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Chair Prozanski and Members of the Judiciary Committee,

HB 2901, The Privacy Protection and Safe Communities Act, is law enforcement's plan to modernize and enhance the privacy protections afforded to Oregonians while maintaining the tools law enforcement needs to be able to do its job effectively in the digital age.

**What tools does law enforcement need?**

- Like all civil lawyers and administrative agencies, law enforcement needs to ability to use subpoenas to gather business records that companies create and maintain for their customers.
- We need the ability to apply for warrants in a reasonable way to obtain access to more sensitive information – like discovering a person's current location
- We need to ensure that the process in place for obtaining and utilizing these records is consistent with best practices and not unduly burdensome on law enforcement

**What privacy protections need modernizing?**

- We need to update the mobile tracking statute that permits tracking a person's location through a device on their vehicle to ensure it applies to any form of electronic monitoring of a person's current location
- We need to codify and enhance current practice into statute to provide a consistent and thorough process for law enforcement to obtain these types of records
- We need to provide specific guidance on how long these types of records may be held by law enforcement if no crime is prosecuted

**What is the current law and how does HB 2901 enhance it?**

- Currently, law enforcement needs to rely on federal law to provide the tools to obtain these types of cell phone records. Federal law requires, essentially, reasonable suspicion and a court order approved by a Judge to obtain records held by a phone company. This would include historical and current location information. However, Oregon law enforcement has proactively been seeking full search warrants when current and ongoing location information is being sought. We believe this highest level of protection is the right standard when law enforcement is seeking to monitor someone's movements. HB 2901 would codify Oregon's practice and enhance current law by requiring a search warrant in these instances.
- Currently, subpoenas may be obtained by lawyers (criminal and civil) for business records held by third party companies. We believe this is the appropriate and correct standard for typical subscriber records held by phone companies that do not disclose location information. HB 2901 would codify this existing

standard. Criminal subpoenas are vetted by a Grand Jury where the Grand Jury learns the purpose behind the subpoena and must approve use of the records.

-Currently, federal law provides for court orders on reasonable suspicion for historical location information. We believe this is best practice for historical information and would codify that practice in HB 2901 with enhanced protections above current law by providing that the application for such records be supported by an affidavit from the law enforcement officer with specific criteria met.

-Currently, subpoenas for cell records are not filed with the court after they are completed. This bill would ensure increased transparency by requiring that a subpoena be filed provided a criminal case is being prosecuted.

-Currently, there is no limit to how long law enforcement may retain cell phone records when no prosecution commences. We believe that there should be a limit and that law enforcement should destroy the records once the statute of limitations for the offenses under investigation have passed.

### **What are the details of HB 2901?**

-Section 2 updates the pen register statute to ensure it covers modern practices. The current statute only applies to physical devices installed in hardware to intercept the dialed numbers of a phone when making phone calls. Modern practice uses software processes to obtain this result. This definition change will ensure that citizens enjoy the same protections under the pen register statute when law enforcement uses modern technology.

-Section 4 updates the pen register statute to provide a limited list of reasonable exceptions to the need to obtain a court order to use a pen register device. These include: exigent circumstances, stolen or lost devices, consent, to respond to a request for emergency services and to assist in locating a missing, endangered or deceased individual.

-Sections 5 and 6 create a new statute that governs obtaining records from cell phone companies. It ensures that no user content may be obtained without a search warrant, no historical location information may be obtained without a court order supported by reasonable suspicion, and no subscriber information is obtained without a valid subpoena. Creates limited reasonable exceptions to these requirements for: exigent circumstances, lost or stolen devices, consent, request for emergency services and to assist in locating missing, endangered or deceased individual

-Section 7 spells out the specific information that must be contained in a law enforcement officer's affidavit in order to obtain historical location information through a court order. This includes: the identity if known of the subscriber, facts supporting a reasonable suspicion that a crimes has occurred and how the records sought will assist the investigation.

-Section 9 updates the mobile tracking statute to broaden the language and ensure that monitoring of information that provides the current location of a person is covered and modernizes the mobile tracking device statute to bring it in line with other statutes covering surveillance. Ensure that law enforcement can only utilize this technology in felony crimes and certain misdemeanor offenses that the legislature has already approved in previous sessions. Creates the same consistent list of exceptions to the warrant

requirement: consent, a request for emergency services, stolen devices or to assist in finding missing, endangered or deceased persons.

**Flaws in alternative: SB 640 (prohibits law enforcement) and SB 316 (prohibits cell company)**

-SB 640 is a one size fits all approach that would create massive problems for law enforcement and courts

-Items that are currently subpoenaed become court involved (hundreds of additional applications to be reviewed by courts per month). This includes simple subscriber records like who owns the phone. First steps in a criminal inquiry are no longer available to law enforcement thus ending many investigations before they begin.

-Adds extreme burden to law enforcement to create these lengthy search warrants

-Extraordinary definition of what location information consists of: would include zip codes for the subscriber, or IP addresses which are publically available. Would shut down Oregon's child pornography investigations

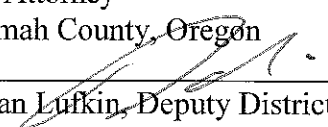
-In addition to adding hundreds of applications for warrants, would require law enforcement to go back to court every 90 days to ensure that the target of the investigation doesn't learn about the investigation because, absent a finding every 90 days, the subscriber must be told: "the nature of the inquiry", the date range that law enforcement obtained the records for, and why law enforcement sought to delay notice to the subscriber. Imagine murder cases going on for years...every 90 days is not feasible

-Even where law enforcement obtains these records because of an emergency situation (a long standing constitutional exception to applying for a search warrant) this bill requires law enforcement to "file a report" from a "supervisory officer" to the court. No purpose behind this filing, court has no jurisdiction to do anything with the report. Would serve no purpose but cause more work.

-Requires law enforcement to collect incredible amounts of data about use of these records and provide to legislature in publically available document. No way to obtain the information sought by the bill, including every application ever made during the calendar year. Moreover, you'd be disclosing ongoing investigations in a publically available document. Murder suspects get to learn from this report they are under investigation.

-SB 316 seeks to prohibit the phone companies themselves from doing what federal law requires them to do. This is almost certainly pre-empted by federal law and won't be effective.

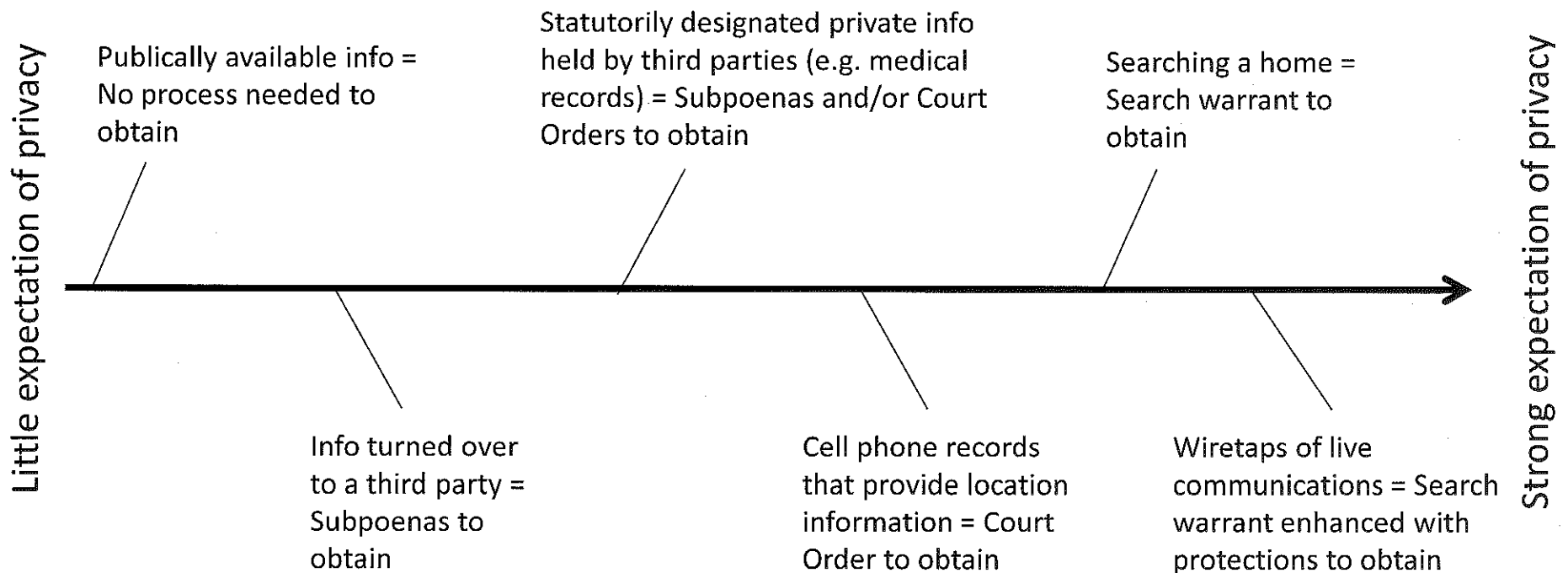
Regards,  
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Multnomah County, Oregon

By:   
Ryan Lufkin, Deputy District Attorney

# Privacy Rights and Law Enforcement

## (not mutually exclusive)

General rule: The stronger the general public's reasonable expectation of privacy is in keeping something private, the more process law enforcement must undertake to obtain it



Burden of Proof:

- Reasonable Suspicion = Suspicion that is objectively reasonable
- Probable Cause = More likely than not true (50.1% true)