



Ohio Legislative Service Commission

Bill Analysis

Bill Rowland

H.B. 304

128th General Assembly
(As Introduced)

Reps. Burke, J. Adams, Blair, Boose, Grossman, Huffman, Ruhl, Sears, Stebelton

BILL SUMMARY

- Prohibits a person, subject to the exemptions described in the next dot point, from using a tracking device to determine the location or movement of another person without the other person's consent.
- Specifies that the prohibition described above does not apply to:
 - The use of a tracking device by a law enforcement agency, law enforcement officer, prosecutor, or investigative officer in accordance with the bill's provisions;
 - The use of a tracking device to determine another person's location or movement if a vehicle owner or lien holder has consented to its use with respect to that vehicle, or if a vehicle lessor or lessee and operator have consented to its use with respect to that vehicle;
 - An action of a law enforcement agency acting in a law enforcement capacity or an action of a law enforcement official, court official, or another authorized person relating to an offender's or delinquent child's use of a GPS device or electronic monitoring device required under a sanction imposed or order issued under a Revised Code provision;
 - An action of U.S. military law enforcement personnel in the performance of their duties;
 - An action of a parent, guardian, custodian, or person *in loco parentis* of another person, with respect to determining the other person's location or movement;
 - An action of a family member or caregiver of another person diagnosed to be suffering from any of a list of specified diseases or dementias, with respect to determining the other person's location or movement;

--An action of a licensed, certified, or accredited hospice, nursing home, residential care facility, adult care facility, home for the aging, or hospital with respect to determining a patient's location or movement through the use of the device as considered medically necessary by the patient's physician;

--The provision of a commercial service, including mobile telephone service or vehicle safety or security service, that allows the provider to determine the location or movement of a device provided to a customer for the purpose of providing the service;

--An action of a Class A or Class B private investigator, while performing any duty authorized for the investigator in connection with pending, active civil litigation if the investigator has obtained a court order authorizing the use of a tracking device and other specified criteria apply.

- Authorizes a law enforcement officer or prosecutor to apply to a common pleas court judge for the issuance of a search warrant authorizing the installation, use, and removal of a tracking device and, if a warrant is so issued, provides procedures and rules for installation, use, and removal of the device.
- Authorizes an investigative officer or law enforcement officer to have installed and use a tracking device if: (1) the officer is specially designated by the Attorney General or by a prosecuting attorney to install and use a tracking device without the prior issuance of a search warrant, and (2) the officer reasonably determines that certain specified emergency circumstances exist and there are grounds upon which a search warrant could be issued to authorize the installation and use of the tracking device.
- Requires an investigative officer or law enforcement officer who installs and uses a tracking device under the circumstances described above to apply for and obtain a search warrant within a specified period of time after its installation and use.

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CONTENT AND OPERATION

Unauthorized use of a tracking device

Prohibition and penalty

The bill prohibits a person, subject to the exemptions described below in "**Exemptions**," from using a "tracking device" (see "**Unauthorized use definitions**," below) to determine the location or movement of another person without the other person's consent (see **COMMENT 1**). A violation of the prohibition is the offense of "unauthorized use of a tracking device," a misdemeanor of the first degree. (R.C. 2917.51(B) and (F).)

Exemptions

The prohibition described in the preceding paragraph does not apply to any of the following (R.C. 2917.51(C) and (D)):

(1) The use of a tracking device pursuant to the bill's provisions that pertain to the issuance and use of a tracking device search warrant, as described below in "**Tracking device search warrants**," by any law enforcement agency, law enforcement officer, prosecutor, or investigative officer if the use is in accordance with those provisions;

(2) The use of a tracking device to determine another person's location or movement if the owner or lien holder of a vehicle has consented to the use of a tracking device with respect to the vehicle and the device is used with respect to that vehicle, or if the lessor or lessee of a vehicle and the person operating the vehicle have consented to the use of a tracking device with respect to the vehicle and the device is used with respect to that vehicle;

(3) An action of a law enforcement agency acting in a law enforcement capacity or an action of a law enforcement official, court official, or other authorized person that relates to an offender's or delinquent child's use of a global positioning system device, global positioning device, or electronic monitoring device required pursuant to a sanction imposed or order issued under any Revised Code provision;

(4) An action of United States military law enforcement personnel in the performance of the personnel's official duties;

(5) An action of a parent, guardian, custodian, or person *in loco parentis* of a child or another person, with respect to determining the location or movement of the child or other person with whom the parent, guardian, custodian, or person *in loco parentis* has the specified legal relationship;

(6) An action of a person who is a family member or caregiver of another person who has been diagnosed by a licensed physician to be suffering from Alzheimer's Disease, Vascular Dementia, Pick's Disease, Creutzfeldt-Jakob Disease, Parkinson's Disease, or Lewy Body Dementia, with respect to determining the location or movement of the person who has been so diagnosed;

(7) An action of a facility licensed, certified, or accredited pursuant to R.C. Chapter 3712., 3721., 3722., or 3727. (see **COMMENT 2**), with respect to determining a patient's location or movement through the use of a tracking device when the device is considered medically necessary by the patient's physician;

(8) The provision of a commercial service, including, but not limited to, a mobile telephone service or vehicle safety or security service, that allows the provider of the service to determine the location or movement of a device provided to a customer of the service for the purpose of providing the service;

(9) An action of a "private investigator" who has been issued a "Class A" or "Class B" license (see "**Unauthorized use definitions**," below) under R.C. Chapter 4749. that is valid at the time of the action, while in the performance of any duty that is authorized for the private investigator in connection with pending, active civil litigation if all of the following apply: (a) before engaging in the action, the private investigator obtains an order authorizing the use of a tracking device from the court of common pleas of the county in which the person who is the subject of the tracking device resides, and (b) any information or data obtained as a result of the use of the device by the private investigator is kept confidential and is not to be disclosed to any person other than the judge and the parties involved in the litigation and their attorneys except upon order of the court in which the civil litigation is pending, the information or data so obtained is subject to discovery by any party to the civil litigation, and, upon the termination of the civil litigation, the information or data is immediately destroyed.

Implanting cannot be required

The bill specifies that, notwithstanding the exemptions described above in clauses (2) through (9) under "**Exemptions**," no person may be required to be implanted with a tracking device pursuant to its provisions in R.C. 2917.51 (R.C. 2917.51(E)).

Unauthorized use definitions

As used in the bill's provisions described above: (1) "tracking device" means any device that reveals its location or movement by the transmission of electronic signals, and (2) "Class A license," "Class B license," and "private investigator" have the same meanings as in existing R.C. 4749.01 (see **COMMENT 3**) (R.C. 2917.51(A)).

Tracking device search warrants

Application for warrant

The bill provides that a "law enforcement officer" of a law enforcement agency in the county in which the "tracking device" is to be installed, or a "prosecutor" who serves that county or a municipal corporation within that county, may apply to a judge of the court of common pleas of that county for the issuance of a search warrant authorizing the installation, use, and removal of a tracking device (see "**Tracking device warrant definitions**," below, for definitions of the terms in quotation marks). The application for a search warrant must be in writing upon oath or affirmation to a judge of the court of common pleas of the county in which the tracking device is to be installed and must contain all of the following (R.C. 2933.81(B)):

(1) A full and complete statement of the facts relied on by the applicant that are sufficient to establish probable cause to believe that a particular crime has been, is being, or will be committed and that the person or object to be tracked is, was, or will be involved in the commission or facilitation of that crime;

(2) A full and complete statement of the facts relied on by the applicant that are sufficient to establish probable cause to believe that the use of a tracking device will result in the prevention of a criminal offense under investigation, the seizure of evidence relevant to the investigation or prosecution of a criminal offense, or the whereabouts of a fugitive from justice or a suspect, victim, or witness relating to a criminal offense;

(3) A particular description of the person or object upon which a tracking device is to be installed.

Issuance and use of warrant

Upon the written application of a law enforcement officer or prosecutor made pursuant to the provisions described above in the prior paragraph, a judge of a court of common pleas with whom the application is made may issue a search warrant authorizing the installation, use, and removal of a tracking device. If a judge issues a search warrant of that nature, all of the following apply (R.C. 2933.81(C)):

(1) A tracking device authorized by the search warrant must be installed within ten days after the issuance of the warrant, the device must be installed within the county served by the issuing judge, the date and time of installation must be recorded and included in the return described below in (4) that is made to the issuing judge, and, if the device is not installed within the specified ten-day period, the warrant must be returned to the issuing judge as unexecuted.

(2) The search warrant must authorize the use of a tracking device for a reasonable period of time, not to exceed 45 days, unless extended as described in this paragraph, commencing on the date on which the device is installed upon the person or object to be tracked. Upon written application for an extension of the authorized time for use of the device and upon a finding of good cause, the issuing judge may authorize one or more extensions of the warrant for a reasonable period of time, not to exceed 45 days for each such extension.

(3) When the period of time authorized for the use of a tracking device under the search warrant or the last extension of the period of time for the use of the device has expired, monitoring of the tracking device must be discontinued immediately.

(4) Within ten days after the period of time authorized for the use of a tracking device under the search warrant or the last extension of the period of time for the use of the device has expired, the officer executing the warrant must make a return of the warrant to the issuing judge. The return must specify the date on which and the time at which the device was installed, the address or location of installation of the device, the date on which and the time at which the monitoring was discontinued, and a general summary of the movements of the object or person tracked during the duration of the tracking.

(5) Within ten days after the period of time authorized for the use of a tracking device under the search warrant or the last extension of the period of time for the use of the device has expired, the officer executing the warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. The "office" (this probably should refer to the "officer") is required to accomplish service of the warrant on a person under this provision by delivering a copy of it to the person, by leaving a copy of it at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location, or by mailing a copy of it to the person's last known address. Upon the request of the law enforcement officer or prosecutor who applied for the warrant or the officer who executed the warrant, the issuing judge may delay for a reasonable time service of the notice. If the issuing judge delays service of notice, the notice must be served not later than ten days after the issuance of an arrest warrant, indictment, or information based wholly or in part upon information derived from the use of a tracking device pursuant to the warrant.

(6) A tracking device installed and used under the authority of the search warrant may be used within the county served by the issuing judge and, provided the device is installed within that county, may be used outside that county.

(7) Except as otherwise described in this paragraph, the search warrant and any extension of the warrant, the application upon which the warrant and any extensions

were issued, the affidavit supporting the warrant and any extensions, the return made as described in (4), above, and any request for an order granting a delay in the service of notice must be filed with the clerk of the court of common pleas served by the issuing judge, or with the issuing judge if so ordered, at the time the return is made or when the warrant has been returned as described in (1), above, as unexecuted. The judge who issues the search warrant may order that the documents described in this paragraph be sealed while an investigation remains ongoing until such time that an arrest warrant, indictment, or information based wholly or in part upon information derived from the use of the tracking device installed and used under the authority of the search warrant is issued.

Emergency exception for investigative or law enforcement officer use of tracking device without a warrant

The bill provides that any "investigative officer" or "law enforcement officer" who is specially designated in writing by the Attorney General or by a "prosecuting attorney" (see "**Tracking device warrant definitions**," below, for definitions of the terms in quotation marks) for the purpose of having installed and using a tracking device without the prior issuance of a search warrant, may have installed and use a tracking device without the prior issuance of a search warrant pursuant to the bill if the officer reasonably determines both of the following: (1) an emergency situation exists that involves either immediate danger of death or serious physical harm to any person or conspiratorial activities characteristic of organized crime, and the emergency situation requires the installation and use of a tracking device before a search warrant authorizing that installation and use can, with due diligence, be obtained pursuant to the bill's warrant provisions described above, and (2) there are grounds upon which a search warrant could be issued pursuant to the bill to authorize such installation and use. The authority to use the emergency mechanism described in this paragraph is subject to the provisions described in the next paragraph.

If an investigative officer or law enforcement officer has installed and uses a tracking device under authority of the emergency mechanism described in the preceding paragraph, within 48 hours after the time the device is installed, the officer or another investigative officer or law enforcement officer serving the same law enforcement agency as that officer must apply for and obtain in accordance with the bill a search warrant approving the installation or use of the device. If an application for a search warrant is made and is granted, the bill's provisions described above in "**Issuance and use of warrant**" apply to the further installation and use of the tracking device. If an application for a search warrant is made and is denied, or if the installation or use of the tracking device under the emergency mechanism is terminated without a search warrant having been issued pursuant to the bill, any tracking information or other surveillance effected pursuant to the use of the device under the

emergency mechanism is confidential and cannot be disclosed or be admissible in any Ohio court except to prove violations of the bill's provisions described in "**Tracking device search warrants**" or in "**Unauthorized use of a tracking device.**" (R.C. 2933.81(D).)

Tracking device warrant definitions

As used in the bill's provisions described above regarding tracking device warrants (R.C. 2933.81(A)):

(1) "Tracking device" means, except as otherwise described in this paragraph, an electronic or mechanical device that, when placed or installed upon a person or object, permits one or more other persons to remotely determine or track the position and movement of the person upon whom, or the object upon which, the device is placed or installed. "Tracking device" does not include any of the following: (a) any device, including, but not limited to, a cellular telephone or another personal electronic device, that includes as an incidental feature the capability of determining the location of the device by utilizing a global positioning satellite system, or (b) any device that is installed or utilized with the knowledge and consent of the owner or user of the device or, in the case of a minor, with the knowledge and consent of the minor's parent or guardian.

(2) "Investigative officer" means any of the following (by reference to existing R.C. 2933.51, not in the bill): (a) an officer of Ohio or an Ohio political subdivision who is empowered by law to conduct investigations or to make arrests for a designated offense, (b) a sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a metropolitan housing authority police force, or State Highway Patrol trooper, or an officer, agent, or employee of Ohio or any of its agencies, instrumentalities, or political subdivisions upon whom by statute a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority, (c) an attorney authorized by law to prosecute or participate in the prosecution of a designated offense, (d) a secret service officer appointed pursuant to R.C. 309.07, and (e) an officer of the United States, a state, or a political subdivision of a state who is authorized to conduct investigations pursuant to the federal Electronic Communications Privacy Act of 1986, as amended.

(3) "Law enforcement officer" means any sheriff, deputy sheriff, constable, municipal police officer, marshal, deputy marshal, or State Highway Patrolman, or any officer, agent, or employee of Ohio or any of its agencies, instrumentalities, or political subdivisions upon whom, by statute, the authority to arrest violators is conferred, when the officer, agent, or employee is acting within the limits of that statutory authority.

(4) "Prosecutor" means the prosecuting attorney of a county, the village solicitor, city director of law, or similar chief legal officer of a municipal corporation, and any assistant of any of those officers.

COMMENT

1. No provision of existing law expressly regulates or prohibits a person's use of a tracking device to determine the location or movement of another person. But, when a person uses a tracking device to determine the location or movement of another person, depending upon the facts and circumstances present, a few provisions of existing law that include prohibitions that are more general in nature arguably could apply regarding the person's use of the device. Those provisions, none of which are in the bill and each of which requires one or more additional elements not specified in the provisions of the bill, include R.C. 2903.21 (which sets forth the offense of "aggravated menacing"), 2903.311 ("menacing by stalking"), 2903.22 ("menacing"), 2907.08 ("voyeurism"), 2907.22 ("promoting prostitution"), 2909.04 ("disrupting public services"), 2911.13 ("breaking and entering"), 2911.21 ("criminal trespass"), 2917.11 ("disorderly conduct"), 2917.21 ("telecommunications harassment"), 2921.04 ("intimidation of an attorney, victim, or witness in a criminal case"), 2921.31 ("obstructing official business"), 2921.32 ("obstructing justice"), and 2923.42 ("participating in a criminal gang").

Also, the existing Communications Interception Law, contained in R.C. 2933.51 to 2933.66, 2933.76, and 2933.77 (which are not in the bill), regulates and generally restricts the interception of wire, oral, or electronic communications, the use of pen registers, the use of trap and trace devices, and related activities. A violation of the prohibition restricting the interception is the offense of "interception of wire, oral, or electronic communications." The Law permits the interception in specified circumstances, including through the execution of an interception warrant obtained by a specified law enforcement official from a judge. The Law also contains special provisions that permit a judge of a court of common pleas to grant an oral order for an interception of a wire, oral, or electronic communication without a warrant.

The Communications Interception Law does not expressly regulate a person's use of a tracking device to determine the location or movement of another person and, in fact, *it expressly states that a communication from an electronic or mechanical tracking device that permits the tracking of the movement of a person or object is not an "electronic communication" for purposes of the Law.*

2. A "facility licensed, certified, or accredited pursuant to R.C. Chapter 3712., 3721., 3722., or 3727." is a hospice care program, home, nursing home, residential care facility, home for the aging, adult care facility, or hospital licensed, certified, or accredited pursuant to any of those Revised Code Chapters.

3. As used in the bill (by reference to existing R.C. 4749.01, not in the bill):

"Private investigator" means any person who engages in the "business of private investigation." **"Business of private investigation"** means, except when performed by one excluded under the provision described in the third succeeding paragraph, the conducting, for hire, in person or through a partner or employees, of any investigation relevant to any crime or wrong done or threatened, or to obtain information on the identity, habits, conduct, movements, whereabouts, affiliations, transactions, reputation, credibility, or character of any person, or to locate and recover lost or stolen property, or to determine the cause of or responsibility for any libel or slander, or any fire, accident, or damage to property, or to secure evidence for use in any legislative, administrative, or judicial investigation or proceeding.

"Class A license" means a license issued under R.C. 4749.03 that qualifies the person issued the license to engage in the business of private investigation and the business of security services.

"Class B license" means a license issued under R.C. 4749.03 that qualifies the person issued the license to engage only in the business of private investigation.

"Private investigator" and **"business of private investigation"** do not include: (a) public officers and employees whose official duties require them to engage in investigatory activities, (b) attorneys at law or an expert hired by an attorney at law for consultation or litigation purposes, (c) a consumer reporting agency, as defined in federal law, provided that the agency is in compliance with the requirements of federal law and that its activities are confined to other specified criteria, (d) certified public insurance adjusters that hold a certificate of authority issued pursuant to Ohio law, while the adjuster is investigating the cause of or responsibility for a fire, accident, or other property damage with respect to a claim for loss or damage under an insurance policy covering real or personal property, (e) personnel placement services and their employees engaged in investigating matters related to personnel placement activities, (f) an employee in the regular course of the employee's employment, engaged in investigating matters pertinent to the business of the employer or protecting property in the possession of the employer, provided the employer is deducting all applicable state and federal employment taxes on behalf of the employee and neither the employer nor the employee is employed by, associated with, or acting for or on behalf of any private investigator or security guard provider, (g) a better business bureau or similar organization or any of its employees while engaged in the maintenance of the quality of business activities relating to consumer sales and services, (h) an accountant registered or certified under Ohio law or any of the accountant's employees while engaged in activities for which the accountant is certified or registered, (i) a person who, for hire or otherwise, conducts genealogical research in Ohio, (j) an Ohio resident who conducts

research for the purpose of locating the last known owner of unclaimed funds, provided that the person is in compliance with Ohio law and rules, (k) a professional engineer registered under Ohio law or any of his or her employees, (l) an Ohio resident who, for hire or otherwise, conducts research for the purpose of locating persons to whom the state of Ohio owes money in the form of warrants that the state voided but subsequently reissues, (m) an independent insurance adjuster who, in any of a list of specified capacities, engages in the business of independent insurance adjustment, or a person who supervises the handling of claims except while acting as an employee of an insurer licensed in Ohio while handling claims pertaining to specific policies written by that insurer, or (n) except for a commissioned peace officer who engages in the business of private investigation or compensates others who engage in the business of private investigation or the business of security services or both, a commissioned peace officer.

HISTORY

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