

Court: Judges can demand warrant for cell locales

September 7 2010, By MARYCLAIRE DALE , Associated Press Writer

(AP) -- Judges have the right to require warrants before police get cell phone records that could suggest a customer's likely location, a U.S. appeals court ruled Tuesday in a novel electronic privacy case.

The Pennsylvania case involves the government's interest in records that show a caller's location during past calls. Cell phone tower records can pinpoint a user's location to within several hundred feet.

Judges in a Pittsburgh drug case had insisted that federal agents get a warrant for the data. The usage patterns could show when a phone customer is typically home, at work or at some other location, they said.

The government appealed, arguing that the 1986 Electronics Communications Privacy Act required only "reasonable grounds" the data is relevant to a criminal investigation, not the higher probable cause standard needed for warrants.

Tuesday's ruling was a victory for electronic privacy groups.

"My concern is, doesn't the weaker standard permit fishing expeditions?" said Susan Freiwald, a University of San Francisco law professor specializing in cyberspace law.

However, the court stopped short of saying warrants are always needed for the cell phone company data.

Senate Judiciary Chairman Patrick Leahy, D-Vt., chief author of the 1986 law, has pledged to revisit the subject, calling electronic privacy laws "woefully outdated."

The 32-page opinion by Judge Dolores Sloviter suggests judges have the discretion, and can demand more information from the government before deciding if a probable-cause warrant is needed.

The panel ordered the Pittsburgh magistrate to do more fact-finding "and give a full explanation that balances the government's need (not merely desire) for the information with the privacy interests of cell phone users."

U.S. Magistrate Lisa Pupo Lenihan had demanded a probable-cause showing for the data in 2008, calling the information "extraordinarily personal and potentially sensitive."

The Electronic Frontier Foundation and the American Civil Liberties Union sided with her in opposing the government's appeal.

The Justice Department was reviewing the decision and had no immediate comment, a spokeswoman said.

The government had argued that the law only required warrants to obtain the contents of electronic communications, such as a text or e-mail, or to wiretap a phone. In oral arguments in February, Justice Department lawyer Mark Eckenwiler said they were not required to obtain "non-content" data.

Sloviter, during the session, said she presumed police usually have enough information in major criminal cases to secure warrants.

"I think this is going to have an impact on a broad range of electronic

privacy issues, not just the issue of access to cell phone records," said Kevin Bankston, the Electronic Frontier Foundation lawyer who argued the case.

The ruling "give(s) lower courts the tools to require a warrant and avoid any potentially unconstitutional location tracking," he said Tuesday.

Freiwald had hoped the court would go further and always require a warrant for the potentially sensitive records.

"The courts continue to avoid the Fourth Amendment question when it comes to new communications technology," Freiwald said.

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