

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: SB 282

INTRODUCER: Senator Hukill

SUBJECT: Tracking Devices or Applications

DATE: March 27, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Pre-meeting</b>
2.			JU	
3.			ACJ	
4.			RC	

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**I. Summary:**

SB 282 creates a second degree misdemeanor offense applicable to persons who use a tracking device or application to determine the location or movement of another person without their consent.

The bill provides exceptions to the prohibition against such use of tracking devices or applications. The bill creates definitions for the terms “tracking application” and “tracking device.”

The bill becomes effective on October 1, 2015.

**II. Present Situation:**

**Cell Phone Tracking**

Any time a cellular phone is on, it will periodically send a signal to the local “base station”<sup>1</sup> to verify the strength of the phone’s connection to the provider network.<sup>2</sup> Cellular phones also communicate back and forth with base stations during phone calls.<sup>3</sup> Providers divide their service area up among base stations in the area, and the cellular phone communicates with different nearby base stations as the user moves around the service area.<sup>4</sup> Providers keep close track of

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<sup>1</sup> The “base station” is the device or communications tower that transmits cellular radio signals so a telephone call can be made wirelessly. These towers are also referred to as “cellular towers.” See IEEE Global History Network, *Base Stations*, [http://www.ieeeeghn.org/wiki/index.php/Cellular\\_Base\\_Stations](http://www.ieeeeghn.org/wiki/index.php/Cellular_Base_Stations) (last visited Jan. 22, 2015).

<sup>2</sup> *ECPA Reform and the Revolution in Location Based Techs. & Servs. before the Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Cong. 13-14 (testimony of Matt Blaze, Assoc. Prof., Univ. Pa.).

<sup>3</sup> *Id.* at 13.

<sup>4</sup> *Id.* at 13.

which base stations a phone communicates with so the provider knows which base stations to send phone calls to.<sup>5</sup> The electronic record created by a cellular phone communicating with a base station is often referred to as “cell site location information” (CSLI).<sup>6</sup>

CSLI is also used by cellular providers to transmit location data for cellular phones that dial 911.<sup>7</sup> The Federal Communications Commission (FCC) developed the Enhanced 911 program (E911) to ensure that wireless carriers provide location information to 911 dispatchers when a 911 call is placed from a cellular phone.<sup>8</sup> Over time the FCC has created more stringent requirements for cellular providers that currently require specific location data such as latitude and longitude of the 911 caller.<sup>9</sup> In similar form to the FCC requirements, Florida law requires the establishment of a statewide E911 program requiring providers to route 911 calls to the correct public safety answering points.<sup>10</sup> This is accomplished by “selective routing based on the geographical location from which the call originated,” and requires providers to create automatic number identification and automatic location-identification features.<sup>11</sup>

### GPS Tracking

The Global Positioning System (GPS) is a system of twenty-four operating satellites that orbit the earth and transmit radio signals.<sup>12</sup> The GPS system is operated by the United States Air Force,<sup>13</sup> and is used for civilian applications as well as national security and military operations.<sup>14</sup> GPS can be used for tracking and locating cellular phones that are equipped with hardware that can receive radio signals from GPS satellites.<sup>15</sup> GPS technology can usually identify the location of a cellular phone within a distance of ten meters;<sup>16</sup> however, more recent cellular phone models are the only models equipped with the proper hardware to utilize this technology.<sup>17</sup>

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<sup>5</sup> *Id.* at 14.

<sup>6</sup> *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304 (3d Cir. 2010).

<sup>7</sup> Federal Commc'ns Comm'n, *Enhanced 9-1-1 Wireless Services*, <http://www.fcc.gov/encyclopedia/enhanced-9-1-1-wireless-services> (last visited Jan. 23, 2015).

<sup>8</sup> Federal Commc'ns Comm'n, *Guide: 911 Wireless Services*, <http://www.fcc.gov/guides/wireless-911-services> (last visited Jan. 23, 2015).

<sup>9</sup> Federal Commc'ns Comm'n, *Enhanced 9-1-1 Wireless Services*, <http://www.fcc.gov/encyclopedia/enhanced-9-1-1-wireless-services> (last visited Jan. 23, 2015).

<sup>10</sup> Section 365.172(3)(h), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> GPS.Gov, *Space Segment*, <http://www.gps.gov/systems/gps/space/> (last visited Jan. 23, 2015).

<sup>13</sup> Schriever Air Force Base, *GPS*, <http://www.schriever.af.mil/GPS/> (last visited Jan. 23, 2015).

<sup>14</sup> GPS.Gov, *GPS Applications*, <http://www.gps.gov/applications/> (last visited Jan. 23, 2015).

<sup>15</sup> *ECPA Reform and the Revolution in Location Based Techs. & Servs. before the Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Cong. 13-14 (statement of Matt Blaze, Assoc. Prof., Univ. Pa.).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 22.

## Tracking Software

Tracking software can be downloaded onto phones and other electronic devices and used to track the location of the device for mapping applications or other purposes.<sup>18</sup> Some types of tracking software can monitor messages, emails, web sites that are visited, and contacts that are saved, in addition to tracking a device's location.<sup>19</sup>

## Florida Law

Chapter 934, F.S., governs the security of electronic and telephonic communications and the procedural requirements for searching and monitoring such communications. The law covers a number of different investigative and monitoring procedures, including wiretapping, obtaining service provider records, and mobile tracking devices. However, many of the chapter's provisions only apply to law enforcement entities (e.g., s. 934.42, F.S., authorizes a law enforcement officer to apply to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device<sup>20</sup>).

The statute currently authorizes law enforcement officers to use a pen register,<sup>21</sup> trap and trace device,<sup>22</sup> or a mobile tracking device,<sup>23</sup> after receiving an ex parte court order from a judge.<sup>24</sup> To obtain a court order, the application must include the identity of the applicant, the identity of the law enforcement agency conducting the related investigation, and a certification that "the information likely to be obtained is relevant to an ongoing criminal investigation being conducted."<sup>25</sup> This certification is a lower standard than the probable cause standard<sup>26</sup> required for obtaining a lawful warrant.

The Florida Supreme Court recently addressed the question of whether probable cause was required for a law enforcement agency to gather real-time CSLI on a cellular phone user.<sup>27</sup> The Court found that cellular phones have become an "indispensable" part of most peoples' lives,<sup>28</sup>

<sup>18</sup> *ECPA Reform and the Revolution in Location Based Techs. & Servs. before the Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 111th Cong. 13-14 (statement of Matt Blaze, Assoc. Prof., Univ. Pa.).

<sup>19</sup> CBS DFW, *Stalkers Using Cell Phones to Track Victims*, <http://dfw.cbslocal.com/2015/01/14/stalkers-using-cell-phones-to-track-victims/> (last visited Jan. 26, 2015); Christine Pitawanich, *Virtually Invisible Cell Phone Apps Used to Track and Spy on Victims*, NBC News, Nov. 25, 2014, <http://kobi5.com/news/item/virtually-invisible-cell-phone-apps-used-to-track-and-spy-on-victims.html#.VMvymKNOns> (last visited Jan. 26, 2015).

<sup>20</sup> Section 934.42, F.S., defines "tracking device" as an electronic or mechanical device which permits the tracking of the movement of a person or object.

<sup>21</sup> Section 934.02(20), F.S., (defining a "pen register" as a "device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted," but does not capture the contents of the communications).

<sup>22</sup> Section 934.02(21), F.S., (defining a "trap and trace device" as a "device or process that captures the incoming electronic or other impulses that identify the originating number or dialing, routing, addressing, or signaling information reasonably likely to identify the source of a wire or electronic communication," but does not capture the contents of the communications).

<sup>23</sup> "Mobile tracking device" is not defined in Chapter 934, F.S.

<sup>24</sup> Sections 934.32, 934.33, and 934.42, F.S.

<sup>25</sup> Sections 934.32(2) and 934.42(2)(b), F.S.

<sup>26</sup> *Tracey v. Florida*, 2014 WL 5285929 (*Fla.* 2014).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 17.

and real-time CSLI tracking of a cellular phone requires a probable cause warrant.<sup>29</sup> Also, it should be noted that law enforcement officers who do get a probable cause warrant to gather real-time CSLI are not currently required to create a contemporaneous record describing in detail the circumstances under which the tracking device or application is being used.

Section 934.03, F.S., which applies to all persons, makes it a third degree felony<sup>30</sup> for a person to intentionally use the contents of an electronic communication, knowing or having reason to know that the information was obtained through the unlawful interception of the electronic communication (i.e., without the consent of both parties). The term “electronic communication” is defined as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce.”<sup>31</sup> However, the definition specifically excludes “any communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object.”<sup>32</sup>

Florida law does not currently prohibit a private individual from using a tracking device or application to determine the location or movement of another person without the other person’s consent.

### **Federal Law**

Title 18 of the United States Code governs electronic surveillance, including mobile tracking devices, pen registers, and other electronic tracking methods.<sup>33</sup> Title 18 allows law enforcement to gather stored electronic communications data pursuant to a court order when the law enforcement entity can show “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”<sup>34</sup> The “specific and articulable facts” standard is lower than that required under the “probable cause” standard.<sup>35</sup>

The law preempts any state laws that govern electronic surveillance and tracking, although states may enact more restrictive requirements.<sup>36</sup>

### **III. Effect of Proposed Changes:**

The bill creates the following definitions:

- “Tracking application” means any software program that, once installed on an electronic device, enables the device to be used as a tracking device; and

<sup>29</sup> *Id.* at 19.

<sup>30</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>31</sup> Section 934.02(12), F.S.

<sup>32</sup> *Id.*

<sup>33</sup> 18 U.S.C. ss. 2510-22, 2701-12, 3117, 3121-27 (2014).

<sup>34</sup> 18 U.S.C. s. 2703(d) (2014).

<sup>35</sup> *In re U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013); *United States v. Thousand*, 558 Fed.Appx 666, 670 (7th Cir. 2014).

<sup>36</sup> *Florida v. Otte*, 887 So.2d 1186, 1187 (Fla. 2004).

- “Tracking device” means any device that reveals its location or movement by the transmission of electronic signals.

The bill creates a new section of the Florida Statutes making it a second degree misdemeanor<sup>37</sup> for a person to use a tracking device or application to determine the location or movement of another person without his or her consent. This prohibition does not apply to:

- The owner of a motor vehicle, including the owner of a motor vehicle available for rent, who has consented to the use of the tracking device or application with respect to such vehicle;
- The lessor or lessee of a motor vehicle and the person operating the motor vehicle who have consented to the use of a tracking device or application with respect to such vehicle;
- Any law enforcement agency, including state, federal, and military law enforcement agencies, that are acting pursuant to a court order or lawfully using the tracking device or application in an ongoing criminal investigation, if the law enforcement officer employing the tracking device or application creates a contemporaneous record describing in detail the circumstances under which the tracking device or application is being used.
- A parent or legal guardian of a minor child whose location or movements are being tracked by the parent or legal guardian (when the parents of the minor child are divorced, separated, or otherwise living apart from one another, this exception applies only if both parents consent to the tracking of the minor child’s location and movements, unless one parent has been granted sole custody, in which case consent of the noncustodial parent is not required);
- The owner or operator of a correctional institution, as defined in s. 944.241, F.S.,<sup>38</sup> that is tracking a prisoner<sup>39</sup> or any person detained under the immigration laws of the United States at any such correctional institution who is under its custody or supervision;
- Any provider of a commercial mobile radio service, such as a mobile telephone service or vehicle safety or security service, which allows the provider to determine the location or movement of a device provided to a customer of such service;
- Any commercial motor carrier operation; and
- Any commercial enterprise engaged in good faith marketing or advertising to the public through the use of tracking applications if the location of a member of the public, as revealed to the commercial enterprise through the tracking application, is used only for good faith marketing or advertising and no other purpose.

The bill specifies that a person’s consent to be tracked is presumed to be revoked in the following circumstances:

- When the person files a petition for dissolution of marriage from the person to whom prior consent had been given; or
- When the person seeks a restraining order against the person to whom prior consent had been given.

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<sup>37</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

<sup>38</sup> Section 944.241, F.S., defines “correctional institution” as any facility under the authority of the department or the Department of Juvenile Justice, a county or municipal detention facility, or a detention facility operated by a private entity.

<sup>39</sup> The bill defines the term “prisoner” as any person incarcerated or detained in any correctional institution who is accused of, convicted of, sentenced for, or adjudicated delinquent for a violation of criminal law or the terms and conditions of parole, probation, community control, pretrial release, or a diversionary program.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

Anyone who is prosecuted for a violation of the new law is subject to 2nd degree misdemeanor penalties which would likely include fines, fees, and court costs.

## C. Government Sector Impact:

The bill creates a new second degree misdemeanor, which is punishable by up to 60 days in county jail and a \$500 fine. This may have a negative jail bed impact.

**VI. Technical Deficiencies:**

The definition of the term “tracking application” is somewhat broad in that it includes *any* software application that has the capability to reveal a person’s location, even if that is not the *prime purpose* of the software (e.g., a game or weather application). Similarly, the definition of the term “tracking device” is broad in that it would likely include any cell phone.

The bill prohibits a person from using a tracking device or application to determine the location or movement of another person without his or her consent. Because the definitions applicable to this prohibition are somewhat broad, the criminal penalties may apply to persons engaging in arguably harmless behavior (e.g., a person who finds a phone and uses the phone’s applications to locate its owner).

The bill defines the terms “tracking device” and “tracking application.” However, there are numerous references in the bill to a “tracking device or application.” The reference to “application” should be changed to “tracking application” to match the definition.

The bill specifies that a person’s consent to be tracked is presumed to be revoked when the person seeks a restraining order against the person to whom prior consent had been given. The

reference to “restraining order” should be replaced with a reference to “an injunction for protection against domestic violence, issued pursuant to s. 741.30, an injunction for protection against repeat violence, sexual violence, or dating violence, issued pursuant to s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315.”

The bill prohibits a person from using a tracking device or application, but does not define the term “person.” If the intent is to specifically include or exclude business entities or governmental entities from the bill’s prohibitions, the term “person” should be defined.

The prohibition on using a tracking device or application to determine the location or movement of another person without his or her consent does not apply to any provider of a “commercial mobile radio service.” This term should be defined.

## **VII. Related Issues:**

The Florida Department of Law Enforcement raises the following issues in the department’s analysis of the bill:

- The additional requirement that a law enforcement officer must make a contemporaneous record in detail describing the circumstances under which the device or application is being used may conflict with the Mobile Tracking Authorization Statute. Section 934.42 (4), F.S., states: “A court may not require greater specificity or additional information beyond that which is required by this section as a requisite for issuing an order.” As written, the language is vague and open to interpretation and may present issues in the prosecution of criminal charges resulting from the use of a mobile device.
- Additionally, the contemporaneous record required by the bill creates public record and confidentiality issues, dealing with privacy, active criminal investigations, and active criminal intelligence information.<sup>40</sup>

## **VIII. Statutes Affected:**

This bill creates section 934.425 of the Florida Statutes.

## **IX. Additional Information:**

### **A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

### **B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>40</sup> FDLE Agency Bill Analysis, posted January 29, 2015.