
September 13, 2012

The Honorable Edmund G. Brown Jr.
Governor of California
State Capitol
Sacramento, CA 94184

Re: SB 1434

Dear Governor Brown:

The ACLU of California and Electronic Frontier Foundation (hereinafter "EFF") continue to urge you to sign SB 1434 (Leno), notwithstanding the arguments advanced to the contrary by the Los Angeles County District Attorney's Office (hereinafter "LADA" or the "Opponents"). Although the ACLU and EFF do not request that you veto AB 2055 (Fuentes), the LADA-sponsored bill dealing with a related subject matter, the two bills are by no means similar.

**Introduction**

At the outset, we wish to make two points very clear: AB 2055 does not explicitly require a warrant to obtain location information, and SB 1434 will not endanger public safety.

First, AB 2055 does little more than clarify existing state law in response to the holding of United States v. Jones, 132 S.Ct. 945 (2012) (hereinafter Jones). The holding in Jones requires law enforcement to obtain a warrant before installing a GPS tracking device on a vehicle. AB 2055 simply expands existing warrant procedures to explicitly permit law enforcement to obtain and exercise a warrant under such circumstances. Although we take no issue with such clarification, AB 2055 does not contain any language clearly ***requiring*** a search warrant or mandating any specific legal process to install or use a tracking device or otherwise obtain an individual's location information.

On the other hand, SB 1434 provides a clear standard by which law enforcement is required to obtain a search warrant before seeking a person's location information, regardless of whether that information is obtained from cell phone data, or an affixed GPS device.

Second, SB 1434 does not create any risk to public safety, and does not interfere with, or otherwise hamper law enforcement investigations. Multiple law enforcement agencies throughout California already obtain a search warrant for location tracking information and are still able to fulfill their mission to protect public safety and investigate and prosecute criminal activity. SB 1434 would also safeguard the integrity of future convictions by eliminating the likelihood of reversible error for failure to obtain a warrant, as well as reduce the cost of avoidable court battles on the legitimacy of warrantless demands for location information under both the California and United States Constitutions.

We take each of the remaining arguments advanced by the LADA, in turn.

## I. SB 1434 appropriately specifies when a warrant must issue to obtain tracking information.

The LADA argues that SB 1434 is flawed because rather than amending a procedural statute pertaining to search warrants, the bill adds a new section to the penal code. It is true that SB 1434 creates a new penal code section, rather than amending the existing search warrant statute. This was intentional, as the existing warrant statute does not require the issuance of a warrant.

SB 1434 requires law enforcement to obtain a search warrant when seeking any location information, regardless of what type of tracking device is used, and for location information both past and present. Simply amending Penal Code section 1524, as is proposed by AB 2055, does not create any new warrant requirement. Penal Code sections 1524 and 1534 merely provide several different scenarios in which a judge ***may*** issue a warrant, and the appropriate procedure for the issuance of said warrant. *See* Cal. Pen. Code § 1524; Cal. Penal Code § 1534.

Hence, it is AB 2055 that suffers for failure to create a new section explicitly mandating the issuance of a warrant. This is precisely why AB 2055, while well-intentioned, does not really change the law. It does not clearly state that a warrant must issue for locational information, and so arguably, fails even to codify the holding of Jones. Moreover, as further explained below, just because the provisions of SB 1434 are new, does not mean that those provisions interfere with existing law as it pertains to exigency or the procedural requirements of the notice and, and if appropriate, the service of a warrant. Those provisions remain unaffected.

## II. AB 2055 does not require a warrant for cell phone information, and arguably requires no warrant at all, even when installing a GPS tracking devices.

As explained above and contrary to the assertions of the LADA, absolutely nothing in AB 2055 requiring the issuance of a search warrant to obtain location information from a tracking device. Rather, all AB 2055 does by amending Penal Codes section 1524 and 1534 is authorize a judge to issue a warrant in specified circumstances.

Modeling AB 2055 after Federal Rule of Criminal Procedure ("Fed. R. Crim. Proc.") 41(e)(2)(C), as the LADA explains in their letter, only highlights the deficiencies in AB 2055. Like the sections amended in AB 2055, Fed. R. Crim. Proc., 41 does not actually require that law enforcement obtain a warrant. That requirement is found in the Fourth Amendment to the U.S. Constitution and in various federal statutes. Instead, all Fed. R. Crim. Proc., 41 does is "codify and clarify search and seizure ***practice and procedure***." *In re* Application of U.S. for an Order, 849 F. Supp. 2d 526, 565 (D. Md. 2011) (emphasis added).

Hence, as the stated purpose of AB 2055 is to "model" the language on Fed. R. Crim. Proc., 41, then the bill does nothing more than specify the appropriate procedures for issuing a warrant post-Jones. It ***does not*** require police to obtain a warrant before tracking a person's location via one's cell phone.

If the intention of the LADA is to require a warrant before accessing location tracking information, particularly information transmitted or stored in a cell phone, then we urge you to sign SB 1434, as that is the only pending legislation that requires a warrant to obtain a person's location information.

## III. Signing AB 2055 alone will create even more confusion in existing law and heighten the likelihood of further litigation

The LADA attempts to "guaranty the constitutionality of AB 2055 against any attack in the court system" by noting that it mirrors federal law. However, the LADA seems to miss the fact that it is not AB 2055 itself but the practice of obtaining or demanding location information without a search warrant, a practice that AB 2055 arguably permits to continue, that is among the most hotly contested issues in federal constitutional and statutory law and has spawned a myriad of conflicting opinions.

For example, the federal Electronic Communications Privacy Act ("ECPA") applies only to "tracking devices," which are defined as "an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117. Yet it is unclear whether this definition of tracking device includes a cell phone or similar personal electronic device, or if it is limited to police-owned GPS beepers and the like.

A number of federal courts, including the Third Circuit, have ruled that that the term "tracking device" found in 18 U.S.C. § 3117 does not capture location information generated by a cellular phone. *In re* Application of U.S., 620 F.3d 304, 313 (3d Cir. 2010). Other courts have disagreed. *In re* Application of the U.S., 2009 WL 159187, at *6–7 (S.D.N.Y. Jan.13, 2009). SB 1434 rescues California from that confusion by expressly specifying that cell phones or personal electronic devices are tracking devices, whereas AB 2055 would not.

More broadly, federal courts have issued a number of divergent and conflicting decisions regarding the issue of warrantless cell phone tracking. For example, the Third Circuit ruled in 2010 that a judge could require a search warrant to compel disclosure of location information. *In re* Application of U.S., 620 F.3d 304, 313 (3d Cir. 2010). More recently, the Sixth Circuit reached the opposite conclusion, finding a court order issued under federal law not rising to a search warrant was sufficient. United States v. Skinner, --- F.3d ----, 2012 WL 3289801 (6th Cir. Aug. 14, 2012). And there are numerous other opinions from federal trial courts interpreting disclosure of location records under federal law that have reached different conclusions.

It is no surprise then that in 2002, the Ninth Circuit referred to electronic privacy as "a confusing and uncertain area of law." Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002).

This judicial confusion requires legislative action. Justice Alito pointedly noted in United States v. Jones that "in circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative." 132 S.Ct. at 964 (Alito, J., concurring).

SB 1434 provides a clear standard for access to location information which in turn eliminates the burden of litigating legally questionable demands. Signing AB 2055 alone will mire our criminal justice system in the legal trenches of uncertainty, including but by no means limited to the question of whether that bill actually imposes a warrant requirement as LADA asserts.

## IV. SB 1434 appropriately requires a warrant before law enforcement may access both real time and historical locational tracking data.

LADA asserts both that access to stored location information without a warrant is essential to the investigation of crimes and that stored location information "in and of itself is useless." Neither of these statements is accurate.

Numerous law enforcement agencies within and outside of California are able to fulfill their duties while obtaining a search warrant for stored as well as real-time location information. And as Justice Sotomayor recognized in Jones, compiled location information can convey a great deal of information about an individual. See 132 S.Ct. at 955-56

(Sotomayor, J., concurring). SB 1434 accounts for both of these considerations—and avoids the potential for litigation and the suppression of evidence—by appropriately requiring a warrant for historical as well as real-time location information.

Although LADA posit that a warrant requirement for stored location information will impede the investigation of serious crimes, there is ample evidence that this is not the case. According to Public Records Act responses, police departments in California municipalities including Chula Vista, Irvine, Riverside, Sacramento, San Francisco, Santa Ana, and Stockton currently obtain a search warrant or comply with a probable cause standard for stored location information. These agencies, like hundreds around the country, find that they are able to carry out their duties within the boundaries that would be imposed by SB 1434. In addition, SB 1434 would have no impact whatsoever on traditional methods of investigation, including in-person surveillance of a suspect's location, that law enforcement has relied on for centuries to investigate and solve crimes.

Moreover, law enforcement has long alleged that *any* restrictions on their authority will interfere with or otherwise impede the investigation of serious crimes. By this reasoning, the California and U.S. Constitutions are themselves inappropriate to the extent that they impose search warrant requirements and other limitations on law enforcement. But like our Constitutional protections for privacy, SB 1434 is appropriate both because it respects the privacy interests of stored location information and because there is ample evidence that law enforcement can in fact carry out its duties within the bill's constraints.

And the privacy interests in stored location information are considerable. First, there is functionally little difference between information pertaining to a person's "real-time" location and "stored" information concerning that person's location ten minutes or even ten seconds ago. In addition, stored location information can provide law enforcement with a detailed portrait of a person's movements and associations. As Justice Sotomayor noted in Jones, stored location information "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." 132 S.Ct. at 955 (Sotomayor, J.,

concurring). It is for precisely these reasons that at least one federal court has ruled there is no constitutional difference between "stored" location information, and information obtained in real time. *See* In re U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827, 839 (S.D. Tex. 2010).

Finally, LADA contends that federal law has already established the standard required to obtain stored location information, and as such SB 1434 is at best unnecessary or at worst in direct conflict with provisions of ECPA. These arguments are without merit. At the outset, EPCA explicitly grants states the right to enact statutes that provide a greater

degree of protection, and as such SB 1434 is not in conflict with federal law. See 18 U.S.C. § 2703(d).

More importantly, the court orders authorized by ECPA to compel disclosure of electronic communications and records, also known as "d" orders (as specified in 18 U.S.C. § 2703(d)) are the source of considerable litigation, including over their applicability to stored location information. This is unsurprising as, contrary to LADA's assertion that ECPA's drafters "recognized" specific concerns about stored location information, ECPA was enacted in 1986 and as a result did not contemplate cell phones or location information at all. Courts are thus contending with questions both of whether ECPA in fact encompasses stored location at all, the specific requirements to obtain location information under ECPA, and whether any such requirements comply with the Fourth Amendment.

## V. SB 1434 incorporates existing law concerning search warrants, including judicially-created exceptions to notice requirements.

SB 1434 does not alter Penal Code 1524 or any procedural requirements for obtaining or executing a search warrant in existing law. In this regard, it is consistent with existing California law restricting access to book records (Civil Code § 1798.90), non-privileged medical records (Penal Code § 1543), financial records (Government Code § 7470), or electronic toll records (Streets & Highways Code § 31490). In addition, as noted above, several municipal law enforcement agencies in California already obtain a search warrant for location information without reported hindrance. Thus, there is no evidence that existing law pertaining to notice exceptions would not be applicable if SB 1434 were signed.

## VI. SB 1434 offers a fluid and consistent definitions of "user" and explicitly excludes a thief from its protections.

SB 1434 does not require that a "user" be "duly authorized by the provider to engage in such use," as federal law does. This was done to allow SB 1434 to better comport with emerging technologies that operate without any sort of explicitly defined relationship between a device and a provider, such as GPS, as well as to avoid the complexity of identifying the specific "provider" for a mobile device that uses GPS to determine its location and then sends that location to a location-based service over a cellular network.

However, the LADA is wrong to suggest that the definition of "user" under SB 1434 "inexplicably" provides a thief or possessor of a stolen electronic device with the protection of a search warrant. SB 1434 contemplated this precise situation by explicitly allowing the legitimate owner of a stolen device to consent to government access to location information.

## VII. SB 1434 does not violate Proposition 8 (1982).

Contrary to opponents' assertion, SB 1434 does not conflict in either principle or operation with Proposition 8, also known as the Truth in Evidence Act of the California Constitution. As opponents note, SB 1434 does not purport to prohibit the use of any evidence obtained in violation of its provisions in a criminal proceeding.

SB 1434 also allows the use of location information obtained in violation of its provisions to be used in a civil proceeding as proof of a violation of this chapter, which pertains to the permitted methods of obtaining location information. Thus, a violation of this chapter occurs when location information is obtained by illegal methods, and has no bearing on the Truth in Evidence Act whatsoever. This is consistent with other provisions of California law, which make it a misdemeanor to "maliciously and without probable cause procures a search warrant" even though evidence procured through the execution of such warrant would be admissible under the Truth in Evidence Act.

## Conclusion

SB 1434 is necessary to balance the legitimate needs of law enforcement to carry out an extended investigation into an individual's present or past location with the potential for harm that arises from indefinite surveillance. As the Sixth Circuit recently wrote, "[a] person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts." A limitation that requires law enforcement to obtain a probable cause warrant and to monitor location only as long as necessary to accomplish their objective achieves this balance.

Once again, we urge you to sign SB 1434.

Very truly yours,

Hanni Fakhoury, Esq.
Staff Attorney
Electronic Frontier Foundation

Chris Conley, Esq.
Staff Attorney
American Civil Liberties Union

Cc: Honorable Mark Leno