



May 13, 2016

Greg Watson  
Legislative Clerk  
Committee on Energy and Commerce  
2125 Rayburn House Office Bldg.  
Washington, D.C. 20515

Dear Mr. Watson,

Enclosed with this letter is my response to Chairman Walden's request for additional information for the record made orally during the April 13, 2016, hearing of the Subcommittee on Communications and Technology entitled "Legislative Hearing on Seven Communications Bills," and provided to me in writing on May 13, 2016. A copy of Chairman Walden's request is attached. I have also transmitted a copy of my response to you via e-mail.

If you have any further questions, please feel free to contact me at the below number or Legislative Counsel Neema Singh Guliani at 202-675-2322 or [nguliani@aclu.org](mailto:nguliani@aclu.org).

Sincerely,

**Nathan Freed Wessler**  
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To: Greg Watson, Legislative Clerk, House Committee on Energy and Commerce

From: Nathan Freed Wessler, Staff Attorney, American Civil Liberties Union

Date: May 13, 2016

Re: Response to Member Request for the Record

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Request for the Record of Congressman Greg Walden:

**The Oregon version of the Kelsey Smith Act passed the state House and Senate unanimously and was signed into law by a Democratic governor. What was ACLU's position on the Oregon statute?**

Response of Nathan Freed Wessler:

State legislation is handled by the ACLU's state affiliates, not by the national ACLU. The ACLU of Oregon was neutral on the version of the Kelsey Smith Act enacted by the Oregon legislature in 2014 (HB 4022), and did not submit written testimony.<sup>1</sup> In brief oral testimony,<sup>2</sup> the ACLU of Oregon raised concerns about a provision of the legislation that may have conflicted with the federal Electronic Communications Privacy Act. In response to a question from the committee, the ACLU of Oregon's representative also urged inclusion of an after-the-fact reporting requirement to identify any abuse of the emergency request procedures included in the bill.

In 2015, the ACLU of Oregon supported SB 640, which would have imposed a warrant requirement for law enforcement access to cell phone location information and required law enforcement to report to a court within 48 hours of obtaining cell phone location data pursuant to a warrantless emergency request.<sup>3</sup>

Various after-the-fact protections against abuse of emergency cell phone location authority appear in state laws across the country. For example, the versions of the Kelsey Smith Act enacted in Colorado and Indiana require law enforcement to obtain an after-the-fact court order upon a probable cause showing within 48 hours after the emergency request.<sup>4</sup> California law requires after-the-fact judicial review within three days, as well as notice to the person whose location information was obtained and judicially enforceable remedies in cases of abuse.<sup>5</sup> Illinois requires after-the-fact judicial review within 72 hours and provides a suppression remedy when

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<sup>1</sup> The witness registration form from the Oregon House hearing on HB 4022 showing the ACLU of Oregon's position on the legislation is available at:

<https://olis.leg.state.or.us/liz/2014R1/Downloads/CommitteeMeetingDocument/33277>.

<sup>2</sup> Audio of the February 4, 2014 hearing of the Oregon House Committee on Veterans' Services and Emergency Preparedness is available at: [http://oregon.granicus.com/MediaPlayer.php?clip\\_id=900](http://oregon.granicus.com/MediaPlayer.php?clip_id=900).

<sup>3</sup> SB 640, § 4(3), available at

<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB640/Introduced>. The ACLU of Oregon's support for this bill is noted here: <http://aclu-or.org/category/legislation/2015-legislature>.

<sup>4</sup> Colo. Rev. Stat. § 18-9-312(1.5)(e); Ind. Pub. L. 57 (H.B. 1013), § 3 (2016) (to be codified at Ind. Code § 35-33-5-15(b)).

<sup>5</sup> Cal. Penal Code § 1546.1.

no emergency was found to have existed.<sup>6</sup> Maine imposes a notice requirement and requires law enforcement to report to a court “[w]ithin a reasonable period of time.”<sup>7</sup> Minnesota and Montana provide a suppression remedy for violations of the law.<sup>8</sup> Virginia requires law enforcement to notify a court within three days of the emergency location request.<sup>9</sup>

These protections, like the protections sought by the ACLU in the context of H.R. 4889, are a reasonable safeguard against abuse and do not interfere with law enforcement’s ability to quickly locate a phone in an emergency.

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<sup>6</sup> 725 Ill. Comp. Stat. 168/15(6)(B)–(C).

<sup>7</sup> Me. Rev. Stat. tit. 16, §§ 649–50.

<sup>8</sup> Minn. Stat. § 626A.42(6)(a); Mont. Code Ann. § 46-5-110(1)(c).

<sup>9</sup> Va. Code Ann. § 19.2-70.3(E).