

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.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/SB 282

INTRODUCER: Criminal Justice Committee and Senator Hukill

SUBJECT: Tracking Devices or Tracking Applications

DATE: April 14, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	Fav/CS
2.	<u>Clodfelter</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Fav/CS
3.	<u>Cellon</u>	<u>Phelps</u>	<u>RC</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 282 creates a second degree misdemeanor offense applicable to persons who install a tracking device or tracking application on the property of another person without their consent.

The bill provides exceptions to the prohibition against such installation of tracking devices or applications.

The bill creates definitions for the terms “tracking application,” “tracking device,” “business entity,” and “person” for purposes of the bill.

The bill will have no impact on the state prison population. It is not known how many criminal cases will be brought under the new law or how often convicted defendants will be jailed in local facilities.

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”¹ to verify the strength of the phone’s connection to the provider network.² Cellular phones also communicate back and forth with base stations during phone calls.³ Providers divide their service area among base stations in the area, and the cellular phone communicates with different nearby base stations as the user moves around the service area.⁴ Providers keep close track of which base stations a phone communicates with so the provider knows which base stations to send phone calls to.⁵ The electronic record created by a cellular phone communicating with a base station is often referred to as “cell site location information” (CSLI).⁶

CSLI is also used by cellular providers to transmit location data for cellular phones that dial 911.⁷ 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.⁸ 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.⁹ 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.¹⁰ 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.¹¹

GPS Tracking

The Global Positioning System (GPS) is a system of twenty-four operating satellites that orbit the earth and transmit radio signals.¹² The GPS system is operated by the United States Air Force,¹³ and is used for civilian applications as well as national security and military

¹ 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 (last visited Jan. 22, 2015).

² *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.).

³ *Id.* at 13.

⁴ *Id.* at 13.

⁵ *Id.* at 14.

⁶ *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).

⁷ 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).

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

⁹ 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).

¹⁰ Section 365.172(3)(h), F.S.

¹¹ *Id.*

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

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

operations.¹⁴ GPS can be used for tracking and locating cellular phones that are equipped with hardware that can receive radio signals from GPS satellites.¹⁵ GPS technology can usually identify the location of a cellular phone within a distance of ten meters;¹⁶ however, more recent cellular phone models are the only models equipped with the proper hardware to utilize this technology.¹⁷

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.¹⁸ 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.¹⁹

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 device²⁰).

The statute currently authorizes law enforcement officers to use a pen register,²¹ trap and trace device,²² or a mobile tracking device,²³ after receiving an ex parte court order from a judge.²⁴ 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

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

¹⁵ *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.).

¹⁶ *Id.*

¹⁷ *Id.* at 22.

¹⁸ *Supra* note 15.

¹⁹ 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#.VMvymKNOncs> (last visited Jan. 26, 2015).

²⁰ 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.

²¹ 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).

²² 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).

²³ "Mobile tracking device" is not defined in Chapter 934, F.S.

²⁴ Sections 934.32, 934.33, and 934.42, F.S.

conducted.”²⁵ This certification is a lower standard than the probable cause standard²⁶ 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.²⁷ The Court found that cellular phones have become an “indispensable” part of most peoples’ lives,²⁸ and real-time CSLI tracking of a cellular phone requires a probable cause warrant.²⁹ 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 felony³⁰ 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.”³¹ 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.”³²

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.³³ 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.”³⁴ The “specific and articulable facts” standard is lower than that required under the “probable cause” standard.³⁵

²⁵ Sections 934.32(2) and 934.42(2)(b), F.S.

²⁶ *Tracey v. Florida*, 2014 WL 5285929 (Fla. 2014).

²⁷ *Id.*

²⁸ *Id.* at 17.

²⁹ *Id.* at 19.

³⁰ 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.

³¹ Section 934.02(12), F.S.

³² *Id.*

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

³⁴ 18 U.S.C. s. 2703(d) (2014).

³⁵ *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).

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

III. Effect of Proposed Changes:

The bill creates the following definitions:

- “Business entity” means any form of corporation, partnership, association, cooperative, joint venture, business trust, or sole proprietorship that conducts business in this state;
- “Tracking application” means any software program whose primary purpose is to track or identify the location or movement of an individual;
- “Tracking device” means any device whose primary purpose is to reveal its location or movement by the transmission of electronic signals; and
- “Person” means an individual and does not mean a business entity.

The bill creates a new section of the Florida Statutes making it a second degree misdemeanor³⁷ for a person to knowingly install a tracking device or tracking application on another’s property without the other person’s consent.

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

- When the consenting person and the person to whom consent was given are lawfully married and one person files a petition for dissolution of marriage from the other; or
- When the consenting person or the person to whom consent was given files an injunction for protection against the other person pursuant to s. 741.30, s. 741.315, s. 784.046, or s. 784.0485, F.S.

The prohibition against knowingly installing a tracking device or tracking application does not apply to:

- A law enforcement officer as defined in s. 943.10, F.S., or any local, state, federal, or military law enforcement agency, that lawfully installs a tracking device or application on another person’s property as part of a criminal investigation;
- A parent or legal guardian of a minor child who installs a tracking device or application on the minor’s property (when the parents or guardians are divorced, separated, or otherwise living apart from one another, this exception applies only if both parents or guardians consent to the installation of the device or application; however, if one parent or guardian has been granted sole custody, consent of the noncustodial parent is not required; the exemption also applies to the sole surviving parent or guardian.);
- A caregiver of an elderly person or disabled adult, if the elderly person or disabled adult’s treating physician certifies that such installation is necessary to ensure the safety of the elderly person or disabled adult; or
- A person acting in good faith on behalf of a business entity for a legitimate business purpose.

The effective date of the bill is October 1, 2015.

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

³⁷ 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.

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:

Under CS/SB 282 anyone who is prosecuted for a violation of the new law is subject to second degree misdemeanor penalties which would likely include fines, fees, and court costs.

C. Government Sector Impact:

The new second degree misdemeanor offense created in the bill is punishable by up to 60 days in county jail and a \$500 fine. It is not known how often criminal cases will be brought under the new law or how often convicted defendants will be jailed. However, the bill will have no impact on the state prison population.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 934.425 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 30, 2015:

- Narrowed the definition of “tracking application” and “tracking device” to encompass applications and devices whose primary purpose was to track or identify its location;
- Added the definitions of “person” and “business entity”;
- Narrowed the prohibition against tracking a person’s location to only encompass the act of installing a tracking device or tracking application;
- Removed the requirement for law enforcement officers to create a contemporaneous record of the use of the tracking device or application;
- Modified the exception for law enforcement use to apply when a tracking device or tracking application is lawfully installed;
- Added a new exception for installing a tracking device or application by a caregiver of an elderly person or disabled adult; and
- Added a new exception for a person acting in good faith on behalf of a business entity.

- B. **Amendments:**

None.