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HOUSE BILL NO. 1640

Offered January 16, 2020

A BILL to amend and reenact §§ 19.2-70.2 and 19.2-70.3 of the Code of Virginia, relating to obtaining records concerning electronic communication service or remote computing service; location data.

Patron—Ayala

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-70.2 and 19.2-70.3 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-70.2. Application for and issuance of order for a pen register or trap and trace device; assistance in installation and use.

A. An investigative or law-enforcement officer may make application for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device, in writing under oath or equivalent affirmation, to a court of competent jurisdiction. The application shall include:

1. The identity of the officer making the application and the identity of the law-enforcement agency conducting the investigation; and

2. A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

The application may include a request that the order require information, facilities and technical assistance necessary to accomplish the installation be furnished.

B. An application for an ex parte order authorizing the installation and use of a pen register or trap and trace device may be filed in the jurisdiction where the ongoing criminal investigation is being conducted; where there is probable cause to believe that an offense was committed, is being committed, or will be committed; or where the person or persons who subscribe to the wire or electronic communication system live, work, or maintain an address or a post office box. For the purposes of an order entered pursuant to this section for the installation and use of a pen register or trap and trace device, such installation shall be deemed to occur in the jurisdiction where the order is entered, regardless of the physical location or the method by which the information is captured or routed to the law-enforcement officer that made the application. Upon application, the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device if the court finds that the investigative or law-enforcement officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

The order shall specify:

1. The identity, if known, of the person in whose name the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied is listed or to whom the line or other facility is leased;

2. The identity, if known, of the person who is the subject of the criminal investigation;

3. The attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied; and

4. A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

C. Installation and use of a pen register or a trap and trace device shall be authorized for a period not to exceed 60 days. Extensions of the order may be granted, but only upon application made and order issued in accordance with this section. The period of an extension shall not exceed 60 days.

D. An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

1. The order and application be sealed until otherwise ordered by the court;

2. Information, facilities and technical assistance necessary to accomplish the installation be furnished if requested in the application; and

3. The person owning or leasing the line or other facility to which the pen register or trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

E. Upon request of an investigative or a law-enforcement officer authorized by the court to install and use a pen register, a provider of wire or electronic communication service, a landlord, custodian or

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59 any other person so ordered by the court shall, as soon as practicable, furnish the officer with all
60 information, facilities, and technical assistance necessary to accomplish the installation of the pen
61 register unobtrusively and with a minimum of interference with the services that the person so ordered
62 by the court accords the party with respect to whom the installation and use is to take place.

63 F. Upon request of an investigative or law-enforcement officer authorized by the court to receive the
64 results of a trap and trace device under this section, a provider of wire or electronic communication
65 service, a landlord, custodian or any other person so ordered by the court shall, as soon as practicable,
66 install the device on the appropriate line and furnish the officer with all additional information, facilities
67 and technical assistance, including installation and operation of the device, unobtrusively and with a
68 minimum of interference with the services that the person so ordered by the court accords the party with
69 respect to whom the installation and use is to take place. Unless otherwise ordered by the court, the
70 results of the trap and trace device shall be furnished to the investigative or law-enforcement officer
71 designated by the court at reasonable intervals during regular business hours for the duration of the
72 order. Where the law-enforcement agency implementing an ex parte order under this subsection seeks to
73 do so by installing and using its own pen register or trap and trace device on a packet-switched data
74 network of a provider of electronic communication service to the public, the agency shall ensure that a
75 record will be maintained that will identify (i) any officer or officers who installed the device and any
76 officer or officers who accessed the device to obtain information from the network; (ii) the date and
77 time the device was installed, the date and time the device was uninstalled, and the date, time, and
78 duration of each time the device is accessed to obtain information; (iii) the configuration of the device at
79 the time of its installation and any subsequent modification thereof; and (iv) any information that has
80 been collected by the device. To the extent that the pen register or trap and trace device can be set
81 automatically to record this information electronically, the record shall be maintained electronically
82 throughout the installation and use of such device. The record maintained hereunder shall be provided ex
83 parte and under seal of the court that entered the ex parte order authorizing the installation and use of
84 the device within 30 days after termination of the order, including any extensions thereof.

85 G. A provider of a wire or electronic communication service, a landlord, custodian or other person
86 who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated
87 for reasonable and actual expenses incurred in providing such facilities and assistance. The expenses
88 shall be paid out of the criminal fund.

89 H. When disclosure of real-time location data is not prohibited by federal law, an investigative or
90 law-enforcement officer may obtain a pen register or trap and trace device installation without a court
91 order; ~~in addition to any real-time location data obtained pursuant to subsection E of § 19.2-70.3,~~ in the
92 following circumstances:

93 1. To respond to a user's call for emergency services;

94 2. With the informed, affirmative consent of the owner or user of the electronic device concerned if
95 (i) the device is in his possession, (ii) the owner or user knows or believes that the device is in the
96 possession of an employee or agent of the owner or user with the owner's or user's consent, or (iii) the
97 owner or user knows or believes that the device has been taken by a third party without the consent of
98 the owner or user;

99 3. With the informed, affirmative consent of the legal guardian or next of kin of the owner or user,
100 if reasonably available, if the owner or user is reasonably believed to be deceased, is reported missing,
101 or is unable to be contacted;

102 4. To locate a child who is reasonably believed to have been abducted or to be missing and
103 endangered; or

104 5. If the investigative or law-enforcement officer reasonably believes that an emergency involving the
105 immediate danger to a person requires the disclosure, without delay, of pen register and trap and trace
106 data; ~~or real-time location data pursuant to subsection E of § 19.2-70.3,~~ concerning a specific person and
107 that a court order cannot be obtained in time to prevent the identified danger.

108 No later than three business days after seeking the installation of a pen register or trap and trace
109 device pursuant to this subsection, the investigative or law-enforcement officer seeking the installation
110 shall file with the appropriate court a written statement setting forth the facts giving rise to the
111 emergency and the reasons why the installation of the pen register or trap and trace device was believed
112 to be important in addressing the emergency.

113 I. No cause of action shall lie in any court against a provider of a wire or electronic communication
114 service, its officers, employees, agents or other specified persons for providing information, facilities, or
115 assistance in accordance with the terms of a court order issued pursuant to this section. Good faith
116 reliance on a court order, a legislative authorization or a statutory authorization is a complete defense
117 against any civil or criminal action based upon a violation of this chapter.

118 **§ 19.2-70.3. Obtaining records concerning electronic communication service or remote**
119 **computing service.**

120 A. A provider of electronic communication service or remote computing service, which, for purposes

121 of subdivisions 2, 3, and 4, includes a foreign corporation that provides such services, shall disclose a
122 record or other information pertaining to a subscriber to or customer of such service, excluding the
123 contents of electronic communications and ~~real-time~~ location data, to an investigative or law-enforcement
124 officer only pursuant to:

- 125 1. A subpoena issued by a grand jury of a court of the Commonwealth;
- 126 2. A search warrant issued by a magistrate, general district court, or circuit court;
- 127 3. A court order issued by a circuit court for such disclosure issued as provided in subsection B; or
- 128 4. The consent of the subscriber or customer to such disclosure.

129 B. A court shall issue an order for disclosure under this section only if the investigative or
130 law-enforcement officer shows that there is reason to believe the records or other information sought are
131 relevant and material to an ongoing criminal investigation, or the investigation of any missing child as
132 defined in § 52-32, missing senior adult as defined in § 52-34.4, or an incapacitated person as defined in
133 § 64.2-2000 who meets the definition of a missing senior adult except for the age requirement. Upon
134 issuance of an order for disclosure under this section, the order and any written application or statement
135 of facts may be sealed by the court for 90 days for good cause shown upon application of the attorney
136 for the Commonwealth in an ex parte proceeding. The order and any written application or statement of
137 facts may be sealed for additional 90-day periods for good cause shown upon subsequent application of
138 the attorney for the Commonwealth in an ex parte proceeding. A court issuing an order pursuant to this
139 section, on a motion made promptly by the service provider, may quash or modify the order, if the
140 information or records requested are unusually voluminous in nature or compliance with such order
141 would otherwise cause an undue burden on such provider.

142 C. Except as provided in subsection D or E, a provider of electronic communication service or
143 remote computing service, including a foreign corporation that provides such services, shall disclose the
144 contents of electronic communications or ~~real-time~~ location data to an investigative or law-enforcement
145 officer only pursuant to a search warrant issued by a magistrate, a juvenile and domestic relations
146 district court, a general district court, or a circuit court, based upon complaint on oath supported by an
147 affidavit as required in § 19.2-54, or judicial officer or court of any of the several states of the United
148 States or its territories, or the District of Columbia when the warrant issued by such officer or such
149 court complies with the provisions of subsection G. In the case of a search warrant directed to a foreign
150 corporation, the affidavit shall state that the complainant believes that the records requested are actually
151 or constructively possessed by a foreign corporation that provides electronic communication service or
152 remote computing service within the Commonwealth of Virginia. If satisfied that probable cause has
153 been established for such belief and as required by Chapter 5 (§ 19.2-52 et seq.), the magistrate, the
154 juvenile and domestic relations district court, the general district court, or the circuit court shall issue a
155 warrant identifying those records to be searched for and commanding the person seeking such warrant to
156 properly serve the warrant upon the foreign corporation. A search warrant for ~~real-time~~ location data
157 shall be issued if the magistrate, the juvenile and domestic relations district court, the general district
158 court, or the circuit court is satisfied that probable cause has been established that the ~~real-time~~ location
159 data sought is relevant to a crime that is being committed or has been committed or that an arrest
160 warrant exists for the person whose ~~real-time~~ location data is sought.

161 D. A provider of electronic communication service or remote computing service, including a foreign
162 corporation that provides such services, shall disclose a record or other information pertaining to a
163 subscriber to or customer of such service, including ~~real-time~~ location data but excluding the contents of
164 electronic communications, to an investigative or law-enforcement officer pursuant to an administrative
165 subpoena issued pursuant to § 19.2-10.2 concerning a violation of § 18.2-374.1 or 18.2-374.1:1, former
166 § 18.2-374.1:2, or § 18.2-374.3 when the information sought is relevant and material to an ongoing
167 criminal investigation.

168 E. ~~When~~ *Notwithstanding any other provision of Virginia law, when* disclosure of real-time location
169 data is not prohibited by federal law, an investigative or law-enforcement officer may obtain ~~real-time~~
170 location data without a warrant in the following circumstances:

- 171 1. To respond to the user's call for emergency services;
- 172 2. With the informed, affirmative consent of the owner or user of the electronic device concerned if
173 (i) the device is in his possession; (ii) the owner or user knows or believes that the device is in the
174 possession of an employee or agent of the owner or user with the owner's or user's consent; or (iii) the
175 owner or user knows or believes that the device has been taken by a third party without the consent of
176 the owner or user;
- 177 3. With the informed, affirmative consent of the legal guardian or next of kin of the owner or user,
178 if reasonably available, if the owner or user is reasonably believed to be deceased, is reported missing,
179 or is unable to be contacted;
- 180 4. To locate a child who is reasonably believed to have been abducted or to be missing and
181 endangered; or

182 5. If the investigative or law-enforcement officer reasonably believes that an emergency involving the
183 immediate danger to a person requires the disclosure, without delay, of ~~real-time~~ location data
184 concerning a specific person and that a warrant cannot be obtained in time to prevent the identified
185 danger.

186 No later than three business days after seeking disclosure of ~~real-time~~ location data pursuant to this
187 subsection, the investigative or law-enforcement officer seeking the information shall file with the
188 appropriate court a written statement setting forth the facts giving rise to the emergency and the facts as
189 to why the person whose ~~real-time~~ location data was sought is believed to be important in addressing
190 the emergency.

191 F. In order to comply with the requirements of § 19.2-54, any search of the records of a foreign
192 corporation shall be deemed to have been made in the same place wherein the search warrant was
193 issued.

194 G. A Virginia corporation or other entity that provides electronic communication services or remote
195 computing services to the general public, when properly served with a search warrant and affidavit in
196 support of the warrant, issued by a judicial officer or court of any of the several states of the United
197 States or its territories, or the District of Columbia with jurisdiction over the matter, to produce a record
198 or other information pertaining to a subscriber to or customer of such service, including ~~real-time~~
199 location data, or the contents of electronic communications, or both, shall produce the record or other
200 information, including ~~real-time~~ location data, or the contents of electronic communications as if that
201 warrant had been issued by a Virginia court. The provisions of this subsection shall only apply to a
202 record or other information, including ~~real-time~~ location data, or contents of electronic communications
203 relating to the commission of a criminal offense that is substantially similar to (i) a violent felony as
204 defined in § 17.1-805, (ii) an act of violence as defined in § 19.2-297.1, (iii) any offense for which
205 registration is required pursuant to § 9.1-902, (iv) computer fraud pursuant to § 18.2-152.3, or (v)
206 identity theft pursuant to § 18.2-186.3. The search warrant shall be enforced and executed in the
207 Commonwealth as if it were a search warrant described in subsection C.

208 H. The provider of electronic communication service or remote computing service may verify the
209 authenticity of the written reports or records that it discloses pursuant to this section by providing an
210 affidavit from the custodian of those written reports or records or from a person to whom said custodian
211 reports certifying that they are true and complete copies of reports or records and that they are prepared
212 in the regular course of business. When so authenticated, no other evidence of authenticity shall be
213 necessary. The written reports and records, excluding the contents of electronic communications, shall be
214 considered business records for purposes of the business records exception to the hearsay rule.

215 I. No cause of action shall lie in any court against a provider of a wire or electronic communication
216 service or remote computing service or such provider's officers, employees, agents, or other specified
217 persons for providing information, facilities, or assistance in accordance with the terms of a court order,
218 warrant, administrative subpoena, or subpoena under this section or the provisions of subsection E.

219 J. A search warrant or administrative subpoena for the disclosure of ~~real-time~~ location data pursuant
220 to this section shall require the provider to provide ongoing disclosure of such data for a reasonable
221 period of time, not to exceed 30 days. A court may, for good cause shown, grant one or more
222 extensions, not to exceed 30 days each.

223 K. An investigative or law-enforcement officer shall not use any device to obtain electronic
224 communications or collect ~~real-time~~ location data from an electronic device without first obtaining a
225 search warrant authorizing the use of the device if, in order to obtain the contents of such electronic
226 communications or such ~~real-time~~ location data from the provider of electronic communication service
227 or remote computing service, such officer would be required to obtain a search warrant pursuant to this
228 section. However, an investigative or law-enforcement officer may use such a device without first
229 obtaining a search warrant under the circumstances set forth in subsection E. For purposes of
230 subdivision E 5, the investigative or law-enforcement officer using such a device shall be considered to
231 be the possessor of the ~~real-time~~ location data.

232 L. Upon issuance of any subpoena, search warrant, or order for disclosure issued under this section,
233 upon written certification by the attorney for the Commonwealth that there is a reason to believe that the
234 victim is under the age of 18 and that notification or disclosure of the existence of the subpoena, search
235 warrant, or order will endanger the life or physical safety of an individual, or lead to flight from
236 prosecution, the destruction of or tampering with evidence, the intimidation of potential witnesses, or
237 otherwise seriously jeopardize an investigation, the court may in an ex parte proceeding order a provider
238 of electronic communication service or remote computing service not to disclose for a period of 90 days
239 the existence of the subpoena, search warrant, or order and written application or statement of facts to
240 another person, other than an attorney to obtain legal advice. The nondisclosure order may be renewed
241 for additional 90-day periods for good cause shown upon subsequent application of the attorney for the
242 Commonwealth in an ex parte proceeding. A court issuing an order for disclosure pursuant to this
243 section, on a motion made promptly by the service provider, may quash or modify the order if the

244 information or records requested are unusually voluminous in nature or compliance with such order
245 would otherwise cause an undue burden on such provider.

246 M. For the purposes of this section:

247 "Electronic device" means a device that enables access to, or use of, an electronic communication
248 service, remote computing service, or location information service, including a global positioning service
249 or other mapping, locational, or directional information service.

250 "Foreign corporation" means any corporation or other entity, whose primary place of business is
251 located outside of the boundaries of the Commonwealth, that makes a contract or engages in a terms of
252 service agreement with a resident of the Commonwealth to be performed in whole or in part by either
253 party in the Commonwealth, or a corporation that has been issued a certificate of authority pursuant to
254 § 13.1-759 to transact business in the Commonwealth. The making of the contract or terms of service
255 agreement or the issuance of a certificate of authority shall be considered to be the agreement of the
256 foreign corporation or entity that a search warrant or subpoena, which has been properly served on it,
257 has the same legal force and effect as if served personally within the Commonwealth.

258 "*Location data*" means any data or information concerning the location of an electronic device that,
259 in whole or in part, is generated, derived from, or obtained by the operation of the device.

260 "Properly served" means delivery of a search warrant or subpoena by hand, by United States mail, by
261 commercial delivery service, by facsimile or by any other manner to any officer of a corporation or its
262 general manager in the Commonwealth, to any natural person designated by it as agent for the service
263 of process, or if such corporation has designated a corporate agent, to any person named in the latest
264 annual report filed pursuant to § 13.1-775.

265 "Real-time location data" means any data or information concerning the current location of an
266 electronic device that, in whole or in part, is generated, derived from, or obtained by the operation of
267 the device.