



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-20777

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**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

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AN ACT <sup>you lat</sup> relating to: prohibition on the use of location information from a <sup>tele</sup> cellular phone by law enforcement without court authorization and providing a penalty.

***Analysis by the Legislative Reference Bureau***

Current law limits certain interceptions of communications and the use of pen register or trap and trace devices. This bill prohibits, with certain exceptions, law enforcement officers from using the mobile tracking features of a cellular phone or other wireless communications device to to identify or track the location of a person, item, or vehicle without first obtaining a court order authorizing the action.

For further information see the **state and local** fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

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SECTION 1. 134.43 (3) of the statutes is amended to read:

134.43 (3) Any person who is the victim of an intrusion of privacy under this section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible under ss. 968.27 to ~~968.37~~ 968.373.

1           **SECTION 2.** <sup>X</sup>968.27 (10) of the statutes is amended to read:

2           968.27 (10) "Investigative or law enforcement officer" means any officer of this  
3 state or political subdivision thereof, who is empowered by the laws of this state to  
4 conduct investigations of or to make arrests for offenses enumerated in ss. 968.28 to  
5 ~~968.37~~ <sup>✓</sup>968.373, and any attorney authorized by law to prosecute or participate in the  
6 prosecution of those offenses.

7 History: 1971 c. 40 s. 93; 1987 a. 399; 1991 <sup>✓</sup>a. 39; 1997 a. 218; 2009 a. 349.

7           **SECTION 3.** <sup>✓</sup>968.373 of the statutes is created to read:

8           **968.373 Warrant for location information from communications**

9           **device.** (1) DEFINITIONS. In this section:

10           (a) "Cellular <sup>tele</sup>phone" includes other wireless communications devices.

11           (b) "Location information" means any information concerning the location of  
12 a cellular telephone that is wholly or partly generated by or derived from the mobile  
13 tracking features of the cellular telephone.

14           (2) PROHIBITION. Except as provided in sub. <sup>✓</sup>(8), no investigative or law  
15 enforcement officer may use location information to identify or track the locations of  
16 a person, vehicle, or item without first obtaining a court order under sub. <sup>✓</sup>(4).

17           (3) APPLICATION TO USE LOCATION INFORMATION. The attorney general or a district  
18 attorney may apply for an order or for an extension of an order under sub. <sup>✓</sup>(4) that  
19 authorizes, in writing, the use of location information to identify or track the location  
20 of a person, vehicle, or item. The attorney general or district attorney shall include  
21 in the application the identity of the applicant, the identity of the law enforcement  
22 agency conducting the investigation, an identification of the cellular <sup>tele</sup>phone to be  
23 monitored and its owner or possessor, and a certification by the applicant that the  
24 information likely to be obtained from the use of the location information is relevant

1 to an ongoing criminal investigation that the law enforcement agency is conducting.  
2 The attorney general or district attorney shall submit the application to the circuit  
3 court of one of the following:

4 (a) The county in which the investigation is taking place.

5 (b) The county in which the person, vehicle, or item is located.

6 (4) AUTHORIZATION. (a) Upon receiving an application under sub. (3), the court  
7 shall enter an ex parte order authorizing the use of location information to identify  
8 or track the location of a person, vehicle, or item if the court determines that the  
9 applicant has demonstrated that the information likely to be obtained by the use of  
10 the location information is relevant to an ongoing criminal investigation. An order  
11 entered under this paragraph may not authorize the use of location information to  
12 track for more than 90 days.

13 (b) The court may extend an order under par. (a) for a period of no more than  
14 90 days upon an application for extension by the attorney general or a district  
15 attorney, subject to the court determination under par. (a).

16 (c) An order authorizing the use of location information must direct the  
17 following:

18 1. That the order be sealed until otherwise ordered by the court.

19 2. That any person who has been ordered by the court to provide assistance to  
20 the applicant not disclose the existence of the order or of the investigation to any  
21 other person unless ordered by a court.

22 (d) In addition to any other right to appeal, the state has the right to appeal  
23 from an order denying an application for an order under par. (a) or (b), and an appeal  
24 under this paragraph shall be ex parte and in camera in preference to all other  
25 pending appeals in accordance with rules promulgated by the supreme court.

1 (5) ASSISTANCE. Upon the request of the attorney general, a district attorney,  
 2 or a law enforcement agency authorized under sub. (4) (a) or (b) to use location  
 3 information, the court shall order a provider of cellular phone service or other person  
 4 to provide to an investigative or law enforcement officer information, facilities, and  
 5 technical assistance to identify or track the location of a person, vehicle, or item by  
 6 the use of location information. A person who is ordered under this subsection shall  
 7 be compensated for the reasonable expenses incurred. *A person*

*tele?*

8 (6) CONFIDENTIALITY OF INFORMATION. *or* An investigative or law enforcement  
 9 officer who, by any means authorized under this section, obtains location  
 10 information, or evidence derived from the location information, may not disclose or  
 11 use the information or evidence obtained *investigative or* except as follows:

12 *(a) If the person is an law enforcement officer,*  
 13 He or she may disclose the information or evidence to another investigative  
 14 or law enforcement officer to the extent that the disclosure is appropriate to the  
 15 proper performance of the official duties of the officer making or receiving the  
 16 disclosure.

17 *(b)* He or she may use the information or evidence to the extent that the use is  
 18 appropriate to the proper performance of his or her official duties.

19 *(c) (b) who would have* A person who, by any means authorized under this section, obtains location  
 20 information, or evidence derived from the location information, may not disclose or  
 21 use the information or evidence obtained except while giving testimony under oath  
 22 or affirmation in any court proceeding or before any magistrate or grand jury.

23 (7) DEFENSE AND IMMUNITY. (a) Good faith reliance on a court order under this  
 24 section constitutes a complete defense to any action brought under this section.

25 (b) No cause of action may arise against any provider of services related to  
 cellular phones, its officers, employees, or agents or other persons specified in the

*tele?*

*He or she may disclose the information or evidence while*

1 court order under sub. (5) for providing information, facilities, or assistance in  
2 accordance with the terms of a court order under sub. (5).

3 (8) EXCEPTION. (a) The prohibition in sub. (2) does not apply if a law  
4 enforcement officer uses location information to identify or track the location of a  
5 person, vehicle, or item if any of the following applies:

6 1. The person is reported missing or the vehicle or item is reported stolen by  
7 the owner.

8 2. An immediate, life-threatening emergency is occurring or imminent and the  
9 use of the location information is relevant to preventing or minimizing the  
10 emergency or its impact.

11 (b) If a law enforcement or investigative officer uses location information as  
12 provided under par. (a) 2., the officer shall apply for a warrant under sub. (3) as soon  
13 as practicable. If the judge finds that an immediate, life-threatening emergency did  
14 not occur or was not imminent and declines to provide authorization under sub. (4),  
15 any evidence obtained is not admissible in a criminal action.

16 (9) PENALTY. (a) Whoever knowingly violates sub. (2) may be fined not more  
17 than \$10,000 or imprisoned for not more than 9 months or both.

18 (b) Any device used in violation of sub. (2) may be seized as contraband by any  
19 law enforcement officer and forfeited to this state in an action by the department of  
20 justice under ch. 778.

21 SECTION 4. 995.50 (7) of the statutes is amended to read:

22 995.50 (7) No action for invasion of privacy may be maintained under this  
23 section if the claim is based on an act which is permissible under ss. 196.63 or 968.27  
24 to ~~968.37~~ 968.373.



## Modifications to Cell Tracking Draft LRB-2077/p1

All changes from the original LRB draft are highlighted in yellow.

SECTION 1. 134.43 (3) of the statutes is amended to read:

134.43 (8) Any person who is the victim of an intrusion of privacy under this section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible under ss. 968.27 to ~~968.37~~ 968.373.

SECTION 2. 968.27 (10) of the statutes is amended to read:

968.27 (10) "Investigative or law enforcement officer" means any officer of this state or political subdivision thereof, who is empowered by the laws of this state to conduct investigations of or to make arrests for offenses enumerated in ss. 968.28 to ~~968.37~~ 968.373, and any attorney authorized by law to prosecute or participate in the prosecution of those offenses.

SECTION 3. 968.373 of the statutes is created to read:

968.373 Warrant for location information from communications device. (1) DEFINITIONS. In this section:

(a) "Cellular telephone" includes any wireless or mobile device that transmits wire communications or electronic communications.

*Note: I changed this definition from (1)(a) The term "wireless communications" has no meaning under state or federal electronic surveillance laws. In fact, the term cellular telephone is not defined either. So I think the focus should be on what kinds of devices we are talking about: devices that transmit wire and electronic communications s. 968.27. I believe that this definition would then get at technologies beyond cellular technologies such as satellite phones. We don't have the ability to track those now but it provides guidance in the future.*

(b) Location information" means any information concerning the location of a cellular telephone that is wholly or partly generated by or derived from the mobile tracking features of the cellular telephone.

(2) PROHIBITION. Except as provided in sub. (8), no investigative or law enforcement officer may use location information to identify or track the location of a person, vehicle, or item without first obtaining a court order under sub. (4).

(3) APPLICATION. Upon the request of the district attorney or attorney general,<sup>1</sup> a law enforcement officer may apply to a judge for a warrant authorizing the use of location information to identify or track the location of a person, vehicle or item. The application shall be under oath or affirmation, may be in writing or orally, and may be upon personal knowledge or information and belief. The application shall:

- a. Identify the person, vehicle or item to be located;
- b. Identify, if known, the owners or possessors of the vehicle or item to be located;
- c. Identify, if known, the person who is the subject of the investigation;
- d. Provide a statement of the offense to which the information likely to be obtained relates;
- e. Provide a statement setting forth facts and circumstances which provide the applicant with probable cause that the criminal activity has been, is, or will be in progress and that the use the location information will yield information relevant to an ongoing criminal investigation.

*Note: The drafter used the pen register/trap & trace statute as a model. However, I believe that this should be treated as a warrant based on the higher probable cause standard. By drafting (3) in this manner (see e.g. s. 968.375), we eliminate the need for much of the language in (4). Further, we need to call this a warrant for purposes of obtaining compliance assistance from phone companies. National phone companies are no longer providing locational data in response to a subpoena. They insist on a warrant that complies with the ECPA (18 USC 2703). So far, the providers have been responding to s. 968.375 warrants for other types of provider records because they believe that section complies with federal law. So it is best to track our current statute.*

*I have eliminated the geographical restrictions on the locations of the courts that can issue these orders. As a practical matter, local agencies working on an investigation in their county will go to local judges. Search warrants, which are far more intrusive, have no such restrictions. A judge can issue a warrant for anywhere in the state. In addition, this helps our DCI agents who are not always conveniently located to the county of investigation.*

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<sup>1</sup> Officers do not need a prosecutor's approval to obtain a search warrant. And certainly installation of a tracking device results in the seizure of information less personal than that than can be obtained through a search warrant at a house. However, we have imposed requirements for prosecutorial oversight in a number of areas involving intrusions less invasive than a search warrant including subpoenas for records under §968.135 & §968.375, and pen register/trap & trace requests under §§968.35-.36.

(4) WARRANT: The judge shall issue a warrant authorizing the use of location information to identify or track the location of a person, vehicle or item if the court finds that the application satisfies the requirements in sub. (2). A warrant issued under this section shall not be issued for a period to exceed 60 days. The court may extend an order for a period of no more than 60 days upon the request of the attorney general or a district attorney that satisfies the requirements of (3).

*Note: The purpose of (4) is to specify the length of the order. The 60 days here would dovetail our pen register and trap & trace statute. Why is this important? We often utilize both cell tracking and pen register/trap & trace orders at the same time. So it would make sense to have a common 60 day time limit for both. To renew the request, the prosecutor would have to make a new probable cause showing.*

(4m) SECRECY. A warrant under this section shall be issued with all practicable secrecy and the request, application, or other information upon which it is based may not be filed with the clerk or made public until the warrant has been executed and returned to the court. The judge may issue an order sealing the order, application, request and other information upon which the warrant is based. The judge may issue an order prohibiting any person who has been ordered by the judge to provide assistance to the applicant not to disclose the existence of the warrant or of the investigation to any other person unless ordered by a judge.<sup>2</sup>

*Note: I adopted our secrecy language from s. 968.375.*

(4)(d) In addition to any other right to appeal, the state has the right to appeal from an order denying an application for a warrant under this section, and an appeal under this paragraph shall be ex parte and in camera in preference to all other pending appeals in accordance with rules promulgated by the Supreme Court.

*Note: I have retained this language on the right to an appeal. However, I do not believe it is necessary. I believe we would have the right to appeal a circuit court's decision.*

(5) ASSISTANCE. Upon the request of the attorney general, a district attorney, or a law enforcement agency authorized under sub. (4) to use location information, shall order a provider of ~~cellular telephone~~ electronic communication service or other person to provide to an investigative or law enforcement officer information, facilities, and technical assistance to identify or track the location of a person, vehicle, or item by the use of location information. A person who is ordered under this subsection shall be compensated for the reasonable expenses incurred.

*Note: Use the term electronic communication service. See s. 968.27(5). It captures not just cellular telephone providers but providers of any other kind of technology in which communications are sent.*

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<sup>2</sup> We discussed whether we should have a provision requiring law enforcement to serve a copy of the order on the suspect after its execution is completed. We do not in the pen register/trap & trace statute or in our s. 968.375 statute. But we do in the wiretap statute.

~~(6) CONFIDENTIALITY OF INFORMATION. A person who, by any means authorized under this section, obtains location information, or evidence derived from the location information, may not disclose or use the information or evidence obtained except as follows:~~

~~(a) If the person is an investigative or law enforcement officer, he or she may disclose the information or evidence to another investigative or law enforcement officer to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.~~

~~(b) If the person is an investigative or law enforcement officer, he or she may use the information or evidence to the extent that the use is appropriate to the proper performance of his or her official duties.~~

~~(c) He or she may disclose the information or evidence while giving testimony under oath or affirmation in any court proceeding or before any magistrate or grand jury.~~

**(6) Location information is exempt from disclosure under s. 19.35(1).**

*Note: The language in (6) derives from our wiretap law in s. 968.29. That language is intended to protect the dissemination of communications. This order does not involve the interception of confidential communications. As such, it is not appropriate to impose a requirement parallel to Wis. Stat. s. 968.29. Instead, I believe we can generally protect these records from release by expressly exempting them from disclosure under s. 19.35/36.*

~~(7) DEFENSE AND IMMUNITY. (a) Good faith reliance on a court order under this section constitutes a complete defense to any action brought under this section. A person on whom a warrant issued under this section is served is immune from civil liability for acts or omissions in providing records or information, facilities, or assistance in accordance with the terms of the warrant.~~

*Note: I would rewrite (7)(a) on immunity and adopt the language we use in s. 968.375(13). I would retain (7)(b) on defense.*

~~(b) No cause of action may arise against any provider of electronic communication service, services related to cellular telephones, its officers, employees, or agents or other persons specified in the court order under sub. (5) for providing information, facilities, or assistance in accordance with the terms of a court order under sub. (5).~~

*Note: Use the term electronic communication service. See s. 968.27(5).*

~~(8) EXCEPTION. (a) The prohibition in sub. (2) does not apply if a law enforcement officer uses location information to identify or track the location of a person, vehicle, or item if any of the following applies:~~

1. The person is reported missing or the vehicle or item is reported stolen by the owner and there are reasonable concerns for the person's physical or mental health and safety.

*Note: I am adding a requirement that there be a reasonable concern for a person's physical or mental health or safety. Why? I am concerned that a "person is reported missing" could swallow up the whole. Some people may deliberately choose to disappear. We should only use this technology for purposes of locating persons when there is a reasonable concerns for that person's safety.*

2. An immediate, life-threatening emergency is occurring or imminent and the use of the location information is relevant to preventing or minimizing the emergency or its impact. An emergency involving danger of death or serious physical injury to any person exists

*Note: Instead of using the drafted language, I used language from 18 USC 2702 that is also incorporated in to s. 968.375(15). I think it is important to tie in to federal language governing these issues so that we have a body of case law to help guide courts and law enforcement in the future.*

3. The vehicle or other item is reported stolen by the owner.

*Note: I took the last clause in (a)1 and inserted it in (a)3. because that section deals with property as opposed to people. I do have one concern for this section. Under the law, if a person takes a stolen item in to a place where he or she has an expectation of privacy, law enforcement would require a warrant to locate it. Why? The location of that device (e.g. an I-Pad) in a specific location is really disclosing something about a place where a person has a reasonable expectation of privacy. Thus, while the thief may not have an expectation of privacy with respect to the device that he stole, he may have an expectation of privacy where it is located. I just don't know where our court is going to come down on that. In the case of stolen vehicles, I am less concerned because chances are it won't be put in to a place where it could be hidden from public view (except for a garage).*

~~(b) If a law enforcement or investigative officer uses location information as provided under par. (a) 2., the officer shall apply for a warrant under sub. (3) as soon as practicable. If the judge finds that an immediate, life-threatening emergency did not occur or was not imminent and declines to provide authorization under sub. (4), any evidence obtained is not admissible in a criminal action.~~

*Note: I would eliminate the after the fact warrant requirement under (8)(b) for any (8)(a)2. situation. Under exigent circumstances law, we do not need a warrant. However, in order to use the evidence in court, we would have to demonstrate that the circumstances were exigent. If the state could not demonstrate the exigency in court, then the court would be obligated under 4th amendment to suppress the evidence. Under these circumstances, both sentences in (b) are unnecessary. Further, in many emergency situations in which we are trying to locate a person, we may not be able to articulate that*

*a crime is occurring. The law does not require PC when law enforcement is looking for a person whose health/life is threatened and it is not the result of a crime. If the legislator wants to retain the first sentence of (8)(b), then we would have to draft an even broader definition of PC to include noncrime situations in which life/death are imminent.*

(9) PENALTY. (a) Whoever knowingly violates sub. (2) may be fined not more than \$10,000 or imprisoned for not more than 9 months or both.

(b) Any device used in violation of sub. (2) may be seized as contraband by any law enforcement officer and forfeited to this state in an action by the department of justice under ~~ch. 778~~ Wis. Stat. 973.075.

SECTION 4. 995.50 (7) of the statutes is amended to read:

995.50 (7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 196.63 or 968.27 3 to 968.37 968.373.

*Because this is a warrant, we should also add some provisions present in our s. 968.375 warrant process as well as our standard warrant process:*

**( ) RETURN. A warrant issued under this section shall be returned to the court not later than 5 days after the records or information described in the warrant are received by the attorney general, district attorney, or law enforcement agency, whichever is designated in the warrant.**

*Note: By requiring law enforcement to return these to the circuit court, it allows the courts and the public to track law enforcement use of this technology. This tracks §968.375.*

**( ) TECHNICAL IRREGULARITIES. Evidence disclosed under a warrant issued under this section shall not be suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant.**

*Note: This tracks §968.375. Alternatively, we could use the following language “( ) A court shall not exclude evidence obtained in violation of this section unless its exclusion is required by the United States Constitution or the Wisconsin Constitution.”*

*Finally, this bill is primarily concerned with using tracking technology to proactively locate a telephone. It does not provide any guidance with respect to historic cell site location data. We believe that Wis. Stat. s. 968.375 already authorizes obtaining use of this data through the subpoena/warrant process. However, some legislative proposals have been floated at the federal level that would amend federal law and incorporate a*

*warrant requirement. To avoid any issues under state law, the Legislature should amend Wis. Stat. s. 968.375 to require a warrant (rather than a subpoena) to obtain locational/cell-site data.*

**Section 968.375(4)(c) shall be created as follows:**

**(c) A record or information that identifies the location of a device used to transmit electronic or wire communications.**



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**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

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1 AN ACT to amend 134.43 (3), 968.27 (10) and 995.50 (7); and to create 968.373  
2 of the statutes; relating to: prohibition on the use of location information from  
3 a cellular telephone by law enforcement without court authorization and  
4 providing a penalty. a warrant

**Analysis by the Legislative Reference Bureau**

Current law limits certain interceptions of communications and the use of pen register or trap and trace devices. This bill prohibits, with certain exceptions, law enforcement officers from using the mobile tracking features of a cellular telephone or other wireless communications device to to identify or track the location of a person, item, or vehicle without first obtaining a court order authorizing the action.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

from a court a warrant f. r.

5 SECTION 1. 134.43 (3) of the statutes is amended to read:

1           134.43 (3) Any person who is the victim of an intrusion of privacy under this  
2 section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible  
3 under ss. 968.27 to <sup>✓</sup>968.37 968.373.

4           <sup>✓</sup>**SECTION 2.** 968.27 (10) of the statutes is amended to read:

5           968.27 (10) "Investigative or law enforcement officer" means any officer of this  
6 state or political subdivision thereof, who is empowered by the laws of this state to  
7 conduct investigations of or to make arrests for offenses enumerated in ss. 968.28 to  
8 <sup>✓</sup>968.37 968.373, and any attorney authorized by law to prosecute or participate in the  
9 prosecution of those offenses.

10          <sup>✓</sup>**SECTION 3.** 968.373 of the statutes is created to read:

11          **968.373 Warrant for location information from communications**  
12 **device.** (1) DEFINITIONS. In this section:

13          (a) "Cellular telephone" includes <sup>any</sup>other wireless <sup>or mobile device that transmits wire or electronic</sup>communications devices.

14          (b) "Location information" means any information concerning the location of  
15 a cellular telephone that is wholly or partly generated by or derived from the mobile  
16 tracking features of the cellular telephone.

17          (2) PROHIBITION. Except as provided in sub. <sup>✓</sup>(8), no investigative or law  
18 enforcement officer may use location information to identify or track the location of  
19 a person, vehicle, or item without first obtaining a court order <sup>or warrant</sup> under sub. (4).

20          (3) APPLICATION TO USE LOCATION INFORMATION. The attorney general or a district  
21 attorney may apply for <sup>or a warrant</sup>an order <sup>or a warrant</sup>or for an extension of an order under sub. (4) that  
22 authorizes, in writing, the use of location information to identify or track the location  
23 of a person, vehicle, or item. ~~The attorney general or district attorney shall include~~  
24 ~~in the application the identity of the applicant, the identity of the law enforcement~~  
25 ~~agency conducting the investigation, an identification of the cellular telephone to be~~

1 monitored and its owner or possessor, and a certification by the applicant that the  
2 information likely to be obtained from the use of the location information is relevant  
3 to an ongoing criminal investigation that the law enforcement agency is conducting.  
4 The attorney general or district attorney shall submit the application to the circuit  
5 court of one of the following:

6 (a) The county in which the investigation is taking place.

7 (b) The county in which the person, vehicle, or item is located.

8 (4) AUTHORIZATION. (a) Upon receiving an application under sub. (3), the court  
9 shall enter an ex parte order authorizing the use of location information to identify  
10 or track the location of a person, vehicle, or item if the court determines that the  
11 applicant has demonstrated that the information likely to be obtained by the use of  
12 the location information is relevant to an ongoing criminal investigation. An order  
13 entered under this paragraph may not authorize the use of location information to  
14 track for more than 90 days.

15 (b) The court may extend an order under par. (a) for a period of no more than  
16 90 days upon an application for extension by the attorney general or a district  
17 attorney, subject to the court determination under par. (a).

18 (c) An order authorizing the use of location information must direct the  
19 following:

20 1. That the order be sealed until otherwise ordered by the court.

21 2. That any person who has been ordered by the court to provide assistance to  
22 the applicant not disclose the existence of the order or of the investigation to any  
23 other person unless ordered by a court.

24 (d) In addition to any other right to appeal, the state has the right to appeal  
25 from an order denying an application for an order under par. (a) or (b), and an appeal

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1 under this paragraph ~~shall be ex parte~~ and in camera in preference to all other  
2 ~~pending appeals in accordance with rules promulgated by the supreme court.~~

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3 (5) ASSISTANCE. Upon the request of the attorney general, a district attorney,  
4 or a law enforcement agency authorized <sup>by a warrant issued</sup> under sub. (4) (a) or (b) to use location  
5 information, the court shall order a provider of cellular telephone <sup>electronic communication</sup> service or other  
6 person to provide to an investigative or law enforcement officer information,  
7 facilities, and technical assistance to identify or track the location of a person,  
8 vehicle, or item by the use of location information. A person who is ordered under  
9 this subsection shall be compensated for the reasonable expenses incurred.

9

10 (6) CONFIDENTIALITY OF INFORMATION. A person who, by any means authorized  
11 under this section, obtains location information, or evidence derived from the  
12 location information, may not disclose or use the information or evidence obtained  
13 except as follows:

14 (a) If the person is an investigative or law enforcement officer, he or she may  
15 disclose the information or evidence to another investigative or law enforcement  
16 officer to the extent that the disclosure is appropriate to the proper performance of  
17 the official duties of the officer making or receiving the disclosure.

18 (b) If the person is an investigative or law enforcement officer, he or she may  
19 use the information or evidence to the extent that the use is appropriate to the proper  
20 performance of his or her official duties.

21 (c) He or she may disclose the information or evidence while giving testimony  
22 under oath or affirmation in any court proceeding or before any magistrate or grand  
23 jury.

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INS 4/29

24 (7) DEFENSE AND IMMUNITY. (a) Good faith reliance on a court order under this  
25 section constitutes a complete defense to any action brought under this section.

INS 5-8

electronic communication

(b) No cause of action may arise against any provider of services related to cellular telephones, its officers, employees, or agents or other persons specified in the court order under sub. (5) for providing information, facilities, or assistance in accordance with the terms of a court order under sub. (5).

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(8) EXCEPTION. (a) The prohibition in sub. (2) does not apply if a law enforcement officer uses location information to identify or track the location of a person, vehicle, or item if any of the following applies:

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(a) The person is reported missing or the vehicle or item is reported stolen by the owner.

(b) An immediate, life-threatening emergency involving danger of death or serious physical injury to any person exists and the use of the location information is relevant to preventing or minimizing the emergency or its impact. *the death or injury to mitigating*

(c) If a law enforcement or investigative officer uses location information as provided under par. (a) 2., the officer shall apply for a warrant under sub. (3) as soon as practicable. If the judge finds that an immediate, life-threatening emergency did not occur or was not imminent and declines to provide authorization under sub. (4), any evidence obtained is not admissible in a criminal action.

(9) PENALTY. (a) Whoever knowingly violates sub. (2) may be fined not more than \$10,000 or imprisoned for not more than 9 months or both.

(b) Any device used in violation of sub. (2) may be seized as contraband by any law enforcement officer and forfeited to this state in an action by the department of justice under ch. 778. s. 973.075

SECTION 4. 995.50 (7) of the statutes is amended to read:

INS  
5-23



2013-2014 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2077/p2ins  
CMH:.....

1 Insert A

An officer who violates the prohibition is subject to a fine of not more than \$10,000, imprisonment <sup>for</sup> of not more than nine months, or both. This bill also creates a process by which a law enforcement officer may apply to a court for such a warrant.

2

3 Insert 4-3

4 (3) APPLICATION FOR WARRANT. Upon the request of a district attorney or the  
5 attorney general, a law enforcement officer may apply to a judge for a warrant  
6 authorizing the use of location information to identify or track the location of a  
7 person, vehicle, or item. The application shall be under oath or affirmation, may be  
8 in writing or orally, and may be based upon personal knowledge or information and  
9 belief. In the application, the law enforcement officer shall do all of the following:

10 (a) Identify the person, vehicle, or item to be located.

11 (b) If the application is to track a vehicle or item, identify, if known, the owners  
12 or possessors of the vehicle or item to be located.

13 (c) Identify, if known, the person who is the subject of the investigation.

14 (d) Provide a statement of the criminal offense to which the information likely  
15 to be obtained relates.

16 (e) Provide a statement that sets forth facts and circumstances that provide the  
17 applicant with probable cause <sup>to believe</sup> the criminal activity has been, is, or will be in  
18 progress and that the use of the location information will yield information relevant  
19 to an ongoing criminal investigation.

20 (4) WARRANT. A judge shall issue a warrant authorizing the use of location  
21 information to identify or track the location of a person, vehicle, or item if the judge  
22 finds that the application satisfies the requirements under sub. (3). A warrant

1 issued under this subsection may not authorize the use of location information for  
2 a period that exceeds 60 days. A judge may extend the authorized period by up to  
3 60 days upon the request of the attorney general or a district attorney if the request  
4 satisfies the requirements under sub. (3).

5 (4m) **SECRECY.** A warrant under sub. (4) shall be issued with all practicable  
6 secrecy and the request, application, or other information upon which the warrant  
7 is based may not be filed with the clerk or made public until the warrant has been  
8 executed and returned to the court. The judge may issue an order sealing the  
9 application, request, or other information upon which the warrant is based. The  
10 judge may issue an order prohibiting any person who has been ordered by the judge  
11 to provide assistance to the applicant not to disclose the existence of the warrant or  
12 of the investigation to any other person unless ordered by a judge.

13  
14 Insert 4-23

15 (6) **EXEMPT FROM DISCLOSURE.** Location information is not subject to the right  
16 of inspection and copying under s. 19.35 (1).

17 (6m) **RETURN.** A warrant issued under sub. (4) shall be returned to the court  
18 not later than 5 days after the records or information described in the warrant are  
19 received by the attorney general, district attorney, or law enforcement agency,  
20 whichever is designated in the warrant.

21  
22 Insert 4-24

23 A person on whom a warrant issued under sub. (4) is served is immune from  
24 civil liability for acts or omissions in providing records or information, facilities, or  
25 assistance in accordance with the terms of the warrant.

1

2

Insert 5-5

3

4

5

**(7m) TECHNICAL IRREGULARITIES.** Evidence disclosed under a warrant issued under sub. (4) may not be suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant.

6

7

Insert 5-8

8

9

and there are reasonable concerns for the person's physical or mental health and safety

10

11

Insert 5-23

12

**SECTION 1.** 968.375 (4) (c) of the statutes is created to read:

13

14

968.375 (4) (c) A record or information that identifies the location of a device used to transmit electronic or wire communications.

Comments to consider:

- 968.27(10) limits the officers and prosecutors who can seek this warrant to those who can arrest or prosecute for “offenses enumerated in ss. 968.28 to 968.373.” 968.28 may be the only one of those statutes that contain any specific “enumeration” of the offenses for which the process (wiretap) can be used – and that is because the use of that technique is supposed to be limited to only certain categories of offenses. Pen registers/Traps, the proposed warrant under 968.373, and subpoenas/warrants in 968.135, 968.375, and 968.12 are not limited at all – they can be used in all criminal investigations regardless of the offense being investigated. The draft could just read “...who is empowered by the laws of this state to conduct investigations of or make arrests for any crime ...”.
- Throughout 968.373, the phrase “... authorizing *the use* of location information to identify or track ...” is used. No other warrant or subpoena provision uses that language. The draft could read “... authorizing *the receipt* of...” at each point.
- In 968.373(4), there is language about the 60 day limit on the length of the initial warrant and the extension of it. It may suggest that only one 60 day extension can be had. Language similar to existing 968.28(5) and 968.36(3) and (4) may be more clear, like:

“The warrant shall authorize the receipt of the location information for a period not to exceed 60 days from the earlier of the date on which the investigative or law enforcement officer or attorney first begins to receive the location information under this warrant or ten (10) days after the warrant is issued. Extensions of the period within which the location information is authorized to be received may be granted but only upon the request of the attorney general or a district attorney and only if the request satisfies the requirements set forth in sub. (3). Any extension may be for a period not to exceed 60 days.”

- 968.373(5) provides that “A person who is ordered under this subsection shall be compensated ...”. Consider inserting the phrase “to assist” so it reads “A person who is ordered to assist under this subsection ...”.
- 968.373(8) set out the “emergency” exception. The exception may be interpreted only to provide sanctuary for an officer who “uses” (or receives) location information in violation of the general prohibition against doing so without a warrant. That’s fine. But language may also be needed to specifically permit the provider to disclose the location information in an emergency. The officer can’t receive/use it until the provider agrees to give it to them without a warrant. The language in 968.375(15)(b) can be used for that purpose. The “consent” exception in 968.375(15)(a) may also be authorized here.

- Since many of these providers will be out of the state, you may want to consider a “long-arm” jurisdictional provision like in 968.375(2).

Add in a deletion of evidence provision

(b) The attorney general, a law enforcement agency, or a district attorney that obtains under this section location information, or evidence derived from the location information, shall destroy any location information or evidence derived from it if the trial court reaches final disposition for all charges in connection with the investigation that was the subject of the order under sub. (4) and no person was adjudged guilty of a crime in connection with the investigation.



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-2077/P2  
CMH:eev:ev

today  
please

P3

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

referral

receipt  
receipt

1 AN ACT *to amend* 134.43 (3), 968.27 (10) and 995.50 (7); and *to create* 968.373  
2 and 968.375 (4) (c) of the statutes; **relating to:** prohibition on the use of location  
3 information from a cellular telephone by law enforcement without a warrant  
4 and providing a penalty.

*Analysis by the Legislative Reference Bureau*

Current law limits certain interceptions of communications and the use of pen register or trap and trace devices. This bill prohibits, with certain exceptions, law enforcement officers from using the mobile tracking features of a cellular telephone or other wireless communications device to identify or track the location of a person, item, or vehicle without first obtaining from a court a warrant authorizing the action. An officer who violates the prohibition is subject to a fine of not more than \$10,000, imprisonment for not more than nine months, or both. This bill also creates a process by which a law enforcement officer may apply to a court for such a warrant.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

5 SECTION 1. 134.43 (3) of the statutes is amended to read:

1 134.43 (3) Any person who is the victim of an intrusion of privacy under this  
2 section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible  
3 under ss. 968.27 to ~~968.37~~ 968.373.

4 SECTION 2. 968.27 (10) of the statutes is amended to read:

5 968.27 (10) "Investigative or law enforcement officer" means any officer of this  
6 state or political subdivision thereof, who is empowered by the laws of this state to  
7 conduct investigations of or to make arrests for ~~offenses enumerated in ss. 968.28 to~~  
8 ~~968.37~~ 968.373 *or violations of the laws that he or she is employed to enforce* and any attorney authorized by law to prosecute or participate in the  
9 prosecution of those offenses.

10 SECTION 3. 968.373 of the statutes is created to read:

11 **968.373 Warrant for location information from communications**  
12 **device.** (1) DEFINITIONS. In this section:

13 (a) "Cellular telephone" includes any wireless or mobile device that transmits  
14 wire or electronic communications.

15 (b) "Location information" means any information concerning the location of  
16 a cellular telephone that is wholly or partly generated by or derived from the mobile  
17 tracking features of the cellular telephone.

18 (2) PROHIBITION. Except as provided in sub. (8), no investigative or law  
19 enforcement officer may ~~use~~ <sup>receive</sup> location information to identify or track the location of  
20 a person, vehicle, or item without first obtaining a warrant under sub. (4).

21 (3) APPLICATION FOR WARRANT. Upon the request of a district attorney or the  
22 attorney general, <sup>an investigative or</sup> a law enforcement officer may apply to a judge for a warrant  
23 authorizing the ~~use~~ <sup>receipt</sup> of location information to identify or track the location of a  
24 person, vehicle, or item. The application shall be under oath or affirmation, may be

1 in writing or oral, and may be based upon personal knowledge or information and  
2 belief. In the application, the <sup>investigative or</sup> law enforcement officer shall do all of the following:

3 (a) Identify the person, vehicle, or item to be located.

4 (b) If the application is to track a vehicle or item, identify, if known, the owners  
5 or possessors of the vehicle or item to be located.

6 (c) Identify, if known, the person who is the subject of the investigation.

7 (d) Provide a statement of the criminal offense to which the information likely  
8 to be obtained relates.

9 (e) Provide a statement that sets forth facts and circumstances that provide the  
10 applicant with probable cause to believe the criminal activity has been, is, or will be  
11 in progress and that the <sup>receipt</sup> use of the location information will yield information  
12 relevant to an ongoing criminal investigation.

13 (4) WARRANT. A judge shall issue a warrant authorizing the <sup>receipt</sup> use of location  
14 information to identify or track the location of a person, vehicle, or item if the judge  
15 finds that the application satisfies the requirements under sub. (3). A warrant  
16 issued under this subsection may not authorize the <sup>receipt</sup> use of location information for  
17 a period that exceeds 60 days. A judge may extend the authorized period <sup>receipt</sup> by up to  
18 60 days upon the request of the attorney general or a district attorney if the request  
19 satisfies the requirements under sub. (3). <sup>Each extension may not exceed 60 days but there is no</sup>

20 (4m) SECRECY. A warrant under sub. (4) shall be issued with all practicable <sup>limit</sup>  
21 secrecy and the request, application, or other information upon which the warrant  
22 is based may not be filed with the clerk or made public until the warrant has been  
23 executed and returned to the court. The judge may issue an order sealing the  
24 application, request, or other information upon which the warrant is based. The  
25 judge may issue an order prohibiting any person who has been ordered by the judge

<sup>number</sup>  
on the number of  
extensions a judge may grant

1 to provide assistance to the applicant not to disclose the existence of the warrant or  
2 of the investigation to any other person unless ordered by a judge.

3 (5) ASSISTANCE. Upon the request of the attorney general, a district attorney,  
4 or a law enforcement agency authorized by a warrant issued under sub. (4) to ~~use~~ *receive*  
5 location information, the court shall order a provider of electronic communication  
6 service or other person to provide to an investigative or law enforcement officer  
7 information, facilities, and technical assistance to identify or track the location of a  
8 person, vehicle, or item by the ~~use~~ *receipt* of location information. A person who is ordered  
9 under this subsection shall be compensated for the reasonable expenses incurred.

10 (6) ~~EXEMPT FROM DISCLOSURE~~ *CONFIDENTIALITY OF INFORMATION (CS)* Location information is not subject to the right *to provide assistance*  
11 of inspection and copying under s. 19.35 (1).

12 (6m) RETURN. A warrant issued under sub. (4) shall be returned to the court  
13 not later than 5 days after the records or information described in the warrant are  
14 received by the attorney general, district attorney, or law enforcement agency,  
15 whichever is designated in the warrant.

16 (7) DEFENSE AND IMMUNITY. (a) A person on whom a warrant issued under sub.  
17 (4) is served is immune from civil liability for acts or omissions in providing records  
18 or information, facilities, or assistance in accordance with the terms of the warrant.

19 (b) No cause of action may arise against any provider of electronic  
20 communication service, or its officers, employees, or agents or other persons specified  
21 in the court order under sub. (5), for providing information, facilities, or assistance  
22 in accordance with the terms of a court order under sub. (5).

23 (7m) TECHNICAL IRREGULARITIES. Evidence disclosed under a warrant issued  
24 under sub. (4) may not be suppressed because of technical irregularities or errors not  
25 affecting the substantial rights of the defendant.

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4-1213*

*to an investigative of*

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(8) EXCEPTION. <sup>(u)</sup> The prohibition in sub. (2) does not apply ~~to~~ <sup>to an investigative of</sup> a law enforcement officer <sup>who receives</sup> uses location information to identify or track the location of a person, vehicle, or item if any of the following applies:

<sup>1.</sup> (a) The person is reported missing and there are reasonable concerns for the person's physical or mental health and safety.

<sup>2.</sup> (b) An emergency involving danger of death or serious physical injury to any person exists and the <sup>receipt</sup> use of the location information is relevant to preventing the death or injury or to mitigating the injury.

<sup>3.</sup> (c) The vehicle or item is reported stolen by the owner.

(9) PENALTY. (a) Whoever knowingly violates sub. (2) may be fined not more than \$10,000 or imprisoned for not more than 9 months or both.

(b) Any device used in violation of sub. (2) may be seized as contraband by any law enforcement officer and forfeited to this state in an action by the department of justice under s. 973.075.

SECTION 4. 968.375 (4) (c) of the statutes is created to read:  
 968.375 (4) (c) A record or information that identifies the location of a device used to transmit electronic or wire communications.

SECTION 5. 995.50 (7) of the statutes is amended to read:  
 995.50 (7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 196.63 or 968.27 to ~~968.37~~ 968.373.

SECTION 6. Initial applicability. <sup>receipt</sup>  
 (1) This act first applies to the use of location information on the effective date of this subsection.

*INS 5-10*

2013-2014 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2077/p3ins  
CMH:.....

1           Insert 4-12

2           (b) The attorney general, a law enforcement agency, or a district attorney that  
3 obtains under this section location information, or evidence derived from the location  
4 information, shall destroy any location information or evidence derived from it if the  
5 trial court reaches final disposition for all charges in connection with the  
6 investigation that was the subject of the ~~order~~<sup>warrant</sup> under sub. (4) and no person was  
7 adjudged guilty of a crime in connection with the investigation.

8

9           Insert 5-10

10          (b) A provider of electronic communication service may disclose the location  
11 information of a customer or subscriber without a warrant if any of the following  
12 applies:

13           1. The customer or subscriber provides consent for the particular disclosure.

14           2. A law enforcement agency has informed the provider of the electronic  
15 communication service that a person is reported missing, that there are reasonable  
16 concerns for the person's physical or mental health and safety, and that the  
17 disclosure of the location information will aid the law enforcement agency in finding  
18 the person.

19           3. The provider of electronic communication service believes in good faith that  
20 an emergency involving the danger of death or serious physical injury to any person  
21 exists and that disclosure of the location information is relevant to preventing the  
22 death or injury or to mitigating the injury.

continues →

1           **(8m) JURISDICTION.** For purposes of this section, a person is considered to be  
2 doing business in this state and is subject to service and execution of process from  
3 this state, if the person makes a contract with or engages in a terms of service  
4 agreement with any other person, whether or not the other person is a resident of this  
5 state, and any part of the performance of the contract or provision of service takes  
6 place within this state on any occasion.

## Hanaman, Cathlene

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**From:** Pratt, Phillip  
**Sent:** Tuesday, October 29, 2013 2:48 PM  
**To:** Hanaman, Cathlene  
**Subject:** FW: tracking  
**Attachments:** 13-2077\_P3\_dvl\_edits\_10-10-13 MGS edits.docx

Cathlene,

Attached is a document containing revisions to LRB 2077. Could you apply these revisions that are highlighted in yellow, green and red text? The text in purple/pink should be deleted as we would no longer like to include those provisions. Finally, we would like to remove criminal penalty, 9(a), from the bill.

Would you be able to provide us with a new copy by the end of the day today/early tomorrow?

Thanks for all of your help with this.

Best Regards,

Phillip Pratt  
Legislative Assistant  
Office of State Representative Rob Hutton  
13<sup>th</sup> Assembly District  
State Capitol, Room 3 North  
(608) 267-9837





**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1 **AN ACT to amend** 134.43 (3), 968.27 (10) and 995.50 (7); and **to create** 968.373  
2 and 968.375 (4) (c) of the statutes; **relating to:** prohibition on the receipt of  
3 location information from a cellular telephone by law enforcement without a  
4 warrant and providing a penalty.

---

**Analysis by the Legislative Reference Bureau**

Current law limits certain interceptions of communications and the use of pen register or trap and trace devices. This bill prohibits, with certain exceptions, law enforcement officers from ~~using the mobile tracking features of~~ a cellular telephone or other wireless communications device to identify or track the location of a person, item, or vehicle without first obtaining from a court a warrant authorizing the action. An officer who violates the prohibition is subject to a fine of not more than \$10,000, imprisonment for not more than nine months, or both. This bill also creates a process by which a law enforcement officer may apply to a court for such a warrant.

For further information see the **state and local** fiscal estimate, which will be printed as an appendix to this bill.

---

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

5 **SECTION 1.** 134.43 (3) of the statutes is amended to read:

1           134.43 (3) Any person who is the victim of an intrusion of privacy under this  
2 section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible  
3 under ss. 968.27 to ~~968.37~~ 968.373.

4           **SECTION 2.** 968.27 (10) of the statutes is amended to read:

5           968.27 (10) "Investigative or law enforcement officer" means any officer of this  
6 state or political subdivision thereof, who is empowered by the laws of this state to  
7 conduct investigations of or to make arrests for offenses enumerated in ~~ss. 968.28 to~~  
8 ~~968.37~~ violations of the laws that he or she is employed to enforce, and any attorney  
9 authorized by law to prosecute or participate in the prosecution of those offenses.

10           **SECTION 3.** 968.373 of the statutes is created to read:

11           **968.373 Warrant for location information from communications**  
12 **device.** (1) DEFINITIONS. In this section:

13           (a) "~~Cellular telephone~~ Communications device" includes any wireless or  
14 mobile

15 device that transmits wire or electronic communications.

16           (b) "Location information" means any information concerning the location of  
17 a ~~cellular telephone communications device that is wholly or partly generated by~~  
18 ~~or derived from the mobile tracking features of the cellular telephone.~~

19           (2) PROHIBITION. Except as provided in sub. (8), no investigative or law  
20 enforcement officer may receive location information to identify or track the location  
21 of a ~~person, vehicle, or item~~ communications device without first obtaining a warrant  
22 under sub. (4). Location information received pursuant to a warrant under sub. (4) may be  
23 disclosed to other investigative or law enforcement officers.

24           (3) APPLICATION FOR WARRANT. Upon the request of a district attorney or the  
25 attorney general, an investigative or law enforcement officer may apply to a judge  
26 for a warrant authorizing the receipt of location information to identify or track the  
27 location of a ~~person, vehicle, or item~~ communications device. The application  
28 shall be under oath or

29 affirmation, may be in writing or oral, and may be based upon personal knowledge

1 or information and belief. In the application, the investigative or law enforcement  
2 officer shall do all of the following:

3 (a) Identify the ~~person, vehicle, or item~~ communications device to be located.

4 (b) ~~If the application is to track a vehicle or item,~~ identify, if known, the owners  
5 or possessors of ~~person, vehicle, or item~~ the communications device to be located.

6 (c) Identify, if known, the person who is the subject of the investigation.

7 (d) Provide a statement of the criminal offense to which the information likely  
8 to be obtained relates.

9 (e) Provide a statement that sets forth facts and circumstances that provide ~~the~~  
10 ~~applicant with~~ probable cause to believe the criminal activity has been, is, or will be

11 in progress and that the receipt of the location information will yield information  
12 relevant to an ongoing criminal investigation.

13 **(4) WARRANT.** A judge shall issue a warrant authorizing the receipt of location  
14 information to identify or track the location of ~~person, vehicle, or item~~ communications device if the judge

15 finds that the application satisfies the requirements under sub. (3). A warrant  
16 issued under this subsection may not authorize the receipt of location information  
17 for a period that exceeds 60 days. A judge may extend the authorized period upon  
18 the request of the attorney general or a district attorney if the request satisfies the  
19 requirements under sub. (3). Each extension may not exceed 60 days but there is no  
20 limit on the number of extensions a judge may grant.

21 **(4m) SECRECY.** A warrant under sub. (4) shall be issued with all practicable  
22 secrecy and the request, application, or other information upon which the warrant  
23 is based may not be filed with the clerk or made public until the warrant has been  
24 executed and returned to the court. The judge may issue an order sealing the  
25 application, request, or other information upon which the warrant is based. The

1 judge may issue an order prohibiting any person who has been ordered by the judge  
2 to provide assistance to the applicant ~~not to~~ from disclosing the existence of the  
warrant or

3 of the investigation to any other person unless ordered by a judge.

4 (5) ASSISTANCE. Upon the request of the attorney general, a district attorney,  
5 or a law enforcement agency authorized by a warrant issued under sub. (4) to receive  
6 location information, the court shall order a provider of electronic communication  
7 service or other person to provide to an investigative or law enforcement officer  
8 information, facilities, and technical assistance to identify or track the location of a  
9 person, vehicle, or item communications device by the receipt of location  
information. A person who is

10 ordered under this subsection to provide assistance shall be compensated for the  
11 reasonable expenses incurred.

12 (6) CONFIDENTIALITY OF INFORMATION. (a) Location information is not subject  
13 to the right of inspection and copying under s. 19.35 (1).

14 (b) The attorney general, a law enforcement agency, or a district attorney that  
15 obtains under this section location information, or evidence derived from the location  
16 information, shall destroy any location information or evidence derived from it if the  
17 trial court reaches final disposition for all charges in connection with the  
18 investigation that was the subject of the warrant under sub. (4) and no person was  
19 adjudged guilty of a crime in connection with the investigation.

20 (6m) RETURN. A warrant issued under sub. (4) shall be returned to the court  
21 not later than 5 days after the records or information described in the warrant are  
22 received by the attorney general, district attorney, or law enforcement agency,  
23 whichever is designated in the warrant. The "return" to the court may be in the  
form of a summary description of the information received.

1           **(7) DEFENSE AND IMMUNITY.** (a) A person on whom a warrant issued under sub.  
2           (4) is served or who complies with a request as provided in (8)(b), is immune from civil  
3           liability for acts or omissions in providing records  
4           or information, facilities, or assistance in accordance with the terms of the warrant  
5           or the request.

6           (b) No cause of action may arise against any provider of electronic  
7           communication service, or its officers, employees, or agents or other persons specified  
8           in the court order under sub. (5), for providing information, facilities, or assistance  
9           in accordance with the terms of a court order under sub. (5).

10           **(7m) TECHNICAL IRREGULARITIES.** Evidence disclosed under a warrant issued  
11           under sub. (4) may not be suppressed because of technical irregularities or errors not  
12           affecting the substantial rights of the defendant.

13           **(8) EXCEPTION.** (a) The prohibition in sub. (2) does not apply to an investigative  
14           or law enforcement officer who receives location information to identify or track the  
15           location of a person, vehicle, or item-communications device if any of the following  
16           applies:

17           1. The person is reported missing and there are reasonable concerns for the  
18           person's physical or mental health and safety.

19           2. An emergency involving danger of death or serious physical injury to any  
20           person exists and the receipt of the location information is relevant to preventing the  
21           death or injury or to mitigating the injury.

22           3. The vehicle or item is reported stolen by the owner customer or subscriber  
23           provides consent for the particular disclosure.

24           (b) A provider of electronic communication service may disclose the location  
25           information of a customer or subscriber without a warrant if any of the following  
26           applies:

27           1. The customer or subscriber provides consent for the particular disclosure.

28           2. A law enforcement agency has informed the provider of the electronic  
29           communication service that a person is reported missing, that there are reasonable

1 concerns for the person's physical or mental health and safety, and that the  
2 disclosure of the location information will aid the law enforcement agency in finding  
3 the person.

4 3. The provider of electronic communication service believes in good faith that  
5 an emergency involving the danger of death or serious physical injury to any person  
6 exists and that disclosure of the location information is relevant to preventing the  
7 death or injury or to mitigating the injury.

8 **(8m) JURISDICTION.** For purposes of this section, a person is considered to be  
9 doing business in this state and is subject to service and execution of process from  
10 this state, if the person makes a contract with or engages in a terms of service  
11 agreement with any other person, whether or not the other person is a resident of this  
12 state, and any part of the performance of the contract or provision of service takes  
13 place within this state on any occasion.

14 **(9) PENALTY.** (a) Whoever knowingly violates sub. (2) may be fined not more  
15 than \$10,000 or imprisoned for not more than 9 months or both.

16 (b) Any device used in violation of sub. (2) may be seized as contraband by any  
17 law enforcement officer and forfeited to this state in an action ~~by the department of~~  
18 ~~justice~~ under s. 973.075.

19 **SECTION 4.** 968.375 (4) (c) of the statutes is created to read:

20 968.375 **(4)** (c) A record or information that identifies the location of a device  
21 used to transmit electronic or wire communications.

22 **SECTION 5.** 995.50 (7) of the statutes is amended to read:

23 995.50 **(7)** No action for invasion of privacy may be maintained under this  
24 section if the claim is based on an act which is permissible under ss. 196.63 or 968.27  
25 to ~~968.37~~ 968.373.





State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-2077/P8  
CMH:eev:jm

py

10:00

7:30

A.M.

Wed.

(per requester)

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

refer cat tracking the location of

1 AN ACT to amend 134.43 (3), 968.27 (10) and 995.50 (7); and to create 968.373  
2 and 968.375 (4) (c) of the statutes; relating to: prohibition on the receipt of  
3 location information from a cellular telephone by law enforcement without a  
4 warrant and providing a penalty.

the location of

**Analysis by the Legislative Reference Bureau**

Current law limits certain interceptions of communications and the use of pen register or trap and trace devices. This bill prohibits, with certain exceptions, law enforcement officers from using the mobile tracking features of a cellular telephone or other wireless communications device to identify or track the location of a person, item, or vehicle without first obtaining from a court a warrant authorizing the action. An officer who violates the prohibition is subject to a fine of not more than \$10,000, imprisonment for not more than nine months, or both. This bill also creates a process by which a law enforcement officer may apply to a court for such a warrant.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

5 SECTION 1. 134.43 (3) of the statutes is amended to read:

1 134.43 (3) Any person who is the victim of an intrusion of privacy under this  
2 section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible  
3 under ss. 968.27 to ~~968.37~~ 968.373.

4 SECTION 2. 968.27 (10) of the statutes is amended to read:

5 968.27 (10) "Investigative or law enforcement officer" means any officer of this  
6 state or political subdivision thereof, who is empowered by the laws of this state to  
7 conduct investigations of or to make arrests for ~~offenses enumerated in ss. 968.28 to~~  
8 ~~968.37~~ violations of the laws that he or she is employed to enforce, and any attorney  
9 authorized by law to prosecute or participate in the prosecution of those offenses.

10 SECTION 3. 968.373 of the statutes is created to read:

11 968.373 Warrant for location information from communications

12 device. (1) DEFINITIONS. In this section, <sup>no PI</sup> communications device

13 <sup>no PI</sup> (a) Cellular telephone includes any wireless or mobile device that transmits  
14 wire or electronic communications.

15 (b) "Location information" means any information concerning the location of  
16 a cellular telephone that is wholly or partly <sup>communications device</sup> generated by or derived from the mobile  
17 tracking features of the cellular telephone.

18 (2) PROHIBITION. Except as provided in sub. (8), no investigative or law  
19 enforcement officer may receive location information to identify or track the location  
20 of a person, vehicle, or item <sup>communications device</sup> without first obtaining a warrant under sub. (4).

21 (3) APPLICATION FOR WARRANT. Upon the request of a district attorney or the  
22 attorney general, an investigative or law enforcement officer may apply to a judge  
23 for a warrant <sup>to</sup> authorizing the receipt of location information to identify or track the  
24 location of a person, vehicle, or item. The application shall be under oath or  
25 affirmation, may be in writing or oral, and may be based upon personal knowledge

communications device

to track a B

no PI

no PI

f

1 or information and belief. In the application, the investigative or law enforcement  
2 officer shall do all of the following:

3 (a) Identify the person, vehicle, or item ~~to be located~~. *communications device*

4 (b) ~~If the application is to track a vehicle or item,~~ identify, if known, the owners  
5 or possessors of the ~~vehicle or item~~ ~~to be located~~. *communications device*

6 (c) Identify, if known, the person who is the subject of the investigation.

7 (d) Provide a statement of the criminal offense to which the information likely  
8 to be obtained relates.

9 (e) Provide a statement that sets forth facts and circumstances that provide ~~the~~  
10 applicant with <sup>the</sup> probable cause to believe the criminal activity has been, is, or will be  
11 in progress and that ~~the receipt of the location information~~ *identifying or tracking a communications device* will yield information  
12 relevant to an ongoing criminal investigation.

13 (4) WARRANT. A judge shall issue a warrant authorizing ~~the receipt of location~~ *communications device*  
14 information <sup>a person</sup> to identify or track the location of a person, vehicle, or item if the judge  
15 finds that the application satisfies the requirements under sub. (3). A warrant  
16 issued under this subsection may not authorize the ~~receipt of location information~~ *action*  
17 for a period that exceeds 60 days. A judge may extend the authorized period upon  
18 the request of the attorney general or a district attorney if the request satisfies the  
19 requirements under sub. (3). Each extension may not exceed 60 days but there is no  
20 limit on the number of extensions a judge may grant.

21 (4m) SECRECY. A warrant under sub. (4) shall be issued with all practicable  
22 secrecy and the request, application, or other information upon which the warrant  
23 is based may not be filed with the clerk or made public until the warrant has been  
24 executed and returned to the court. The judge may issue an order sealing the  
25 application, request, or other information upon which the warrant is based. The

1 judge may issue an order prohibiting any person who has been ordered by the judge  
2 to provide assistance to the applicant <sup>from</sup> ~~not to disclose~~ <sup>ing</sup> the existence of the warrant or  
3 of the investigation to any other person unless ordered by a judge.

4 (5) ASSISTANCE. Upon the request of the attorney general, a district attorney,  
5 or a law enforcement agency authorized by a warrant issued under sub. (4) to <sup>track or</sup> receive  
6 <sup>identify the</sup> location <sup>of a communications device</sup> information, the court shall order a provider of electronic communication  
7 service or other person to provide to an investigative or law enforcement officer <sup>the</sup>  
8 information, facilities, and technical assistance to identify or track the location of <sup>the</sup>  
9 person, vehicle, or item by the receipt of location information. <sup>communications device</sup> A person who is  
10 ordered under this subsection to provide assistance shall be compensated for the  
11 reasonable expenses incurred.

12 (6) CONFIDENTIALITY OF INFORMATION. (a) Location <sup>INS 4-12</sup> information is not subject  
13 to the right of inspection and copying under s. 19.35 (1).

14 (b) The attorney general, a law enforcement agency, or a district attorney that  
15 obtains under this section <sup>information regarding the</sup> location information, or evidence derived from the <sup>location</sup>  
16 information, shall destroy any <sup>of a communications device</sup> location information or evidence derived from it if the  
17 trial court reaches final disposition for all charges in connection with the  
18 investigation that was the subject of the warrant under sub. (4) and no person was  
19 adjudged guilty of a crime in connection with the investigation.

20 (6m) RETURN. A warrant issued under sub. (4) shall be returned to the court  
21 not later than 5 days after the records or information described in the warrant are  
22 received by the attorney general, district attorney, or law enforcement agency,  
23 whichever is designated in the warrant.

INS ERT  
4-20

including in the form of  
a summary description of  
the information received

(7) DEFENSE AND IMMUNITY. (a) A person on whom a warrant issued under sub. (4) is served, is immune from civil liability for acts or omissions in providing records or information, facilities, or assistance in accordance with the terms of the warrant.

(b) No cause of action may arise against any provider of electronic communication service, or its officers, employees, or agents or other persons specified in the court order under sub. (5), for providing information, facilities, or assistance in accordance with the terms of a court order under sub. (5).

(7m) TECHNICAL IRREGULARITIES. Evidence disclosed under a warrant issued under sub. (4) may not be suppressed because of technical irregularities or errors not affecting the substantial rights of the defendant.

(8) EXCEPTION. (a) The prohibition in sub. (2) does not apply to an investigative or law enforcement officer who receives location information to identify or track the location of a person, vehicle, or item if any of the following applies:

1. The person is reported missing and there are reasonable concerns for the person's physical or mental health and safety.

2. An emergency involving danger of death or serious physical injury to any person exists and the receipt of the location information is relevant to preventing the death or injury or to mitigating the injury.

3. The vehicle or item is reported stolen by the owner.

(b) A provider of electronic communication service may disclose the location information of a customer or subscriber without a warrant if any of the following applies:

1. The customer or subscriber provides consent for the particular disclosure.

2. A law enforcement agency has informed the provider of the electronic communication service that a person is reported missing, that there are reasonable

1. The customer or subscriber provides consent for the action.

MS  
5-4

3-3

communications device

identifying or tracking

of the communications device

communications device

1 concerns for the person's physical or mental health and safety, and that the  
2 disclosure of the location information will aid the law enforcement agency in finding  
3 the person.

4 <sup>2</sup> §. The provider of electronic communication service believes in good faith that  
5 an emergency involving the danger of death or serious physical injury to any person  
6 exists and that disclosure of the location information is relevant to preventing the  
7 death or injury or to mitigating the injury.

8 (8m) JURISDICTION. For purposes of this section, a person is considered to be  
9 doing business in this state and is subject to service and execution of process from  
10 this state, if the person makes a contract with or engages in a terms of service  
11 agreement with any other person, whether or not the other person is a resident of this  
12 state, and any part of the performance of the contract or provision of service takes  
13 place within this state <sup>(CS)</sup> on any occasion.

14 (9) <sup>SEIZURE</sup> PENALTY. (a) Whoever knowingly violates sub. (2) may be fined not more  
15 than \$10,000 or imprisoned for not more than 9 months or both.

16 (b) Any device used in violation of sub. (2) may be seized as contraband by any  
17 law enforcement officer and forfeited to this state in an action <sup>(by the department of</sup>  
18 <sup>justice</sup> under s. 973.075.

19 SECTION 4. 968.375 (4) (c) of the statutes is created to read:

20 968.375 (4) (c) A record or information that identifies the location of a device  
21 used to transmit electronic or wire communications.

22 SECTION 5. 995.50 (7) of the statutes is amended to read:

23 995.50 (7) No action for invasion of privacy may be maintained under this  
24 section if the claim is based on an act which is permissible under ss. 196.63 or 968.27  
25 to ~~968.37~~ 968.373.



2013-2014 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-2077/p4ins  
CMH:.....

1           Insert 4-12  
2           obtained under this section regarding the location of a communications device

3  
4           Insert 4-20  
5           (c) Information regarding the location of a communications device that is  
6           obtained under this section may be disclosed to other investigative or law  
7           enforcement officers.

8  
9           Insert 5-4  
10          (b) A person who discloses the location of a communications device under sub.  
11          (8) (b) is immune from civil liability for the acts or omissions in making the disclosure  
12          in accordance with sub. (8) (b).

13  
14          Insert 7-2  
15          regarding the location of a communications device obtained



~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

*Now  
no changes*

*pen register*

1 AN ACT *to amend* 134.43 (3), 968.27 (10) and 995.50 (7); and *to create* 968.373  
2 and 968.375 (4) (c) of the statutes; **relating to:** prohibition on tracking the  
3 location of a cellular telephone by law enforcement without a warrant.

***Analysis by the Legislative Reference Bureau***

Current law limits certain interceptions of communications and the use of pen register or trap and trace devices. This bill prohibits, with certain exceptions, law enforcement officers from tracking the location of a cellular telephone or other wireless communications device without first obtaining from a court a warrant authorizing the action. This bill also creates a process by which a law enforcement officer may apply to a court for such a warrant.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

4 SECTION 1. 134.43 (3) of the statutes is amended to read:  
5 134.43 (3) Any person who is the victim of an intrusion of privacy under this  
6 section is entitled to relief under s. 995.50 (1) and (4) unless the act is permissible  
7 under ss. 968.27 to ~~968.37~~ 968.373.

1           **SECTION 2.** 968.27 (10) of the statutes is amended to read:

2           968.27 (10) “Investigative or law enforcement officer” means any officer of this  
3 state or political subdivision thereof, who is empowered by the laws of this state to  
4 conduct investigations of or to make arrests for ~~offenses enumerated in ss. 968.28 to~~  
5 ~~968.37~~ violations of the laws that he or she is employed to enforce, and any attorney  
6 authorized by law to prosecute or participate in the prosecution of those offenses.

7           **SECTION 3.** 968.373 of the statutes is created to read:

8           **968.373 Warrant to track a communications device.** (1) DEFINITION. In  
9 this section, “communications device” includes any wireless or mobile device that  
10 transmits wire or electronic communications.

11           (2) PROHIBITION. Except as provided in sub. (8), no investigative or law  
12 enforcement officer may identify or track the location of a communications device  
13 without first obtaining a warrant under sub. (4).

14           (3) APPLICATION FOR WARRANT. Upon the request of a district attorney or the  
15 attorney general, an investigative or law enforcement officer may apply to a judge  
16 for a warrant to authorize a person to identify or track the location of a  
17 communications device. The application shall be under oath or affirmation, may be  
18 in writing or oral, and may be based upon personal knowledge or information and  
19 belief. In the application, the investigative or law enforcement officer shall do all of  
20 the following:

21           (a) Identify the communications device.

22           (b) Identify, if known, the owners or possessors of the communications device.

23           (c) Identify, if known, the person who is the subject of the investigation.

24           (d) Provide a statement of the criminal offense to which the information likely  
25 to be obtained relates.

1 (e) Provide a statement that sets forth facts and circumstances that provide  
2 probable cause to believe the criminal activity has been, is, or will be in progress and  
3 that identifying or tracking the communications device will yield information  
4 relevant to an ongoing criminal investigation.

5 (4) WARRANT. A judge shall issue a warrant authorizing a person to identify or  
6 track the location of a communications device if the judge finds that the application  
7 satisfies the requirements under sub. (3). A warrant issued under this subsection  
8 may not authorize the action for a period that exceeds 60 days. A judge may extend  
9 the authorized period upon the request of the attorney general or a district attorney  
10 if the request satisfies the requirements under sub. (3). Each extension may not  
11 exceed 60 days but there is no limit on the number of extensions a judge may grant.

12 (4m) SECRECY. A warrant under sub. (4) shall be issued with all practicable  
13 secrecy and the request, application, or other information upon which the warrant  
14 is based may not be filed with the clerk or made public until the warrant has been  
15 executed and returned to the court. The judge may issue an order sealing the  
16 application, request, or other information upon which the warrant is based. The  
17 judge may issue an order prohibiting any person who has been ordered by the judge  
18 to provide assistance to the applicant from disclosing the existence of the warrant or  
19 of the investigation to any other person unless ordered by a judge.

20 (5) ASSISTANCE. Upon the request of the attorney general, a district attorney,  
21 or a law enforcement agency authorized by a warrant issued under sub. (4) to track  
22 or identify the location of a communications device, the court shall order a provider  
23 of electronic communication service or other person to provide to an investigative or  
24 law enforcement officer information, facilities, and technical assistance to identify  
25 or track the location of the communications device. A person who is ordered under

1 this subsection to provide assistance shall be compensated for the reasonable  
2 expenses incurred.

3 (6) CONFIDENTIALITY OF INFORMATION. (a) Information obtained under this  
4 section regarding the location of a communications device is not subject to the right  
5 of inspection and copying under s. 19.35 (1).

6 (b) The attorney general, a law enforcement agency, or a district attorney that  
7 obtains under this section information regarding the location of a communications  
8 device, or evidence derived from the information, shall destroy any information or  
9 evidence derived from it if the trial court reaches final disposition for all charges in  
10 connection with the investigation that was the subject of the warrant under sub. (4)  
11 and no person was adjudged guilty of a crime in connection with the investigation.

12 (c) Information regarding the location of a communications device that is  
13 obtained under this section may be disclosed to other investigative or law  
14 enforcement officers.

15 (6m) RETURN. A warrant issued under sub. (4) shall be returned, including in  
16 the form of a summary description of the information received, to the court not later  
17 than 5 days after the records or information described in the warrant are received  
18 by the attorney general, district attorney, or law enforcement agency, whichever is  
19 designated in the warrant.

20 (7) DEFENSE AND IMMUNITY. (a) A person on whom a warrant issued under sub.  
21 (4) is served is immune from civil liability for acts or omissions in providing records  
22 or information, facilities, or assistance in accordance with the terms of the warrant.

23 (b) A person who discloses the location of a communications device under sub.  
24 (8) (b) is immune from civil liability for the acts or omissions in making the disclosure  
25 in accordance with sub. (8) (b).

1 (c) No cause of action may arise against any provider of electronic  
2 communication service, or its officers, employees, or agents or other persons specified  
3 in the court order under sub. (5), for providing information, facilities, or assistance  
4 in accordance with the terms of a court order under sub. (5).

5 (7m) TECHNICAL IRREGULARITIES. Evidence disclosed under a warrant issued  
6 under sub. (4) may not be suppressed because of technical irregularities or errors not  
7 affecting the substantial rights of the defendant.

8 (8) EXCEPTION. (a) The prohibition in sub. (2) does not apply to an investigative  
9 or law enforcement officer who identifies or tracks the location of a communications  
10 device if any of the following applies:

- 11 1. The customer or subscriber provides consent for the action.
- 12 2. An emergency involving danger of death or serious physical injury to any  
13 person exists and identifying or tracking the location of the communications device  
14 is relevant to preventing the death or injury or to mitigating the injury.

15 (b) A provider of electronic communication service may disclose the location of  
16 a communications device without a warrant if any of the following applies:

- 17 1. The customer or subscriber provides consent for the particular disclosure.
- 18 2. The provider of electronic communication service believes in good faith that  
19 an emergency involving the danger of death or serious physical injury to any person  
20 exists and that disclosure of the location is relevant to preventing the death or injury  
21 or to mitigating the injury.

22 (8m) JURISDICTION. For purposes of this section, a person is considered to be  
23 doing business in this state and is subject to service and execution of process from  
24 this state, if the person makes a contract with or engages in a terms of service  
25 agreement with any other person, whether or not the other person is a resident of this

1 state, and any part of the performance of the contract or provision of service takes  
2 place within this state on any occasion.

3 (9) SEIZURE. Any device used in violation of sub. (2) may be seized as contraband  
4 by any law enforcement officer and forfeited to this state in an action under s.  
5 973.075.

6 SECTION 4. 968.375 (4) (c) of the statutes is created to read:

7 968.375 (4) (c) A record or information that identifies the location of a device  
8 used to transmit electronic or wire communications.

9 SECTION 5. 995.50 (7) of the statutes is amended to read:

10 995.50 (7) No action for invasion of privacy may be maintained under this  
11 section if the claim is based on an act which is permissible under ss. 196.63 or 968.27  
12 to ~~968.37~~ 968.373.

13 SECTION 6. Initial applicability.

14 (1) This act first applies to information regarding the location of a  
15 communications device obtained on the effective date of this subsection.

16 (END)

**Parisi, Lori**

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**From:** Pratt, Phillip  
**Sent:** Monday, November 04, 2013 11:22 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB -2077/1 Topic: Requirement for a warrant before tracking mobile phone users

Please Jacket LRB -2077/1 for the ASSEMBLY.