



May 23, 2016

RE: Vote “NO” on H.R. 4889, the Kelsey Smith Act of 2016

Dear Representative,

The American Civil Liberties Union urges you to vote “NO” on H.R. 4889, the Kelsey Smith Act. We recognize the commendable goal of this legislation—to ensure that law enforcement has cell phone location information necessary to act in an emergency. However, as reported out of committee, this legislation expands government access to individuals’ location information without appropriate safeguards to prevent abuse. The current version of the bill excludes key protections contained in a prior version of the bill and in other state emergency location disclosure laws. Thus, in the absence of simple modifications to rectify these issues, we urge you to vote against the Kelsey Smith Act.

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

KARIN JOHANSON
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Cell phone location information is incredibly sensitive. Over 90% of Americans own a cell phone and about three-quarters are within five feet of their phones at all times.¹ This means that one’s cell phone is, in most cases, a very accurate proxy for that person’s precise location—be that in a doctor’s office, house of worship, therapy group, or bar. Congress has recognized how sensitive this data is, enacting legislation that requires electronic communications providers to keep this information confidential from the general public and government.² Moreover, in the recent Supreme Court case, *United States v. Jones*, Justice Sotomayor wrote in her concurrence that precise GPS location monitoring of an individual provides “a wealth of detail about her familial, political, professional, religious, and sexual associations.”³

The Kelsey Smith Act opens the door to abuse of emergency requests.

Under the Kelsey Smith Act, telecommunications providers would be forced to comply with requests from law enforcement officials for cell phone location information. Specifically, law enforcement could request cell phone location data from providers when they reasonably believe that the cell phone is in the possession of an individual in an emergency situation that involves the risk of death or serious injury. This removes a longstanding protection in the law that grants telecommunications providers’ discretion to reject emergency location data disclosure requests made in situations that are not true emergencies.⁴

¹ Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, PEW RESEARCH CENTER (June 6, 2013), <http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/>; MOBILE CONSUMER HABITS STUDY (CONDUCTED BY HARRIS INTERACTIVE), JUMIO (2013), available at <http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf>.

² 18 U.S.C. § 2701 et. seq.; 47 U.S.C. § 222.

³ *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, concurring).

⁴ 47 U.S.C. § 222 (d).

The harms posed by removing checks on law enforcement access to cell phone location information are not hypothetical. In California, police coerced a person seeking a restraining order into saying she had been held against her will and then made a false emergency request for location information to the purported kidnapper's cellular service provider.⁵ Similar instances of police making emergency requests, where there was no true emergency also occurred in Texas, New York, and Maryland.⁶ And even the Department of Justice found systemic misuse of emergency disclosure requests at the hands of federal agents in a 2010 report.⁷

In light of the intimate picture that location information can paint about a particular person, the current voluntary disclosure regime is a common sense check on abuse. Indeed, transparency reports from two major telecommunication providers show that many emergency requests are processed—nearly 81,000 in 2015 alone.⁸ And these companies have strived to make the emergency voluntary request procedure efficient and effective.⁹ The Kelsey Smith Act opens the door for abuse when functional alternatives already exist.

The Kelsey Smith Act must include strong privacy protections. If the House decides to adopt the emergency disclosure requirement in the Kelsey Smith Act, the following privacy protections should be included, either in the Senate or during conference:

- *After-the-Fact Judicial Review.* The bill should require mandatory, after-the-fact judicial review of all emergency disclosure requests made by law enforcement. This will help ensure that requests are made pursuant to actual emergencies, while still giving officers flexibility to request information when it is impracticable to wait for a court order. Such after-the-fact review is a longstanding check on information disclosure requests conducted under the Pen Register Statute and the USA Freedom Act. And, several states have already passed similar emergency location disclosure laws that require such judicial review.¹⁰
- *Suppression Remedy.* The bill should provide a remedy in cases where the court finds a violation of the law or fails to provide retroactive authorization. Any information obtained in violation of the law should not be used in any criminal, immigration or administrative proceedings. This provides individuals a remedy in cases where their

⁵ Jayne v. Sprint PCS, No. CIVS072522LKKGGHP, 2009 WL 426117, at *2 (E.D. Cal. Feb. 20, 2009).

⁶ See: State v. Harrison, No. 02-13-00255-CR, 2014 WL 2466369, at *4–5 (Tex. App. May 30, 2014); People v. Moorer, 959 N.Y.S.2d 868, 872, 875 (N.Y. Co. Ct. 2013); Upshur v. State, 56 A.3d 620, 625–26 (Md. App. 2012).

⁷ DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS 257–72 (2010), available at <https://oig.justice.gov/special/s1001r.pdf>.

⁸ AT&T, TRANSPARENCY REPORT (2016), available at http://about.att.com/content/dam/csr/Transparency%20Reports/ATT_Transparency%20Report_Jan%202016.pdf; United States Report, VERIZON, <https://www.verizon.com/about/portal/transparency-report/us-report/>. (last visited April 11, 2016).

⁹ See, e.g., Letter from Timothy P. McKone, Executive Vice President, Federal Relations, AT&T, to Sen. Edward Markey (Oct. 13, 2013), https://www.markey.senate.gov/imo/media/doc/2013-10-03_ATT_re_Carrier.pdf; LAW ENFORCEMENT RELATIONS, T-MOBILE USA, INC., <https://www.t-mobile.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/0000BDF20016F5DE011CB9630A8D07DE/file/Law%20Enforcement%20Security%20Procedures%20For%20T-Mobile%20Website.pdf>.

¹⁰ See Cal. Penal Code § 1546.1(h) ; Colo. Rev. Stat. § 18-9-312(1.5)(e); Ind. Pub. L. 57 (H.B. 1013), § 3 (2016) (to be codified at Ind. Code § 35-33-5-15(b)).

information is illegally obtained. It will also act as a strong deterrent for making an emergency request in cases where a true emergency does not exist.

- *Notice and Civil Remedies.* The bill should require that prompt notice be given to a person whose location information is obtained. Without this provision, an individual may have no ability to pursue judicial remedies if a law enforcement official acts in violation of the law to obtain his or her records. California recently passed legislation that includes such a provision for emergency requests.¹¹ Since location disclosure requests should only be made in true emergencies, notifying individuals that their location information was gathered after they are out of harm's way should not have a negative impact. In addition to notice, the bill should provide a civil remedy so that all people, including those never charged with a crime, can obtain redress in cases where a judge determines that law enforcement has violated the law.
- *Probable Cause Standard.* The bill should raise the standard for an emergency location disclosure request from "reasonable belief" to "probable cause." This change employs a commonly used legal standard familiar to law enforcement officials, analogous to the standard used when engaging in exigent searches without a warrant. A higher standard will also reduce the likelihood that officers request information when no true emergency exists.

The Kelsey Smith Act, while crafted with commendable intentions, falls short in adequately protecting American's rights, and instead undermines important privacy protections. We urge members to vote against the Kelsey Smith Act as reported out of committee.

If you have any questions, please feel free to contact Legislative Counsel Neema Singh Guliani at 202-675-2322 or nguliani@aclu.org.

Sincerely,



Karin Johanson

Director, Washington Legislative Office



Neema Singh Guliani

Legislative Counsel

¹¹ Cal. Penal Code § 1546.1(h).