

JAN 19 2018

A BILL FOR AN ACT

RELATING TO ELECTRONIC EAVESDROPPING.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 803, Hawaii Revised Statutes, is amended by adding a new section to part IV to be appropriately designated and to read as follows:

"§803- Cell site simulator device; collected data; prohibition; exceptions. The State or any of its political subdivisions shall not, by means of a cell site simulator device, collect or use a person's electronic data or metadata without:

(1) That person's informed consent;

(2) A warrant, based upon probable cause, that describes with particularity the person, place, or thing to be searched or seized; or

(3) Acting in accordance with a legally recognized exception to the warrant requirements."

SECTION 2. Section 803-41, Hawaii Revised Statutes, is amended as follows:



1 1. By adding a new definition to be appropriately inserted
2 and to read:

3 "Cell site simulator device" means a device that transmits
4 or receives radio waves for the purpose of conducting one or
5 more of the following operations:

6 (1) Identifying, locating, or tracking the movements of a
7 communications device;

8 (2) Intercepting, obtaining, accessing, or forwarding the
9 communications, stored data, or metadata of a
10 communications device;

11 (3) Affecting the hardware or software operations or
12 functions of a communications device;

13 (4) Forcing transmissions from or connections to a
14 communications device;

15 (5) Denying a communications device access to other
16 communications devices, communications protocols, or
17 services; or

18 (6) Spoofing or simulating a communications device, cell
19 tower, cell site, or service, including but not
20 limited to an international mobile subscriber identity
21 catcher or other invasive cell phone or telephone



1 surveillance or eavesdropping device that mimics a
2 cell phone tower and sends out signals to cause cell
3 phones in the area to transmit their locations,
4 identifying information, and communications content,
5 or a passive interception device or digital analyzer
6 that does not send signals to a communications device
7 under surveillance.

8 A cell site simulator device shall not include any device used
9 or installed by an electric utility solely to the extent that
10 the device is used by that utility to measure electrical usage,
11 to provide services to customers, or to operate the electric
12 grid."

13 2. By amending the definition of "electronic
14 communication" to read:

15 "Electronic communication" means any transfer of signs,
16 signals, writing, images, sounds, data, or intelligence of any
17 nature transmitted in whole or in part by a wire, radio,
18 electromagnetic, photoelectronic, or photo-optical system that
19 affects intrastate, interstate, or foreign commerce. The term
20 "electronic communication" includes[7] but is not limited to[7]



"display pagers" which can display [+]a[+] visual message as part of the paging process, but does not include:

- (1) Any wire or oral communication;
- (2) Any communication made through a tone-only paging device;
- (3) Any communication from a tracking device[+], but solely to the extent the tracking device is owned by the applicable law enforcement agency; or
- (4) Electronic funds transfer information stored by [+]a[+] financial institution in a communications system used for the electronic storage and transfer of funds."

SECTION 3. Section 803-42, Hawaii Revised Statutes, is amended to read as follows:

"§803-42 Interception, access, and disclosure of wire, oral, or electronic communications, use of pen register, trap and trace device, cell site simulator device, and mobile tracking device prohibited. (a) Except as otherwise specifically provided in this part, any person who:

- (1) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to



1 intercept, any wire, oral, or electronic
2 communication;

3 (2) Intentionally uses, endeavors to use, or procures any
4 other person to use or endeavor to use any electronic,
5 mechanical, or other device to intercept any wire,
6 oral, or electronic communication when:

7 (A) Such a device is affixed to, or otherwise
8 transmits a signal through, a wire, cable, or
9 other similar connection used in wire
10 communication; or

11 (B) Such a device transmits communications by radio,
12 or interferes with the transmission of such
13 communication;

14 (3) Intentionally discloses, or endeavors to disclose, to
15 any other person the contents of any wire, oral, or
16 electronic communication, knowing or having reason to
17 know that the information was obtained through the
18 interception of a wire, oral, or electronic
19 communication in violation of this part;

20 (4) Intentionally uses, or endeavors to use, the contents
21 of any wire, oral, or electronic communication,



1 knowing or having reason to know that the information
2 was obtained through the interception of a wire, oral,
3 or electronic communication in violation of this part;

4 (5) (A) Intentionally accesses without authorization a
5 facility through which an electronic
6 communication service is provided; or

7 (B) Intentionally exceeds an authorization to access
8 that facility; and thereby obtains, alters, or
9 prevents authorized access to a wire or
10 electronic communication while it is in
11 electronic storage;

12 (6) Intentionally discloses, or attempts to disclose, to
13 any other person the contents of any wire, oral, or
14 electronic communication, intercepted by means
15 authorized by subsection (b) (1), (2), or (3), or
16 section 803-44 or 803-46; and

17 (A) Either:

18 (i) Knowing or having reason to know that the
19 information was obtained through the
20 interception of the communication in
21 connection with a criminal investigation; or



(ii) Having obtained or received the information
in connection with a criminal investigation;
and

(B) With the intent to improperly obstruct, impede,
or interfere with a duly authorized criminal
investigation[;]

(7) Intentionally installs or uses a pen register ~~[or]~~, a
trap and trace device, or a cell site simulator device
without first obtaining a court order; or

(8) Intentionally installs or uses a mobile tracking
device without first obtaining a search warrant or
other order authorizing the installation and use of
such device, unless the device is installed by or with
consent of the owner of the property on which the
device is installed;

shall be guilty of a class C felony.

(b) (1) It shall not be unlawful under this part for an
operator of a switchboard, or an officer, employee, or
agent of a provider of wire or electronic
communication services, whose facilities are used in
the transmission of a wire communication, to



1 intercept, disclose, or use that communication in the
2 normal course of the officer's, employee's, or agent's
3 employment while engaged in any activity that is
4 either a necessary incident to the rendition of the
5 officer's, employee's, or agent's service or to the
6 protection of the rights or property of the provider
7 of that service; provided that providers of wire
8 communication service to the public shall not utilize
9 service observing or random monitoring except for
10 mechanical or service quality control checks.

11 (2) It shall not be unlawful under this part for an
12 officer, employee, or agent of the Federal
13 Communications Commission, in the normal course of the
14 officer's, employee's, or agent's employment and in
15 discharge of the monitoring responsibilities exercised
16 by the Commission in the enforcement of title 47,
17 chapter 5, of the United States Code, to intercept a
18 wire or electronic communication, or oral
19 communication transmitted by radio, or to disclose or
20 use the information thereby obtained.



1 (3) (A) It shall not be unlawful under this part for a
2 person not acting under color of law to intercept
3 a wire, oral, or electronic communication when
4 the person is a party to the communication or
5 when one of the parties to the communication has
6 given prior consent to the interception unless
7 the communication is intercepted for the purpose
8 of committing any criminal or tortious act in
9 violation of the Constitution or laws of the
10 United States or of this State.

11 (B) It shall not be unlawful for a person acting
12 under color of law to install in any private
13 place, without consent of the person or persons
14 entitled to privacy therein, any device for
15 recording, amplifying, or broadcasting sounds or
16 events in that place, or use of any such
17 unauthorized installation, or install or use
18 outside a private place any such device to
19 intercept sounds originating in that place which
20 would not ordinarily be audible or comprehensible
21 outside.



1 (4) It shall not be unlawful under this part for a person
2 acting under color of law to intercept a wire, oral,
3 or electronic communication, when the person is a
4 party to the communication or one of the parties to
5 the communication has given prior consent to the
6 interception.

7 (5) It shall not be unlawful under this part for any
8 person to intercept a wire, oral, or electronic
9 communication, or to disclose or use the contents of
10 an intercepted communication, when such interception
11 is pursuant to a valid court order under this chapter
12 or otherwise authorized by law; provided that a
13 communications provider with knowledge of an
14 interception of communications accomplished through
15 the use of the communications provider's facilities
16 shall report the fact and duration of the interception
17 to the administrative director of the courts of this
18 State.

19 (6) Notwithstanding any other law to the contrary,
20 providers of wire or electronic communication service,
21 their officers, employees, and agents, landlords,



1 custodians, or other persons, are authorized to
2 provide information, facilities, or technical
3 assistance to persons authorized by law to intercept
4 or access wire, oral, or electronic communications, to
5 conduct electronic surveillance, or to install a pen
6 register [~~or~~], trap and trace device, or cell site
7 simulator device if such provider, its officers,
8 employees, or agents, landlord, custodian, or other
9 specified person, has been provided with:

10 (A) A court order directing such assistance signed by
11 the designated judge; or

12 (B) A certification in writing from the Attorney
13 General of the United States, the Deputy Attorney
14 General of the United States, the Associate
15 Attorney General of the United States, the
16 attorney general of the State of Hawaii, or the
17 prosecuting attorney for each county that no
18 warrant or court order is required by law, that
19 all statutory requirements have been met, and
20 that the specific assistance is required, setting
21 forth the period of time during which the



1 providing of the information, facilities, or
2 technical assistance is authorized and specifying
3 the information, facilities, or technical
4 assistance required.

5 No provider of wire or electronic
6 communication service, officer, employee, or
7 agent thereof, or landlord, custodian, or other
8 specified person shall disclose the existence of
9 any access, interception, or surveillance or the
10 device used to accomplish the interception or
11 surveillance for which the person has been
12 furnished a court order or certification under
13 this part, except as may otherwise be required by
14 legal process and then only after prior
15 notification to the party that provided the court
16 order or certification.

17 No cause of action shall lie in any court
18 against any provider of wire or electronic
19 communication service, its officers, employees,
20 or agents, landlord, custodian, or other
21 specified person for providing information,



1 facilities, or assistance in accordance with the
2 terms of a court order or certification under
3 this part.

4 (7) It shall not be unlawful under this part for any
5 person:

6 (A) To intercept or access an electronic
7 communication made through an electronic
8 communication system configured so that the
9 electronic communication is readily accessible to
10 the general public.

11 (B) To intercept any radio communication that is
12 transmitted:

13 (i) By any station for the use of the general
14 public, or that relates to ships, aircraft,
15 vehicles, or persons in distress;

16 (ii) By any governmental, law enforcement,
17 emergency management, private land mobile,
18 or public safety communications system,
19 including police and fire, readily
20 accessible to the general public;



1 (iii) By a station operating on an authorized
2 frequency within the bands allocated to the
3 amateur, citizens band, or general mobile
4 radio services; or

5 (iv) By any marine or aeronautical communications
6 system.

7 (C) To engage in any conduct that:

8 (i) Is prohibited by section 633 of the
9 Communications Act of 1934 (47 U.S.C. §553);
10 or

11 (ii) Is excepted from the application of section
12 705(a) of the Communications Act of 1934 by
13 section 705(b) of that Act (47 U.S.C. §605).

14 (D) To intercept any wire or electronic communication
15 the transmission of which is causing harmful
16 interference to any lawfully operating station or
17 consumer electronic equipment to the extent
18 necessary to identify the source of the
19 interference.

20 (E) For other users of the same frequency to
21 intercept any radio communication made through a



1 system that uses frequencies monitored by
2 individuals engaged in the providing or the use
3 of the system, if the communication is not
4 scrambled or encrypted.

5 (8) It shall not be unlawful under this part:

6 (A) To use a pen register [~~or~~], a trap and trace
7 device, or cell site simulator device as
8 specified in this part.

9 (B) For a provider of electronic communication
10 service to record the fact that a wire or
11 electronic communication was initiated or
12 completed in order to protect the provider,
13 another provider furnishing service toward the
14 completion of the wire or electronic
15 communication, or a user of that service, from
16 the fraudulent, unlawful, or abusive use of such
17 service.

18 (C) For a provider of electronic or wire
19 communication service to use a pen register [~~or~~],
20 a trap and trace device, or cell site simulator
21 device for purposes relating to the operation,



1 maintenance, and testing of the wire or
2 electronic communication service or to the
3 protection of the rights or property of the
4 provider, or to the protection of users of that
5 service from abuse of service or unlawful use of
6 service.

7 (D) To use a pen register [~~or~~], a trap and trace
8 device, or cell site simulator device where
9 consent of the user of the service has been
10 obtained.

11 (9) Good faith reliance upon a court order shall be a
12 complete defense to any criminal prosecution for
13 illegal interception, disclosure, or use.

14 (10) Except as provided in this section, a person or entity
15 providing an electronic communication service to the
16 public shall not intentionally divulge the contents of
17 any communication (other than a communication to the
18 person or entity or an agent thereof) while in
19 transmission on that service to any person or entity
20 other than an addressee or intended recipient of the



1 communication or an agent of the addressee or intended
2 recipient.

3 (11) A person or entity providing electronic communication
4 service to the public may divulge the contents of any
5 such communication:

6 (A) As otherwise authorized by a court order or under
7 this part;

8 (B) With the lawful consent of the originator,
9 addressee, or intended recipient of the
10 communication;

11 (C) To a person employed or authorized, or whose
12 facilities are used, to forward the communication
13 to its destination;

14 (D) That was inadvertently obtained by the service
15 provider and that appears to pertain to the
16 commission of a crime, if divulged to a law
17 enforcement agency; or

18 (E) To a law enforcement agency, public safety
19 agency, or public safety answering point if the
20 provider, in good faith, believes that an
21 emergency involving danger of death or serious



1 bodily injury to any person requires disclosure
2 without delay of communications relating to the
3 emergency, and is provided with a certification
4 in writing from the governmental entity that
5 provides the facts and circumstances establishing
6 the existence of the emergency, that the specific
7 disclosure is required, and sets forth the period
8 of time during which the disclosure of the
9 information is authorized and specifies the
10 information required.

11 No cause of action shall lie in any court against any
12 provider of electronic communication service, its officers,
13 employees, or agents, custodian, or other specified person for
14 disclosing information in accordance with the terms of a
15 certification under this part."

16 SECTION 4. Section 803-44.5, Hawaii Revised Statutes, is
17 amended to read as follows:

18 "**§803-44.5 Application for a pen register [œ], a trap and**
19 **trace device[-], or cell site simulator device.** (a) The
20 attorney general of this State or the prosecuting attorney for
21 each county, or a subordinate designated to act in either's



1 absence or incapacity, may apply in writing under oath or
2 equivalent affirmation to a designated judge or any other
3 circuit court judge or district court judge, if a circuit court
4 judge has not been designated by the chief justice of the Hawaii
5 supreme court, or is otherwise unavailable, for an order or an
6 extension of an order to authorize the installation and use of a
7 pen register ~~[or]~~, a trap and trace device~~[-]~~, or cell site
8 simulator device.

9 (b) The application shall include:

- 10 (1) The identity of the official making the application
11 and the law enforcement agency conducting the
12 investigation; and
- 13 (2) The facts and circumstances relied upon by the
14 applicant to conclude that there is probable cause to
15 believe that information will be obtained through the
16 installation and use of a pen register ~~[or]~~, trap and
17 trace device, or cell site simulator device that will
18 constitute the fruits, instrumentalities, or evidence
19 of a crime covered under this part."

20 SECTION 5. Section 803-44.6, Hawaii Revised Statutes, is
21 amended to read as follows:



1 "§803-44.6 Issuance of an order for a pen register [e], a
2 trap and trace device[-], or cell site simulator device. (a)

3 Upon an application for an order authorizing the installation
4 and use of a pen register [e], a trap and trace device, or cell
5 site simulator device, the designated judge shall satisfy itself
6 that there are sufficient facts and circumstances contained
7 within the application that there is probable cause to believe
8 that the information to be obtained through the installation and
9 use of a pen register [e], a trap and trace device, or cell
10 site simulator device will constitute the fruits,
11 instrumentalities, or evidence of a crime or is relevant to an
12 ongoing criminal investigation.

13 (b) If the designated judge is so satisfied, the order
14 issued shall specify:

15 (1) In the case of a pen register or trap and trace
16 device:

17 (A) The identity, if known, of the person to whom is
18 leased or in whose name is listed the telephone
19 line, cellular telephone, or electronic device or
20 service to which the pen register or trap and
21 trace device is to be attached;



~~[-(2)]~~ (B) The identity, if known, of the person who is the subject of the criminal investigation;

[~~(3)~~] (C) The number and, if known, the physical location of the telephone line, cellular telephone, or electronic device or service to which the pen register or the trap and trace device is to be attached, and, in the case of a trap and trace device, the geographical limits of the trap and trace order;

[~~(4)~~] (D) A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates; and

[~~(5)~~] (E) Upon the request of the applicant, the information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device that the provider of wire communication service is directed to furnish to the applicant[~~-~~]; or

(2) In the case of a cell site simulator device:

(A) The identity, if known, of:



1 (i) The person to whom is subscribed or in whose
2 name is subscribed the electronic
3 communications service utilized by the
4 device to which the cell site simulator
5 device is to be used; and

6 (ii) The person who possesses the device to which
7 the cell site simulator device is to be
8 used;

9 (B) The telephone number or other unique subscriber
10 account number identifying the wire or electronic
11 communications service account used by the device
12 to which the cell site simulator device is to be
13 attached or used;

14 (C) If known, the physical location of the device to
15 which the cell site simulator device is to be
16 attached or used;

17 (D) The type of device, and the communications
18 protocols being used by the device, to which the
19 cell site simulator device is to be attached or
20 used;



1 (E) The geographic area that will be covered by the
2 cell site simulator device;

3 (F) All categories of metadata, data, or information
4 to be collected by the cell site simulator device
5 from the targeted device, including but not
6 limited to call records and geolocation
7 information;

8 (G) Whether or not the cell site simulator device
9 will incidentally collect metadata, data, or
10 information from any parties or devices not
11 specified in the court order, and if so, what
12 categories of information or metadata will be
13 collected;

14 (H) Any disruptions to access or use of a
15 communications or internet access network that
16 may be created by use of the device; and

17 (I) A statement of the offense to which the
18 information likely to be obtained by the cell
19 site simulator device relates.

20 (c) An order authorizing installation and use of a pen
21 register ~~[or]~~, a trap and trace device, or cell site simulator



1 device shall be for a period not to exceed sixty days.
2 Extension of an order may be granted, but only upon a
3 reapplication for an order and a finding of probable cause to
4 justify continuing use of a pen register [~~or~~], trap and trace
5 device[~~or~~], or cell site simulator device. The period of the
6 extension shall be for a period not to exceed sixty days.

7 (d) An order authorizing the installation and use of a pen
8 register [~~or~~], a trap and trace device, or cell site simulator
9 device shall direct that:

- 10 (1) The order be sealed until otherwise ordered by the
11 court; and
- 12 (2) The person owning or leasing the telephone line,
13 cellular telephone, or electronic device or service to
14 which the pen register [~~or~~], trap and trace device, or
15 cell site simulator device is attached[~~or~~] or used, or
16 who has been ordered by the court to provide
17 assistance to the applicant, not disclose the
18 existence of the pen register [~~or~~], trap and trace
19 device, or cell site simulator device or the existence
20 of the investigation to the listed subscriber or to



1 any other person, unless otherwise ordered by the
2 court."

3 SECTION 6. Section 803-47, Hawaii Revised Statutes, is
4 amended as follows:

5 1. By amending its title to read:

6 "§803-47 Reports concerning intercepted wire, oral, or
7 electronic communications; reports concerning pen registers
8 ~~[and]~~, trap and trace devices[-], and cell site simulator
9 devices."

10 2. By amending subsection (c) to read:

11 "(c) The attorney general, at least twenty days prior to
12 the convening of each regular session, shall annually report to
13 the legislature on the number of pen register orders ~~[and]~~,
14 orders for trap and trace devices, and orders for cell site
15 simulator devices applied for by law enforcement agencies of the
16 State."

17 SECTION 7. If any provision of this Act, or the
18 application thereof to any person or circumstance, is held
19 invalid, the invalidity does not affect other provisions or
20 applications of the Act that can be given effect without the



1 invalid provision or application, and to this end the provisions
2 of this Act are severable.

3 SECTION 8. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 9. This Act shall take effect on July 1, 2018.

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Report Title:

Cell Site Simulator Device; Data; Electronic Eavesdropping;
Court Order

Description:

Prohibits the State and its political subdivisions from collecting or using a person's electronic data or metadata by means of a cell site simulator device, except under certain conditions. Prohibits the installation and use of a cell site simulator device without a court order. Specifies conditions when a cell site simulator device may be used. Specifies procedures for application and issuance of an order for a cell site simulator device. Specifies reporting requirements related to cell site simulator device applications.

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