

United States District Court, S.D. New York.
In re APPLICATION OF THE UNITED STATES
FOR AN ORDER FOR PROSPECTIVE CELL SITE
LOCATION INFORMATION ON A CERTAIN
CELLULAR TELEPHONE
No. 06 CRIM. MISC. 01.

Feb. 28, 2006.

OPINION AND ORDER

PECK, Magistrate J.

*1 Presently before the Court is the Government's application for an order "authorizing the use of a pen register with a caller identification device and/or trap and trace device" for the next sixty days. (Sealed Application of A.U.S.A. Christine Y. Wong, 2/22/06.) The Government's application also seeks prospective cell site location information, specifically an order:

(b) pursuant to [Title 18, United States Code, Section 2703\(d\)](#), authorizing the pen register to capture and report at the same time originating and terminating cell site location information (specifically, information which identifies the antenna tower receiving transmissions from that cellphone (and any information on what portion of that tower is receiving a transmission, if available) at the beginning and end of a particular telephone call made or received by the cellphone's user, which information is to be transmitted from the cellphone's service provider to the DEA and other law enforcement agencies) ("Cell Site Location Information"), for all calls made to or from the CELLPHONE; ...

(2/22/06 A.U.S.A. Wong Application δ 2.) The Government's application is *DENIED*.

The issue of prospective cell site location information has been the subject of at least ten prior decisions by Magistrate Judges in this Circuit and around the country. While my colleague Magistrate Judge Gorenstein has approved a similar Government application for prospective cell site location information, [In re Application of the United States For An Order For Disclosure of Telecommunication Records And Authorizing the Use of A Pen Register and Trap and Trace](#), 405 F.Supp.2d 435 (S.D.N.Y.2005) (Gorenstein, M.J.), ^{FN1} I respectfully come to the opposite conclusion. In doing so, I join eight decisions by seven other Magistrate Judges (including Magistrate Judges Orenstein and Feldman in this Circuit) in concluding that statutory authority

for prospective cell site location information is lacking. *In re Application of the United States for Orders Authorizing the Installation and Use of Pen Registers and Caller Identification Devices on Telephone Numbers [Sealed]*, Misc. No. 06-41, 2006 WL _____ (D.Md. Feb. 27, 2006) (Bredar, M.J.); ^{FN2} [In re Application of the United States For An Order Authorizing the Installation and Use of a Pen Register and/or Trap and Trace and the Disclosure of Subscriber and Activity Information Under 18 U.S.C. \$\beta\$ 2703](#), No. 06-MJ-506.-F. Supp.2d-, 2006 WL 354289 (W.D.N.Y. Feb. 15, 2006) (Feldman, M.J.); *In re Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Information*, No. 06 Misc. 004,-F.Supp.2d-, 2006 WL 243017 (E.D.Wise. Jan. 17, 2006); *In re Application of the United States for an Order Authorizing the Release of Prospective Cell Site Information*, 407 F.Supp.2d 132 (D.D.C.2006); *In re Application of the United States for an Order Authorizing the Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed) and the Production of Real Time Cell Site Information*, 402 F.Supp.2d 597 (D.Md.2005); *In re Applications of the United States for Orders Authorizing the Disclosure of Cell Site Information*, Nos. 05-403, et al., 2005 WL 3658531 (D.D.C. Oct. 26, 2005); *In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information*, 396 F.Supp.2d 294 (E.D.N.Y.2005) (Orenstein, M.J.); *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747 (S.D.Tex.2005). ^{FN3}

^{FN1} Magistrate Judge Hornsby in Louisiana similarly approved a Government request for cell site location information, *In re Application of the United States for an Order Authorizing the Installation and Use of A Pen Register and Trap and Trace Device and Authorizing Release of Subscriber Information and/or Cell Site Information*, No. 06-5021M-01.-F. Supp.2d-, 2006 WL 244270 (W .D. La. Jan. 26, 2006).

^{FN2} In this most recent opinion, Magistrate Judge Bredar, who previously rejected the Government's request for [real time triangulated cell site location information](#), 402 F.Supp.2d 597 (cited below), was called upon by the Government to re-examine his

decision, in light of Judge Gorenstein's decision, for a request limited to single tower data for the beginning and end of the call. (Slip Op at 3-5.) Magistrate Judge Bredar reiterated his prior decision denying cell site location information: “[U]pon review, the court remains convinced that cell site information cannot be obtained on a prospective basis through a combination of the Pen/Trap Statute and the SCA. The information now requested does not escape this holding by virtue of its less intrusive nature.” (Slip Op at 8.)

FN3. See also *In re Application of United States for an Order Authorizing the Installation and Use of A Pen Register with Caller Identification Device and Cell Site Location Authority on a Certain Cellular Telephone*, No. Misc. 2:06 MC 00027-F, Supp.2d-, 2006 WL 445922 at *2-3 (S.D.W.Va. Feb. 17, 2006) (Stanley, M.J.) (Court is “unpersuaded by the government's argument” for authority for a pen register with cell site information, but need not reach the issue because the person sought by the government is not the phone's subscriber and thus is not protected by 47 U.S.C. § 1002(a)(1)).

*2 Because so much has been written on this subject, the Court need not reinvent the wheel nor write at length, but merely states that the Court agrees with these prior decisions that have rejected the Government's “hybrid” statutory interpretation theory, *i.e.*, that it can combine the Pen Register statute, 18 U.S.C. § 3222, 3123; the Communication Assistance for Law Enforcement Act of 1994 (“CALEA”), 47 U.S.C. § 1002(a)(2); and the Stored Communications Act (“SCA”), 18 U.S.C. § 2703(c)-(d), to obtain prospective cell site location information. The Court adopts the statutory interpretation reasoning of the “majority” view set forth in the cases cited above.

The Court also notes that while the Government's request for cell site location information in this District has been limited to general tower location (not triangulation information that can more precisely give the cell phone's location) and only for the origination and termination of calls, the Government's statutory interpretation would allow it to obtain triangulation location information for the entire duration of the call and, indeed, for all times the cell phone is on, even when no call is in progress. See, *e.g.*, Magistrate Judge Bredar's 2/27/06 Decision,

Slip Op at 9-10. The Government candidly admitted in oral argument before Magistrate Judge Feldman in the Western District of New York that the only reason it was not currently seeking the triangulation location information for the entire time a cell phone is on (or for call duration) is because of judicial opposition (*e.g.*, Magistrate Judge Orenstein's early opinion). See *In re Application*, 2006 WL 354289 at *7 & n. 5.^{FN4}

FN4. The Court understands that the Government's position in all of these cases in the various districts is coordinated (and likely determined) by the Department of Justice in Washington, D.C.

If the Department of Justice needs to obtain prospective cell site location information in criminal investigations, it needs to ask Congress to explicitly grant it such authority. See *In re Application*, 2006 WL 354289 at *8 n. 6 (noting that a bill on cell site location issues was recently introduced in the Senate).

Because Judge Gorenstein and I have now reached opposite conclusions, I recommend that the Government seek review of this issue by filing timely objections to this Opinion with the Part I District Judge or otherwise seeking appropriate review by an appropriate District Judge.^{FN5} (The Government is directed to send me courtesy copies of any such filings and rulings.)

FN5. The Court notes that the District Judge who was asked to review Magistrate Judge Feldman's decision denying the Government's application stated that the Government could not file “objections” or “appeal” the Magistrate Judge's denial to the District Judge, but should re-submit the cell site request to that District Judge, who would either sign it or not sign it. The District Judge also told prosecutors that they should obtain legislation to allow prospective cell site location information. See Gary Craig, *Ruling on Using Cell Phone to Track Suspect Could End Up Unknown*, Democrat and Chronicle, Feb. 28, 2006, available at <http://www.democratandchronicle.com/apps/pbcs.dll/article?AID=/20060228/NEWS01/602280332> & SearchID=73237037196663.

SO ORDERED.

S.D.N.Y.,2006.

In re Application of U.S. for an Order for Prospective
Cell Site Location Information on a Certain Cellular
Telephone

Slip Copy, 2006 WL 468300 (S.D.N.Y.)

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