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Cellphones Searched Without a Warrant in Some States

By Krystina Steffen, staff In Good Practice writer – August 24, 2011

States have laws that must be applied when police search a car or a home, including obtaining a warrant to legally search these places. But with new lawsuits emerging in cases where police are searching and confiscating cellphones, it brings up a new topic for debate. Do the police need to have a warrant before looking at the data on your cellphone should you be stopped for a traffic violation or when they visit your home?

Law enforcement agencies say that cellphone data is not a private matter. People are willing to show where they've checked in on their Facebook wall, post pictures on Twitter of their night out, and download apps to locate their nearest friend, event, or restaurant nearby. So if police find incriminating information on a cellphone when a driver is stopped for going over the speed limit, for example, the authorities say there is one less potential criminal on the loose and the data was worth going after. Federal investigators also use cell site location information (CSLI) and cellphone data to pinpoint who did a crime in a particular area.

In Connecticut, investigators sought this information in a string of bank robberies in Windsor and Berlin to recreate movements of individuals who could have carried out this crime. A search of 169 numbers from nine cellphone companies led them to charge Luis Soto with the crime and, "... that he was in close proximity to other alleged participants in the robbery", including his brother. [1] Soto's attorney, Assistant Federal Defender Terence S. Ward, says investigators did not get a warrant for the cellphone records and has filed a motion to suppress the Soto brothers' information that was recreated with cellphone tower records. [2] The authorities had plenty of evidence to convict the Soto brothers without overstepping the boundaries by getting cellphone records.

"The scope of these orders is surprising to say the least, and the time to consider what is mass surveillance and how it interrelates with the Fourth Amendment has arrived," Soto's attorney said. [3]

In Texas, if a driver is stopped for any violation, the police have a right to look at a person's cellphone texts, e-mails, photos, notes, and any other data available. [4] In Michigan, police requested cellphone information on anyone at or near a labor-union protest. [5] For anyone interested in privacy rights, these searches are unreasonable.

"The Constitution guarantees Americans freedom from unwarranted government intrusion everywhere -- in their homes, online and on their cellphones," said Andrew Schneider, executive director of the ACLU of Connecticut. [6] "Technology may make it easier for that intrusion to happen, but that's no excuse for it."

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At the crux of the matter is the fact that a federal court has not made a ruling that all the lower courts and states must follow in light of widespread cellphone use. Courts are deciding state by state what is legal or keep laws on the books that were passed before cellphones were even invented. Courts and state authorities that allow cellphones to be searched equate cellphones to containers and thus allow police to follow a “search incident to arrest doctrine.” [7] Cellphones become like wallets, cigarette packets, and other “containers” in a car. States that have upheld privacy rights include Ohio, Pennsylvania, and Oregon. These states’ highest courts have ruled that searching a cellphone is a violation of the Fourth Amendment, and investigators must prove probable cause before a judge to obtain a warrant.

The American Civil Liberties Union (ACLU) has started a new campaign to protect citizen’s civil liberties in the digital age. [8] They show how cellphone searches without a warrant can lead to serious consequences. Embarrassing personal details, First Amendment actions, and confidential business information could lead authorities to treat otherwise innocent people badly. The ACLU is all for authorities requesting warrants when there is good reason to need cellphone data. But it should not be requested just to find out what types of people go to therapists, abortion clinics, specific churches, protests, bars, gun ranges, fitness centers, or something that certain individuals will vilify, says the ACLU. [9]

“Nationwide it [cellphone tracking] is a large problem and innocent people are being caught in these cellphone dragnets,” said David McGuire, the ACLU staff attorney in Connecticut. [10] “We’re trying to understand the magnitude of the problem.”

The ACLU is currently requesting 379 public records in 31 states to find out how local law enforcement is using cellphone data. The ACLU wants to know if these agencies need to show probable cause to obtain a warrant, how often they use cellphone information and what it costs for them to track cellphones, and their procedures for obtaining the information. [11]

Also, Congress is considering the Geolocation Privacy and Surveillance Act. [12] The U.S. Senate and House of Representatives are reviewing companion bills that would protect a person’s cellphone data and location. The bills would mandate warrants before historical or real-time data could be searched and would also make telecommunications companies get a customer’s consent to store location data. [13]

“The ability to access cellphone location data is an incredibly powerful tool and its use is shrouded in secrecy,” said Catherine Crump, ACLU staff attorney for the national Speech, Privacy and Technology Project. “The public has a right to know how and under what circumstances their location information

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is being accessed by the government. A detailed history of someone's movements is extremely personal and is the kind of information the Constitution protects." [14]

The ACLU and the Electronic Frontier Foundation (EFF) have created two short quizzes that show just how easy it is for authorities and companies to intrude on our privacy rights. [15] The EFF also has tips on how citizens can deal with police should their rights be compromised. [16] The EFF and ACLU, along with certain members of Congress, want to make sure that an individual's privacy rights are upheld. With laws that are relevant for technology circa the 1980s, it is time to update privacy rights and be vocal about unreasonable searches and seizures of our technology.

Sources

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[14] *Id.*

[15] Privacy quiz: <http://www.aclu.org/privacyquiz/>, Know your rights quiz:
<https://www.eff.org/pages/know-your-digital-rights-quiz>

[16] *Tips for Talking to the Police*: https://www.eff.org/files/EFF_Police_Tips_2011.pdf, *Know your rights*: <https://www.eff.org/wp/know-your-rights>