

## **No Warrant Needed for Cell Site Geolocational Information**

The U.S. government can get historical cell phone records, including geolocational information, from cell phone providers without a warrant, the Fifth District Court of Appeals ruled.

The appellate court reversed the trial court, which found that, under the Stored Communications Act (SCA), the government had to seek a warrant and show probable cause before the records could be obtained. The SCA regulates disclosure of stored electronic communications by service providers. With regard to non-content records, the SCA requires the government to obtain either a warrant, which requires a showing of probable cause, or a court order, which requires only showing reasonable grounds to believe that the materials sought are relevant to an ongoing criminal investigation.

In the case before the appellate court, the government requested a cell phone provider to produce 60 days of historical cell site data and other subscriber information for a particular cell phone. The trial court noted these records would include the date, time called, number, and location of the telephone when the call was made. “These data are constitutionally protected from this intrusion,” the trial court found. “The standard under the Stored Communications Act is below that required by the Constitution.” The trial court said the government must request a warrant and show probable cause for the data.

The appellate court disagreed. It instead agreed with the government’s argument that the request is not a search because the government was not collecting the information but rather the government was only seeking information that the cell phone provider collected on its own, and which is, therefore, a “business record.”

“The cell service provider collects and stores historical cell site data for its own business purposes, perhaps to monitor or optimize service on its network or to accurately bill its customers for the segments of its network that they use. The Government does not require service providers to record this information or store it,” the appellate court wrote. “In the case of such historical cell site information, the Government merely comes in after the fact and asks a provider to turn over records the provider has already created.”

The appellate court also found that cell phone users “understand that their service providers record their location information when they use their phones” and thus have no expectation that the information is private.

Cell phone use is “voluntary,” the court said. “Because a cell phone user makes a choice to get a phone, to select a particular service provider, and to make a call, and because he knows that the call conveys cell site information, the provider retains this information, and the provider will turn it over to the police if they have a court order, he voluntarily conveys his cell site data each time he makes a call.”

One judge dissented, finding that under the majority decision the trial court has no discretion but to issue an order “regardless of the type of non-content records the government seeks.”

The dissent noted that geolocational information raises the question of “whether cellular customers have a reasonable expectation of privacy in that information.” The dissent observed that under the Supreme Court’s decision in *United States v. Jones*, the Supreme Court “suggests that warrantless compulsion of cell site location records raises serious Fourth Amendment questions.”

The dissent concludes that SCA “is best construed as directing that warrant procedures be followed when the government seeks non-content records that may be protected by the Fourth Amendment. I would further hold that historical cell site location records constitute one example of this potentially protected information. Thus, I would hold that the government must obtain a warrant pursuant to § 2703(A)(1)(B) when it seeks compel disclosure of historical cell site location data, because that individual data may be constitutionally protected.”

*In re: Application of the United States of American for Historical Cell Site Data*, Fifth Cir. No. 11-20884, filed July 30, 2013.