

House Bill 2901

Sponsored by COMMITTEE ON JUDICIARY (at the request of Law Enforcement Responsible Technology Work Group)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

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, 133.617, 133.619 and
3 165.657.

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

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

8 Whereas Oregon law enforcement needs clear, uniform, consistent and modern standards and
9 procedures for accessing electronic data of all types to prevent crime, apprehend criminals and re-
10 duce victimization for juveniles and adults; and

11 Whereas Oregon law enforcement has limited resources and must carefully maximize the use of
12 new technologies to be as efficient and effective as possible in interdicting crime while, at the same
13 time, protecting the privacy rights of law-abiding people; and

14 Whereas criminals increasingly use technology to assist them in committing crimes; and

15 Whereas it is appropriate and desirable that Oregon law enforcement agencies and Oregon
16 courts keep and maintain records of the use of technology by law enforcement; now, therefore,

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

18 **SECTION 1. Sections 4 and 5 to 7 of this 2015 Act, and the amendments to ORS 133.545,**
19 **133.617, 133.619 and 165.657 by sections 2, 8, 9 and 10 of this 2015 Act, shall be known and**
20 **may be cited as the "Privacy Protection and Safe Communities Act."**

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

22 165.657. As used in ORS 165.659 to 165.669, unless the context requires otherwise:

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 (1) "Electronic communication" has the meaning given **that term** in ORS 133.721.

2 (2)(a) "Pen register" means a device **or process that** [*which*] records or decodes [*electronic or*
3 *other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to*
4 *which such device is attached, but*] **dialing, routing, addressing or signaling information that is**
5 **transmitted by an instrument or facility from which a wire or electronic communication is**
6 **transmitted.**

7 (b) "Pen register" does not include:

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

9 (B) **Any device or process** used by a provider or customer of a provider of electronic or wire
10 communication service for billing or recording as an incident to billing for communications services
11 provided by such provider; or

12 (C) Any device **or process** used by a provider or customer of a wire communication service for
13 cost accounting or other like purposes in the ordinary course of [*its*] business.

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

15 (4) "Trap and trace device" means a device **or process that** [*which*] captures the incoming
16 electronic or other impulses [*which*] **that** identify the originating number [*of an instrument or device*
17 *from which a wire or electronic communication was transmitted*] **or other dialing, routing, ad-**
18 **dressing or signaling information reasonably likely to identify the source of an electronic or**
19 **wire communication but that does not capture the contents of any communication.**

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

21 **SECTION 3. Section 4 of this 2015 Act is added to and made a part of ORS 165.659 to**
22 **165.669.**

23 **SECTION 4. Notwithstanding ORS 165.663 and 165.667, a law enforcement agency, as de-**
24 **defined in ORS 131.550, may install a pen register or trap and trace device without a warrant**
25 **or court order under the following circumstances:**

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

29 (2) **The user of the instrument to be monitored consents to the installation and use of**
30 **the pen register or trap and trace device;**

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

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

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

38 (6) **The pen register or trap and trace device is reasonably believed necessary to assist**
39 **in locating a person who is reported missing, endangered or deceased.**

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

41 (1) **"Electronic communication device" means any device that enables access to, or use**
42 **of, an electronic communication service.**

43 (2) **"Electronic communication service" has the meaning given that term in 18 U.S.C.**
44 **2510.**

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

1 (4)(a) "Personal electronic data" means information created by the user of an electronic
2 communication device that is stored electronically and that is not publicly available or ac-
3 cessible by the general public through lawful means.

4 (b) "Personal electronic data" does not include subscriber information or transactional
5 information.

6 (5)(a) "Subscriber information" means information stored by an electronic communi-
7 cation service provider containing the name and address of the subscriber, local and long
8 distance telephone connection records, records of session times, duration of calls, length of
9 service, and types of services utilized, telephone or instrument number or other subscriber
10 number or identity including any temporarily or permanently assigned network or Internet
11 protocol addresses, and the means and source of payment for such services, including any
12 bank or credit account numbers.

13 (b) "Subscriber information" does not include the contents of any communication or the
14 historical or current location data for an electronic communication device.

15 (6) "Transactional information" means information relating to a subscriber of an elec-
16 tronic communication service provider that is generated and maintained by the provider for
17 the purpose of providing service to its subscribers.

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

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

21 (b) A law enforcement agency shall not obtain the historical location data of an elec-
22 tronic communication device without a court order issued pursuant to section 7 of this 2015
23 Act or a search warrant issued pursuant to ORS 133.525 to 133.703.

24 (c) A law enforcement agency shall not obtain the subscriber information or
25 transactional information of an electronic communication device without a lawfully issued
26 subpoena, a court order issued pursuant to section 7 of this 2015 Act or a warrant issued
27 pursuant to ORS 133.525 to 133.703.

28 (2) A law enforcement agency may obtain the subscriber information, transactional in-
29 formation, historical location data or personal electronic data of an electronic communi-
30 cation device without a warrant, court order or subpoena under the following circumstances:

31 (a) Exigent circumstances exist and the law enforcement agency has probable cause to
32 believe a crime punishable as a felony has occurred, is occurring or will occur and the in-
33 formation is used to prevent or investigate the felony;

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

36 (c) The information obtained is necessary to respond to a request for emergency services
37 by the owner or a user of the electronic communication device;

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

40 (e) The electronic communication device is found missing or abandoned and the infor-
41 mation is needed to return the device to its owner; or

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

44 (3) A subpoena issued for the subscriber information or transactional information of an
45 electronic communication device shall, upon the filing of a criminal case, be filed with the

1 court having jurisdiction over the criminal case. In the event that no criminal case is filed,
 2 the subpoena shall be maintained with any information produced pursuant to the subpoena
 3 and shall be disposed of when the information produced is destroyed.

4 (4) Any subscriber information, transactional information, historical location data or
 5 personal electronic data of an electronic communication device obtained pursuant to a court
 6 order, warrant, subpoena or the circumstances described in subsection (2) of this section
 7 shall be preserved as follows:

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

11 (b) If a criminal case is not filed, the information may not be preserved longer than the
 12 statute of limitations for the crime listed in the warrant or court order. After the statute
 13 of limitations has expired, the information shall be destroyed.

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

16 **SECTION 7.** (1) Any peace officer, as defined in ORS 161.015, may apply to the circuit
 17 court in the judicial district in which the targeted electronic communication device is located
 18 or in which one or more crimes related to the device may be prosecuted for an ex parte order
 19 or extension of an order authorizing a law enforcement agency to obtain the historical lo-
 20 cation data, subscriber information or transactional information of an electronic communi-
 21 cation device. The application shall:

22 (a) Be in writing under oath;

23 (b) Include the identity of the applicant and the identity of the law enforcement agency
 24 conducting the investigation;

25 (c) Contain a description of the information sought that is subscriber information, his-
 26 torical location data or transactional information but not personal electronic data;

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

29 (e) Contain a statement demonstrating that the information sought will assist in the in-
 30 vestigation of the crime or crimes.

31 (2) Upon application made under subsection (1) of this section, the court shall enter an
 32 ex parte order authorizing a law enforcement agency to obtain historical location data, sub-
 33 scriber information or transactional information of an electronic communication device if
 34 the court finds that there is reasonable suspicion to believe that:

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

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

37 (3) The order shall:

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

40 (b) Specify the identity, if known, of the person who is the subject of the criminal in-
 41 vestigation;

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

43 (d) Authorize the law enforcement agency to obtain the historical location data, sub-
 44 scriber information or transactional information of the electronic communication device; and

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

1 **SECTION 8.** ORS 133.617 is amended to read:

2 133.617. As used in ORS 133.545 and 133.619, unless the context requires otherwise, “mobile
3 tracking device” means an electronic or mechanical device **or process that** *[which]* permits the
4 tracking of the movement of a person or object **or that is designed to identify the geographical**
5 **location of the person or object.**

6 **SECTION 9.** ORS 133.619 is amended to read:

7 133.619. (1) A warrant authorizing the installation or *[tracking]* **monitoring** of a mobile tracking
8 device shall be executed as provided in this section.

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

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

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

16 (a) If the mobile tracking device has been affixed to a vehicle, to the registered owner; and

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

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

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

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

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

27 *[(c)]* (b) The crime of unlawfully transporting metal property under ORS 164.857 or a crime de-
28 scribed in ORS 165.118;

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

30 *[(e)]* (c) A violation of a criminal provision of the wildlife laws as described in ORS 496.002;

31 *[(f)]* (d) A violation of a criminal provision of the commercial fishing laws as described in ORS
32 506.001;

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

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

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

38 (8) **A law enforcement agency, as defined in ORS 131.550, may install a mobile tracking**
39 **device without a warrant under the following circumstances:**

40 (a) **Exigent circumstances exist, the law enforcement agency has probable cause to be-**
41 **lieve a crime punishable as a felony has occurred, is occurring or will occur, and the mobile**
42 **tracking device is used to prevent or investigate the felony;**

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

44 (c) **The mobile tracking device is necessary to respond to a request for emergency ser-**
45 **vices by the user of the object to be tracked;**

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

3 **(e) The mobile tracking device is necessary to recover a lost electronic communication**
 4 **device, as defined in section 5 of this 2015 Act; or**

5 **(f) The mobile tracking device is reasonably believed necessary to assist in locating a**
 6 **person who is reported missing, endangered or deceased.**

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

8 133.545. (1) A search warrant may be issued only by a judge. A search warrant issued by a
 9 judge of the Supreme Court or the Court of Appeals may be executed anywhere in the state. Except
 10 as otherwise provided in subsections (2) and (3) of this section, a search warrant issued by a judge
 11 of a circuit court may be executed only within the judicial district in which the court is located.
 12 A search warrant issued by a justice of the peace may be executed only within the county in which
 13 the justice court is located. A search warrant issued by a municipal judge authorized to exercise the
 14 powers and perform the duties of a justice of the peace may be executed only in the municipality
 15 in which the court is located.

16 (2) Notwithstanding subsection (1) of this section, a circuit court judge may authorize execution
 17 of a search warrant outside the judicial district in which the court is located, if the judge finds from
 18 the application that one or more of the objects of the search relate to an offense committed or
 19 triable within the judicial district in which the court is located. If the warrant authorizes the in-
 20 stallation or *[tracking]* **monitoring** of a mobile tracking device, the officer may *[track]* **monitor** the
 21 device in any county to which *[it]* **the device** is transported.

22 (3) Notwithstanding subsection (1) of this section, a circuit court judge duly assigned pursuant
 23 to ORS 1.615 to serve as a judge pro tempore in a circuit court may authorize execution of a search
 24 warrant in any judicial district in which the judge serves as judge pro tempore if the application
 25 requesting the warrant includes an affidavit showing that a regularly elected or appointed circuit
 26 court judge for the judicial district is not available, whether by reason of conflict of interest or
 27 other reason, to issue the warrant within a reasonable time.

28 (4) Application for a search warrant may be made only by a district attorney, a police officer
 29 or a special agent employed under ORS 131.805. **An application for a warrant authorizing the**
 30 **installation or monitoring of a mobile tracking device must be authorized by the district at-**
 31 **torney, sheriff, chief of police, superintendent of the Oregon State Police, or such person's**
 32 **designee.**

33 (5) The application shall consist of a proposed warrant in conformance with ORS 133.565, and
 34 shall be supported by one or more affidavits particularly setting forth the facts and circumstances
 35 tending to show that the objects of the search are in the places, or in the possession of the indi-
 36 viduals, to be searched. If an affidavit is based in whole or in part on hearsay, the affiant shall set
 37 forth facts bearing on any unnamed informant's reliability and shall disclose, as far as possible, the
 38 means by which the information was obtained.

39 (6) Instead of the written affidavit described in subsection (5) of this section, the judge may take
 40 an oral statement under oath. The oral statement shall be recorded and a copy of the recording
 41 submitted to the judge who took the oral statement. In such cases, the judge shall certify that the
 42 recording of the sworn oral statement is a true recording of the oral statement under oath and shall
 43 retain the recording as part of the record of proceedings for the issuance of the warrant. The re-
 44 cording shall constitute an affidavit for the purposes of this section. The applicant shall retain a
 45 copy of the recording and shall provide a copy of the recording to the district attorney if the district

1 attorney is not the applicant.

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

9 (b) When a court issues a warrant upon an application made under paragraph (a) of this sub-
10 section:

11 (A) The court may transmit the signed warrant to the person making application under sub-
12 section (4) of this section by means of facsimile transmission or similar electronic transmission, as
13 described in paragraph (a) of this subsection. The court shall file the original signed warrant and
14 a printed image of the application with the return.

15 (B) The person making application shall deliver the original signed affidavit to the court with
16 the return. If the affiant swore to the affidavit by telephone, the affiant must so note next to the
17 affiant's signature on the affidavit.

18
