



May 21, 2016

**RE: The Kelsey Smith Act (H.R. 4889)**

Dear Representative,

**The Electronic Frontier Foundation (EFF) recommends a “NO” vote on the Kelsey Smith Act (H.R. 4889).** EFF empathizes with the bill’s goal of locating someone in an emergency situation; however, as currently written the bill expands the government’s surveillance ability to obtain cell phone location data from a phone company without first obtaining a probable cause warrant from a judge.

We believe the Fourth Amendment requires law enforcement to obtain a probable cause warrant for geolocation. If Congress wishes to create a narrowly defined emergency exception—like where there is an immediate threat of serious bodily harm—then we recommend the law require the government to obtain a probable cause warrant from a judge within 24 hours *after* the disclosure of geolocation information. Such a procedure in an emergency context is a core safeguard to prevent abuse by the government and preserve privacy. States such as California,<sup>1</sup> Colorado,<sup>2</sup> and Indiana<sup>3</sup> have recently passed similar provisions.

As currently written, the Kelsey Smith Act requires a telecommunications provider to disclose cell site location information “at the request of an investigative or law enforcement officer” when the phone has been used to place a 911 call, or when the officer reasonably believes that the cell phone is in the possession of an individual in an emergency situation that involves the risk of death or serious injury. This removes a longstanding protection in the law granting telecommunications providers’ discretion to reject cell phone location data requests in situations that are not true emergencies.<sup>4</sup>

The harms posed by removing checks on law enforcement access to cell site location information are not hypothetical. The Department of Justice found systemic misuse of emergency disclosure requests at the hands of federal agents in a 2010 report.<sup>5</sup> And instances of police making emergency requests where there was no true emergency have occurred in Texas, New York and Maryland.<sup>6</sup>

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<sup>1</sup> Cal. Penal Code § 1546.1(h).

<sup>2</sup> Col. Revised Stat. 18-9-312(1.5).

<sup>3</sup> Ind. H. B. 1013 (2016).

<sup>4</sup> 47 U.S.C. § 222(d).

<sup>5</sup> DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION’S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS 257–72 (2010), available at <https://oig.justice.gov/special/s1001r.pdf>.

<sup>6</sup> See *State v. Harrison*, No. 02-13-00255-CR, 2014 WL 2466369, at \*4–5 (Tex. App. May 30, 2014); *People v. Moorner*, 959 N.Y.S.2d 868, 872, 875 (N.Y. Co. Ct. 2013); *Upshur v. State*, 56 A.3d 620, 625–26 (Md. App. 2012).

**Indeed, the 113<sup>th</sup> Congress understood these concerns. The prior version of the Kelsey Smith Act (H.R. 1575) required law enforcement to obtain a probable cause court order within 48 hours of requesting cell phone location data from a telecommunications provider.<sup>7</sup> We see no reason why such a core protection should not be included in the current Kelsey Smith Act.**

The requirement to file a probable cause court order within 48 hours is only one of the strong privacy protections the bill must include. In addition, we agree with the American Civil Liberties Union (ACLU) and recommend including:

- ***Suppression Remedy.*** *The bill should provide a remedy in cases where the court finds a violation of the law or fails to provide retroactive authorization. Any information obtained in violation of the law should not be used as evidence in any criminal, immigration, or administrative proceedings. This will provide individuals a remedy in cases where their information is illegally obtained. It will also act as a strong deterrent for making an emergency request in cases where a true emergency does not exist.*
- ***Notice.*** *The bill should require that prompt notice be given to a person whose location information is obtained. Without this provision, an individual may have no ability to pursue judicial remedies if a law enforcement official acts in violation of the law to obtain his or her cell phone location data. California recently passed legislation that includes such a provision for emergency requests.<sup>8</sup> Since location disclosure requests should only be made in true emergencies, notifying individuals that their location information was gathered after they are out of harm's way should not have a negative impact on law enforcement's interests.*
- ***Civil Remedies.*** *The bill should provide a civil remedy so that all people, including those never charged with a crime, can obtain redress in cases where a judge determines that law enforcement has violated the law.*

While we commend the intentions of the Kelsey Smith Act, we believe the bill does not adequately protect privacy and could provide a mechanism for governmental abuse. **We urge members to vote “NO” on the Kelsey Smith Act (H.R. 4889).**

If you have any questions, please feel free to contact Mark Jaycox or Ernesto Falcon at [jaycox@eff.org](mailto:jaycox@eff.org), [ernesto@eff.org](mailto:ernesto@eff.org), or 415-436-9333.

Sincerely,

Electronic Frontier Foundation

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<sup>7</sup> See <https://www.congress.gov/bill/113th-congress/house-bill/1575/text>.

<sup>8</sup> Cal. Penal Code § 1546.1(h).