



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

March 6, 2014

The Honorable Ron Wyden  
Senate Select Committee on Intelligence  
United States Senate  
Washington, D.C. 20510

Dear Senator Wyden:

This is in response to your questions to Director Comey during the Committee's annual threat hearing on January 29, 2014. Specifically, you asked whether the FBI is required to have probable cause in order to acquire Americans' cell site location information (CSLI) for intelligence purposes and if the legal standard is different if the government is collecting location information from a smartphone application rather than a cell phone tower.

In responding to your questions, we understand the term "intelligence purposes" to refer to "foreign intelligence" purposes and the term "American" to have the same definition as the term "U.S. Person" as defined in the Foreign Intelligence Surveillance Act (FISA). We understand the term "CSLI" to mean the records of the tower and which of three pie-piece-shaped sectors covered by the tower that serves a user's phone at the time of a phone call, text message, or data transmission. Providers collect and maintain these records in their ordinary course of business. Based on your second question, we've assumed that you are referring to both: (a) historical and prospective collection of CSLI from a cell phone service provider, i.e., a third party, that obtains the CSLI via a cell phone tower, and (b) the collection of location information from the owner/user of the smartphone by accessing the smartphone itself. Our responses will apply to U.S. Persons anywhere in the world, as well as anyone located within the U.S. Finally, although in certain instances the FBI will use criminal legal authorities in national security investigations, we assume that your questions are focused on national security legal authorities such as FISA. If any of these understandings are incorrect, please let us know and we will provide you with additional responsive information.

I. CSLI From a Cell Phone Service Provider

In order to obtain historical CSLI records pertaining to a U.S. Person from a cell phone provider for a national security investigation, the FBI currently would seek a FISA court order for business records based upon a showing of reasonable grounds to believe that the records sought are relevant to an authorized FBI investigation. In order to obtain prospective CSLI pertaining to a U.S. Person from a cell phone provider for a national security investigation, the FBI would seek a different FISA court order, often described as a "full-content FISA," based upon a showing of probable cause.

Although the FBI's current practice is to seek prospective CSLI pursuant to a full-content FISA order based upon a showing of probable cause for a national security investigation, we are aware that in many jurisdictions U.S. district courts authorize court orders in the criminal context to legally obtain prospective CSLI from a cell phone provider pursuant to other legal authorities that do not require a showing of probable cause. Nevertheless, because a few U.S. district courts require probable cause-based warrants to obtain prospective CSLI in the criminal context, as a prudential matter the FBI elects to seek prospective CSLI pursuant to a full-content FISA order, thus matching the higher standard imposed in some U.S. districts.

## II. Location Information From an Owner/User of a Smartphone

There are a variety of different types of location information that can be obtained via surveillance or search of a smartphone. Which legal authority we would use is very much dependent upon the type of information we are seeking and how we intend to obtain that information. Questions considered include whether or not the information sought would target an individual in an area in which that person has a reasonable expectation of privacy, what type of data we intend to obtain (GPS or other similarly precise location information), and how we intend to obtain the data (via a request for records from the service provider or from the mobile device itself). When obtaining prospective or historical location information pertaining to a U.S. Person from the smartphone itself which is possessed by a U.S. Person (or in other circumstances governed by FISA), the FBI would seek a full-content FISA court order based upon a showing of probable cause, absent any exception to the Fourth Amendment.

The law and technology in this area are complex, and we have endeavored to respond to your questions based on the understandings referenced above. If you have additional questions, we would be happy to brief you regarding these other collection techniques and the legal authorities under which we operate. We appreciate your interest in this issue and your continued support for the FBI's intelligence mission. Please contact the Office of Congressional Affairs at 202-324-5051 if you have questions concerning this or other matters.

Sincerely,



Stephen D. Kelly  
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Office of Congressional Affairs

1 - The Honorable Dianne Feinstein  
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1 - The Honorable Saxby Chambliss  
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