted by the People of the State of Oregon:**

13 **SECTION 1. Sections 4 and 5 to 7 of this 2015 Act, and the amend-  
14 ments to ORS 133.545, 133.617, 133.619 and 165.657 by sections 2, 8, 9 and  
15 10 of this 2015 Act, shall be known and may be cited as the “Privacy  
16 Protection and Safe Communities Act.”**

17 **SECTION 2. ORS 165.657 is amended to read:**

18 165.657. As used in ORS 165.659 to 165.669, unless the context requires  
19 otherwise:

20 (1) “Electronic communication” has the meaning given **that term** in ORS  
21 133.721.

22 (2)(a) “Pen register” means a device **or process that** [*which*] records or  
23 decodes [*electronic or other impulses which identify the numbers dialed or*  
24 *otherwise transmitted on the telephone line to which such device is attached,*  
25 *but*] **dialing, routing, addressing or signaling information that is**  
26 **transmitted by an instrument or facility from which a wire or elec-**  
27 **tronic communication is transmitted.**

28 (b) “Pen register” does not include:

29 (A) Any device **or process that records or decodes the contents of**  
30 **any communication;**

31 (B) Any device **or process** used by a provider or customer of a provider

1 of electronic or wire communication service for billing or recording as an  
2 incident to billing for communications services provided by such provider;  
3 or

4 (C) Any device **or process** used by a provider or customer of a wire  
5 communication service for cost accounting or other like purposes in the or-  
6 dinary course of *[its]* business.

7 (3) "Police officer" has the meaning given in ORS 133.525.

8 (4) "Trap and trace device" means a device **or process that** *[which]* cap-  
9 tures the incoming electronic or other impulses *[which]* **that** identify the  
10 originating number *[of an instrument or device from which a wire or electronic*  
11 *communication was transmitted]* **or other dialing, routing, addressing or**  
12 **signaling information reasonably likely to identify the source of an**  
13 **electronic or wire communication but that does not capture the con-**  
14 **tents of any communication.**

15 (5) "Wire communication" has the meaning given **that term** in ORS  
16 133.721.

17 **SECTION 3. Section 4 of this 2015 Act is added to and made a part**  
18 **of ORS 165.659 to 165.669.**

19 **SECTION 4. Notwithstanding ORS 165.663 and 165.667, a law**  
20 **enforcement agency, as defined in ORS 131.550, may install a pen reg-**  
21 **ister or trap and trace device without a warrant or court order under**  
22 **the following circumstances:**

23 (1) **Exigent circumstances exist, the law enforcement agency has**  
24 **probable cause to believe a crime punishable as a felony has occurred,**  
25 **is occurring or will occur, and the pen register or trap and trace device**  
26 **is used to prevent or investigate the felony;**

27 (2) **The user of the instrument to be monitored consents to the in-**  
28 **stallation and use of the pen register or trap and trace device;**

29 (3) **The pen register or trap and trace device is necessary to respond**  
30 **to a request for emergency services by the owner or a user of the in-**  
31 **strument to be monitored;**

1 (4) The pen register or trap and trace device is installed to respond  
2 to a report by the owner or a user of the instrument to be monitored  
3 that the instrument was stolen and is necessary to recover the stolen  
4 instrument;

5 (5) The pen register or trap and trace device is necessary to recover  
6 a lost electronic communication device, as defined in section 5 of this  
7 2015 Act; or

8 (6) The pen register or trap and trace device is reasonably believed  
9 necessary to assist in locating a person who is reported missing, en-  
10 dangered or deceased.

11 **SECTION 5.** As used in sections 5 to 7 of this 2015 Act:

12 (1) "Electronic communication device" means any device that ena-  
13 bles access to, or use of, an electronic communication service.

14 (2) "Electronic communication service" has the meaning given that  
15 term in 18 U.S.C. 2510.

16 (3) "Law enforcement agency" has the meaning given that term in  
17 ORS 131.550.

18 (4)(a) "Personal electronic data" means information created by the  
19 user of an electronic communication device that is stored electron-  
20 ically and that is not publicly available or accessible by the general  
21 public through lawful means.

22 (b) "Personal electronic data" does not include subscriber informa-  
23 tion or transactional information.

24 (5)(a) "Subscriber information" means information stored by an  
25 electronic communication service provider containing the name and  
26 address of the subscriber, local and long distance telephone connection  
27 records, records of session times, duration of calls, length of service,  
28 and types of services utilized, telephone or instrument number or  
29 other subscriber number or identity including any temporarily or per-  
30 manently assigned network or Internet protocol addresses, and the  
31 means and source of payment for such services, including any bank

1 or credit account numbers.

2 (b) "Subscriber information" does not include the contents of any  
3 communication or the historical or current location data for an elec-  
4 tronic communication device.

5 (6) "Transactional information" means information relating to a  
6 subscriber of an electronic communication service provider that is  
7 generated and maintained by the provider for the purpose of providing  
8 service to its subscribers.

9 SECTION 6. (1) Except as otherwise provided in this section:

10 (a) A law enforcement agency shall not obtain the personal elec-  
11 tronic data of an electronic communication device without a warrant  
12 issued pursuant to ORS 133.525 to 133.703.

13 (b) A law enforcement agency shall not obtain the historical lo-  
14 cation data of an electronic communication device without a court  
15 order issued pursuant to section 7 of this 2015 Act or a search warrant  
16 issued pursuant to ORS 133.525 to 133.703.

17 (c) A law enforcement agency shall not obtain the subscriber in-  
18 formation or transactional information of an electronic communi-  
19 cation device without a lawfully issued subpoena, a court order issued  
20 pursuant to section 7 of this 2015 Act or a warrant issued pursuant to  
21 ORS 133.525 to 133.703.

22 (2) A law enforcement agency may obtain the subscriber informa-  
23 tion, transactional information, historical location data or personal  
24 electronic data of an electronic communication device without a war-  
25 rant, court order or subpoena under the following circumstances:

26 (a) Exigent circumstances exist and the law enforcement agency  
27 has probable cause to believe a crime punishable as a felony has oc-  
28 curred, is occurring or will occur and the information is used to pre-  
29 vent or investigate the felony;

30 (b) The user of the electronic communication device consents to the  
31 law enforcement agency obtaining the information;

1 (c) The information obtained is necessary to respond to a request  
2 for emergency services by the owner or a user of the electronic com-  
3 munication device;

4 (d) The information obtained is necessary to respond to a report by  
5 the owner or a user of an electronic communication device that the  
6 device is missing or stolen;

7 (e) The electronic communication device is found missing or aban-  
8 doned and the information is needed to return the device to its owner;  
9 or

10 (f) The information is reasonably believed necessary to assist in  
11 locating a person who is reported missing, endangered or deceased.

12 (3) A subpoena issued for the subscriber information or  
13 transactional information of an electronic communication device  
14 shall, upon the filing of a criminal case, be filed with the court having  
15 jurisdiction over the criminal case. In the event that no criminal case  
16 is filed, the subpoena shall be maintained with any information  
17 produced pursuant to the subpoena and shall be disposed of when the  
18 information produced is destroyed.

19 (4) Any subscriber information, transactional information, histor-  
20 ical location data or personal electronic data of an electronic commu-  
21 nication device obtained pursuant to a court order, warrant, subpoena  
22 or the circumstances described in subsection (2) of this section shall  
23 be preserved as follows:

24 (a) If a criminal case is filed, the information shall be preserved for  
25 a period of time equal to the period of time criminal case records are  
26 kept in the normal course pursuant to the policy of the circuit court  
27 having jurisdiction over the case; or

28 (b) If a criminal case is not filed, the information may not be pre-  
29 served longer than the statute of limitations for the crime listed in the  
30 warrant or court order. After the statute of limitations has expired,  
31 the information shall be destroyed.

1       **(5) Affidavits and applications for warrants and court orders shall**  
2 **remain confidential in the same manner as described in ORS 133.723.**

3       **SECTION 7. (1) Any peace officer, as defined in ORS 161.015, may**  
4 **apply to the circuit court in the judicial district in which the targeted**  
5 **electronic communication device is located or in which one or more**  
6 **crimes related to the device may be prosecuted for an ex parte order**  
7 **or extension of an order authorizing a law enforcement agency to ob-**  
8 **tain the historical location data, subscriber information or**  
9 **transactional information of an electronic communication device. The**  
10 **application shall:**

11       **(a) Be in writing under oath;**

12       **(b) Include the identity of the applicant and the identity of the law**  
13 **enforcement agency conducting the investigation;**

14       **(c) Contain a description of the information sought that is sub-**  
15 **scriber information, historical location data or transactional informa-**  
16 **tion but not personal electronic data;**

17       **(d) Contain a statement demonstrating that there is reasonable**  
18 **suspicion to believe that one or more particular crimes have occurred,**  
19 **are occurring or will occur; and**

20       **(e) Contain a statement demonstrating that the information sought**  
21 **will assist in the investigation of the crime or crimes.**

22       **(2) Upon application made under subsection (1) of this section, the**  
23 **court shall enter an ex parte order authorizing a law enforcement**  
24 **agency to obtain historical location data, subscriber information or**  
25 **transactional information of an electronic communication device if the**  
26 **court finds that there is reasonable suspicion to believe that:**

27       **(a) One or more particular crimes have occurred, are occurring or**  
28 **will occur; and**

29       **(b) The information sought will assist in the investigation of the**  
30 **crime or crimes.**

31       **(3) The order shall:**

1 (a) Specify the identity, if known, of the person who owns the  
2 electronic communication device;

3 (b) Specify the identity, if known, of the person who is the subject  
4 of the criminal investigation;

5 (c) Contain a statement of the offense to which the information to  
6 be obtained relates;

7 (d) Authorize the law enforcement agency to obtain the historical  
8 location data, subscriber information or transactional information of  
9 the electronic communication device; and

10 (e) Direct that the order and application be sealed until otherwise  
11 ordered by the court.

12 SECTION 8. ORS 133.617 is amended to read:

13 133.617. As used in ORS 133.545 and 133.619, unless the context requires  
14 otherwise, "mobile tracking device" means an electronic or mechanical de-  
15 vice **or process that** [which] permits the tracking of the movement of a  
16 person or object **or that is designed to identify the geographical location**  
17 **of the person or object.**

18 SECTION 9. ORS 133.619 is amended to read:

19 133.619. (1) A warrant authorizing the installation or [tracking] **moni-**  
20 **toring** of a mobile tracking device shall be executed as provided in this  
21 section.

22 (2) The officer **executing the warrant** need not inform any person of the  
23 existence or content of the warrant prior to its execution.

24 (3) Except as provided in subsection (4) of this section, the officer need  
25 not deliver or leave a receipt for things seized or observations made under  
26 authority of the warrant.

27 (4) Within five days of the execution of the warrant, or, in the case of  
28 an ongoing investigation, within such additional time as the issuing judge  
29 may allow upon application, the officer shall mail a receipt for things seized  
30 or observations made under authority of the warrant to the following:

31 (a) If the mobile tracking device has been affixed to a vehicle, to the



1 registered owner; and

2 (b) To such other persons as the court may direct in the warrant.

3 (5) The receipt provided for in subsection (4) of this section must include  
4 the dates and times during which the officer monitored or attempted to  
5 monitor the mobile tracking device.

6 (6) A warrant authorizing the installation or [*tracking*] **monitoring** of a  
7 mobile tracking device shall be issued only when based upon the submission  
8 of an affidavit or oral statement as described in ORS 133.545, which affidavit  
9 or statement demonstrates that probable cause exists to believe that an in-  
10 dividual **has committed**, is committing or is about to commit:

11 [(a) *A particular felony of murder, kidnapping, arson, robbery or other*  
12 *crime dangerous to life and punishable as a felony;*]

13 [(b)] (a) A crime punishable as a felony [*arising under ORS 475.752 or*  
14 *475.806 to 475.894*];

15 [(c)] (b) The crime of unlawfully transporting metal property under ORS  
16 164.857 or a crime described in ORS 165.118;

17 [(d) *Bribery, extortion, burglary or unauthorized use of a motor vehicle*  
18 *punishable as a felony;*]

19 [(e)] (c) A violation of a criminal provision of the wildlife laws as de-  
20 scribed in ORS 496.002;

21 [(f)] (d) A violation of a criminal provision of the commercial fishing laws  
22 as described in ORS 506.001;

23 [(g)] (e) A violation of ORS 704.020, 704.021, 704.030 or 704.065; or

24 [(h)] (f) A conspiracy to commit a crime listed in this subsection.

25 (7) A court may authorize the installation or [*tracking*] **monitoring** of a  
26 mobile tracking device for a period not to exceed 30 days. Upon application,  
27 the court may grant one or more extensions for a period not to exceed 30  
28 days per extension.

29 (8) **A law enforcement agency, as defined in ORS 131.550, may install**  
30 **a mobile tracking device without a warrant under the following cir-**  
31 **cumstances:**

1       **(a) Exigent circumstances exist, the law enforcement agency has**  
2 **probable cause to believe a crime punishable as a felony has occurred,**  
3 **is occurring or will occur, and the mobile tracking device is used to**  
4 **prevent or investigate the felony;**

5       **(b) The user of the object to be tracked consents to the installation;**

6       **(c) The mobile tracking device is necessary to respond to a request**  
7 **for emergency services by the user of the object to be tracked;**

8       **(d) The mobile tracking device is obtained to respond to a report**  
9 **by the user of the object to be tracked that the object was stolen;**

10       **(e) The mobile tracking device is necessary to recover a lost elec-**  
11 **tronic communication device, as defined in section 5 of this 2015 Act;**

12 **or**

13       **(f) The mobile tracking device is reasonably believed necessary to**  
14 **assist in locating a person who is reported missing, endangered or de-**  
15 **ceased.**

16       **SECTION 10.** ORS 133.545 is amended to read:

17       133.545. (1) A search warrant may be issued only by a judge. A search  
18 warrant issued by a judge of the Supreme Court or the Court of Appeals may  
19 be executed anywhere in the state. Except as otherwise provided in sub-  
20 sections (2) and (3) of this section, a search warrant issued by a judge of a  
21 circuit court may be executed only within the judicial district in which the  
22 court is located. A search warrant issued by a justice of the peace may be  
23 executed only within the county in which the justice court is located. A  
24 search warrant issued by a municipal judge authorized to exercise the powers  
25 and perform the duties of a justice of the peace may be executed only in the  
26 municipality in which the court is located.

27       (2) Notwithstanding subsection (1) of this section, a circuit court judge  
28 may authorize execution of a search warrant outside the judicial district in  
29 which the court is located, if the judge finds from the application that one  
30 or more of the objects of the search relate to an offense committed or triable  
31 within the judicial district in which the court is located. If the warrant au-

1 thorizes the installation or [*tracking*] **monitoring** of a mobile tracking de-  
2 vice, the officer may [*track*] **monitor** the device in any county to which [*it*]  
3 **the device** is transported.

4 (3) Notwithstanding subsection (1) of this section, a circuit court judge  
5 duly assigned pursuant to ORS 1.615 to serve as a judge pro tempore in a  
6 circuit court may authorize execution of a search warrant in any judicial  
7 district in which the judge serves as judge pro tempore if the application  
8 requesting the warrant includes an affidavit showing that a regularly elected  
9 or appointed circuit court judge for the judicial district is not available,  
10 whether by reason of conflict of interest or other reason, to issue the war-  
11 rant within a reasonable time.

12 (4) Application for a search warrant may be made only by a district at-  
13 torney, a police officer or a special agent employed under ORS 131.805. **An**  
14 **application for a warrant authorizing the installation or monitoring**  
15 **of a mobile tracking device must be authorized by the district attor-**  
16 **ney, sheriff, chief of police, superintendent of the Oregon State Police,**  
17 **or such person's designee.**

18 (5) The application shall consist of a proposed warrant in conformance  
19 with ORS 133.565, and shall be supported by one or more affidavits partic-  
20 ularly setting forth the facts and circumstances tending to show that the  
21 objects of the search are in the places, or in the possession of the individ-  
22 uals, to be searched. If an affidavit is based in whole or in part on hearsay,  
23 the affiant shall set forth facts bearing on any unnamed informant's reli-  
24 ability and shall disclose, as far as possible, the means by which the infor-  
25 mation was obtained.

26 (6) Instead of the written affidavit described in subsection (5) of this  
27 section, the judge may take an oral statement under oath. The oral statement  
28 shall be recorded and a copy of the recording submitted to the judge who  
29 took the oral statement. In such cases, the judge shall certify that the re-  
30 cording of the sworn oral statement is a true recording of the oral statement  
31 under oath and shall retain the recording as part of the record of proceedings

1 for the issuance of the warrant. The recording shall constitute an affidavit  
2 for the purposes of this section. The applicant shall retain a copy of the re-  
3 cording and shall provide a copy of the recording to the district attorney if  
4 the district attorney is not the applicant.

5 (7)(a) In addition to the procedure set out in subsection (6) of this section,  
6 the proposed warrant and the affidavit may be sent to the court by facsimile  
7 transmission or any similar electronic transmission that delivers a complete  
8 printable image of the signed affidavit and proposed warrant. The affidavit  
9 may have a notarized acknowledgment, or the affiant may swear to the affi-  
10 davit by telephone. A judge administering an oath telephonically under this  
11 subsection must execute a declaration that recites the manner and time of  
12 the oath's administration. The declaration must be filed with the return.

13 (b) When a court issues a warrant upon an application made under para-  
14 graph (a) of this subsection:

15 (A) The court may transmit the signed warrant to the person making ap-  
16 plication under subsection (4) of this section by means of facsimile trans-  
17 mission or similar electronic transmission, as described in paragraph (a) of  
18 this subsection. The court shall file the original signed warrant and a  
19 printed image of the application with the return.

20 (B) The person making application shall deliver the original signed affi-  
21 davit to the court with the return. If the affiant swore to the affidavit by  
22 telephone, the affiant must so note next to the affiant's signature on the af-  
23 fidavit.

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