

Legislation on License Plate Reader and Cell Phone Data
Fairfax County Board of Supervisors' Public Safety Committee
October 10, 2017

Privacy-Related Issues in the General Assembly

- Although legislators had been interested in privacy and law enforcement issues prior to 2013, revelations in 2013 regarding surveillance activities by federal agencies led to increased interest in privacy during the 2014 General Assembly (GA) session for members on both ends of the political spectrum.
- Since 2014, the GA has continued to consider a number of bills related to privacy issues, including law enforcement use of license plate readers (LPRs) and acquisition of cell phone data.
- This handout provides a sampling of relevant legislation, but it is important to note that the GA has considered other legislation tangential to the issue of privacy and data collection/retention by law enforcement.

License Plate Readers

- The Virginia State Police have used LPRs statewide since 2006, generally to detect stolen cars and fugitives. Data has also been used to solve other crimes after the fact, due to the ability to track a vehicle to a particular place at a specific time.
- On February 13, 2013, Attorney General Ken Cuccinelli issued an advisory opinion addressing the relationship between LPRs and the Virginia Government Data Collection and Dissemination Practices Act (Data Act), which governs the collection, maintenance, and dissemination of personal information by government agencies. The Data Act was enacted by the GA to address concerns relating to potentially abusive information-gathering practices by the government.
- Cuccinelli's advisory opinion stated that "the Data Act does not preclude law enforcement agencies from maintaining, using, and disseminating personal information collected by an LPR, provided such data specifically pertains to investigations and intelligence gathering relating to criminal activity."
- Cuccinelli specified that data collected by Virginia State Police in a "passive manner" and that is not directly related to a criminal investigation would be in violation of the Data Act and the Virginia Fusion Intelligence Center statutes, which govern the manner in which State Police may retain criminal intelligence information. Beginning the following session, the GA began considering bills designed to address the data retention period for information collected by LPRs.
- The following bills relating to LPRs were considered by the Virginia General Assembly, however, none were successfully enacted into law.

2017 GA Failed Legislation

HB 1657 (Marshall, R.G.) would have limited the retention of information obtained by LPRs to seven days, unless the information was the subject of an active investigation or was obtained pursuant to a

Summaries have been edited to highlight relevant elements of legislation. For the full text visit <http://lis.virginia.gov/>

warrant. A subsequent version of the bill would have limited retention to 60 days. Both versions would have added license plates to the definition of personal information.

SB 924 (Petersen) would have limited the retention of information obtained from LPRs to no more than seven days unless the information was the subject of an active investigation. Also would have added license plates to the definition of personal information.

2016 GA Failed Legislation

HB 141 (Marshall, R.G.) would have required that information collected by an LPR without a warrant only be retained for seven days, and would also have prohibited the acquisition of personal information collected from LPRs from a third-party private vendor, if the agency would not have been permitted to collect or retain the information on its own. Also would have added license plates to the definition of personal information.

SB 236 (Petersen) would have required that information collected by LPRs be purged after seven days unless it was being used in an ongoing investigation. Also would have added license plates to the definition of personal information.

HB 839 (McClellan) would have required the State Library Board to revise the retention schedule for surveillance videos, including visual and audiovisual recordings by LPRs, in order to ensure that such recordings are retained for at least 60 days.

2015 GA Failed Legislation

HB 1673 (Anderson)/**SB 965** (Petersen) would have prohibited the use of LPRs and other surveillance technology without a warrant, where the collection is of unknown relevance and is not intended for prompt evaluation and potential use in the investigation of crime or terrorism. These bills would have required information gathered by LPRs to be purged after seven days. *These bills passed the GA, but ultimately were vetoed by Governor McAuliffe.*

HB 1528 (Berg) would have allowed a law enforcement agency to collect information from an LPR, provided that any information collected would only be retained for 24 hours and would only be used for the investigation of a crime or a report of a missing person.

2014 GA Failed Legislation

HB 1269 (Anderson)/**SB 670** (Petersen) would have provided that, without a warrant, law enforcement and regulatory agencies could not use LPRs for the passive collection of data without some specific purpose for collecting the information.

Summaries have been edited to highlight relevant elements of legislation. For the full text visit <http://lis.virginia.gov/>

SB 452 (Howell) would have required the Department of State Police to maintain a LPR database under the control of the Virginia Fusion Intelligence Center, and would have made the unauthorized access to or dissemination of LPR data a Class 4 misdemeanor.

Cell Phone Data

- The GA considered several bills during the 2014, 2015, and 2016 sessions addressing the issue of when a search warrant is required to obtain data from electronic devices, including cell phones and computers.
- After legislation was successfully enacted during the 2014 and 2015 sessions, fewer bills were introduced on this particular aspect of privacy in 2016 and 2017.

2016 GA Enacted Legislation

HB 875 (Hugo) makes clear that law enforcement may obtain real-time location data from a communication provider without a warrant in the case of an emergency involving immediate danger to a person; the bill also deletes current Code language requiring that the communication provider must also believe that the emergency requires immediate disclosure of the information.

HB 326 (Albo) provides that a subpoena, search warrant, or court order requiring a communication provider to disclose information relating to a customer may require that the service provider not disclose the existence of the subpoena, search warrant, or court order for 90 days if the victim is under 18 and disclosure will endanger an individual's life or safety, or compromise an investigation.

2015 GA Enacted Legislation

HB 1408 (Marshall, R.G.) provides that if an investigative or law enforcement officer would be required to obtain a search warrant in order to obtain the contents of electronic communications or real-time location data from a provider of electronic communication service or remote computing service, the officer shall not use any device to intercept such communications or collect such real-time location data without first obtaining a search warrant authorizing the use of the device. *This legislation incorporates **HB 1348**.*

HB 2355 (Loupassi) provides that a search warrant for real-time location data shall be issued if the judge or magistrate issuing the warrant is satisfied that probable cause has been established that the real-time location data sought is relevant to a crime that is being committed or has been committed or that an arrest warrant exists for the person whose real-time location data is sought.

SB 1307 (Wexton) clarifies that a search warrant that authorizes the lawful seizure of digital evidence from a computer, computer network, or other device containing electronic or digital information includes the search and seizure of the physical components and the electronic or digital information contained in such computer, computer network, or other device.

Summaries have been edited to highlight relevant elements of legislation. For the full text visit <http://lis.virginia.gov/>

2014 GA Enacted Legislation

HB 17 (Marshall, R.G.) provides that a provider of an electronic communication service or remote computing service shall not disclose real-time location data to an investigative or law-enforcement officer except pursuant to a search warrant. *This legislation incorporates **HB 814 and HB 817**.*

2016 GA Failed Legislation

HB 1332 (Dudenhefer)/ **SB 599** (Petersen) would have prohibited a state or local government agency from taking certain actions relating to access to electronic communication information from a service provider, access to electronic device information from any person other than the authorized possessor of the device, or access to electronic device information by means of physical interaction or electronic communication with the electronic device.

2015 GA Failed Legislation

HB 1274 (Farrell)/ **HB 1349** (Carr)/ **SB 1110** (Barker) would have required a warrant in all cases before a search of cell phones, computers, or other electronic devices could be conducted.

HJ 578 (Anderson)/ **SJ 302** (Stuart) would have clarified that the right of the people to be secure against unreasonable searches and seizures of their persons, houses, businesses, lands, papers, and effects also applies to communications and stored personal information and data, and that a person's disclosure to another person of his papers, effects, or electronic communications, personal information, or data is not alone a waiver of this right.

2014 GA Failed Legislation

HB 173 (Farrell)/**HB 813** (Carr) would have required a warrant in all cases before a search of cell phones, computers, or other electronic devices could be conducted.

HB 325 (Marshall, R.G.) would have provided that a person has a right to privacy in the content and metadata of the person's electronic communications, including emails, text messages, telephone calls, location data, mobile or cellular phone signals, or other forms of electronic communications.

GPS Tracking Devices

At the request of Governor Bob McDonnell, and in response to the January 2012 U.S. Supreme Court decision in *United States v. Jones* requiring probable cause and the issuance of a search warrant for the use of GPS tracking devices, legislation was enacted in 2012 that allows a law-enforcement officer to apply for a search warrant to permit the use of a GPS tracking device (**HB 1298** (Albo)/**SB 685** (Reeves)).

Summaries have been edited to highlight relevant elements of legislation. For the full text visit <http://lis.virginia.gov/>