

STATE OF VERMONT  
WASHINGTON SUPERIOR COURT

**American Civil Liberties Union of Vermont  
and American Civil Liberties Union  
Foundation of Vermont,**  
*Plaintiffs*

Docket No. 184-3-10 WNCV

v.

**Office of the Vermont Attorney General,**  
*Defendant*

**COMPLAINT**

This action seeks to compel the Vermont Attorney General's office to produce documents showing whether and how it uses cellphones to track individual Vermonters. The defendant has unlawfully refused to produce documents plainly subject to disclosure under Vermont's Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320, and has failed to abide by the Act's requirement that any refusal to produce documents be accompanied by a statement of facts supporting that refusal.

***Jurisdiction and Venue***

1. The jurisdiction of this Court is invoked pursuant to Vt. Stat. Ann. tit. 1, § 319(a).
2. This Court is the proper venue for this action because Vt. Stat. Ann. tit. 1, § 319(a) explicitly permits enforcement here.

***Parties***

***The ACLU of Vermont and ACLU Foundation of Vermont***

3. The American Civil Liberties Union of Vermont is a statewide, non-profit, non-partisan organization dedicated to the defense and expansion of civil liberties.

4. The American Civil Liberties Union Foundation of Vermont is a separate Internal Revenue Code § 501(c)(3) non-profit organization that educates the public about civil liberties and provides attorneys to represent individuals and organizations free of charge in civil liberties litigation.
5. Both plaintiffs (collectively referred to as “the ACLU of Vermont” for convenience) are headquartered in Montpelier, Vermont.
6. The ACLU of Vermont is the Vermont affiliate of the American Civil Liberties Union, a nationwide non-profit civil liberties organization with over 500,000 members.
7. As non-partisan, non-profit entities, the plaintiffs have no commercial interest in the disclosure of the records sought in this action.
8. Dissemination of information about civil liberties to the public is a critical and substantial component of the ACLU of Vermont’s work.
9. The ACLU of Vermont makes such information available to everyone, including lawmakers, students, educators, and other non-profit groups, for no cost via printed materials and its website, <http://www.acluvt.org>.

***The Office of the Vermont Attorney General***

10. The defendant comprises the Vermont Attorney General and her/his supporting attorneys and staff. *See* Vt. Stat. Ann. tit. 3, §§ 151, 153, 155.
11. The defendant is a “public agency” as that term is defined by Vermont’s Public Records Act, Vt. Stat. Ann. tit. 1, § 317(a).
12. The defendant is headquartered in Montpelier, Vermont.
13. The defendant “represent[s] the state in all civil and criminal matters,” and has “the same authority throughout the state as a state’s attorney.” Vt. Stat. Ann. tit. 3, § 152.

14. The defendant possesses authority over “the general supervision of criminal prosecutions,” may “consult with and advise the state’s attorneys in matters relating to the duties of their office,” and assists each state’s attorney “in the preparation of indictments and informations” when the interests of the state so require. *Id.* § 153(a).
15. The defendant “appear[s] for the state in the preparation and trial of all prosecutions for homicide,” and may do so in other criminal matters as it sees fit. *Id.* § 157.

### ***Facts***

#### ***Cellphone Location Data***

16. Despite their small size, cellular telephones (“cellphones”) are sophisticated two-way radios so named because they operate on digital networks broadcast in hexagonally shaped geographic areas called “cells.”<sup>1</sup>
17. Each honeycomb-shaped cell is created by the transmissions of base stations called “cell sites” or “cell towers,” owing to the fact that the necessary equipment is often mounted high above the ground on towers or poles.
18. Cell sites broadcast their digital signal in three separate directions, with each directional broadcast forming an individual honeycomb-shaped cell; thus, each cell site is the place at which three cells meet. A cellphone provider’s network is made up of contiguous swaths of cells.
19. When a cellphone is powered on, it scans all available cell sites within radio range and notifies the cellphone provider of the results. This process is called “registration,” and occurs so that when a caller dials the cellphone’s number, the cellphone provider can

---

<sup>1</sup> Further discussion of the mechanics of cellphone location data is available elsewhere. *See generally* Clifford S. Fishman and Anne T. McKenna, *Wiretapping & Eavesdropping: Surveillance in the Digital Age* § 28:2 (3d ed. 2007); U.S. Dep’t of Justice, *Electronic Surveillance Manual* 40-41 (2005), available at <http://www.justice.gov/criminal/foia/docs/elec-sur-manual.pdf>.

- connect the call to the cell on which the cellphone is operating.
20. Each time the cellphone registers, it broadcasts two serial numbers to the cellphone provider, the Electronic Serial Number and the Mobile Identification Number. These numbers enable cellphone providers to uniquely identify every cellphone.
  21. As long as the cellphone remains on – regardless of whether or not it is used to place or receive calls – the cellphone registers every few seconds. Registration also occurs whenever the cellphone travels from one cell to another. Registration is invisible to the cellphone user, and cannot be controlled or interrupted by the user.
  22. Registration data is recorded by cellphone providers, and is retained beyond its period of immediate utility.
  23. Because registration records the cellphone’s unique identity and the signal strength of every cell site available to the cellphone, it is possible to use registration data to calculate the position of the cellphone by determining its proximity to one or more of the three sides of each tower in which it is in radio range. This procedure is called “triangulation.”
  24. Cellphone triangulation is extremely accurate by design: the Federal Communications Commission requires cellphone providers to be able to calculate every cellphone’s position to within 100 meters for purposes of locating a cellphone user who dials 911 for emergency assistance but is unable to describe her or his location.<sup>2</sup>
  25. The cellphone location data provided by the registration process can be used retrospectively (by accessing stored data to reconstruct a cellphone user’s past movements), or in real time by accessing registration data as it flows across a cellphone provider’s computer network to track a cellphone user’s movements as they occur.

---

2 See 47 C.F.R. §20.18(h). Triangulation by means of cellphone signal is not the sole means of determining a cellphone’s location; many cellphone models contain Global Positioning System (GPS) functionality that permits the cellphone to calculate its longitude, latitude, and altitude to an accuracy of twenty meters or less by comparing signals from a network of orbiting satellites. The ACLU of Vermont’s request pertains to any and all cellphone location data obtainment attempts.

### ***Government Use of Cellphone Location Data***

26. Approximately 89 out of every 100 people of all ages in the United States carry a cellphone.<sup>3</sup>
27. Media outlets nationwide have begun to report the widespread law enforcement practice of accessing cellphone location data as a means of tracking the location of particular individuals without their knowledge.<sup>4</sup>
28. Worse, it has become clear that some law enforcement agencies, including those of the federal government, have been routinely obtaining cellphone location data upon a showing of less than probable cause.<sup>5</sup>
29. Prosecutorial agencies have attempted to justify the use of cellphone tracking absent a showing of probable cause on the basis that anyone who uses a cellphone voluntarily waives any rights of privacy, because she or he “assumes the risk that the cell phone provider will create its own internal record of which of its towers handles the call.”<sup>6</sup>
30. The ACLU of Vermont believes that members of the public would be very surprised to learn that their elected officials view any use of a cellphone as a waiver of their rights

---

3 See CTIA – The Wireless Assoc., *CTIA Semi-Annual Wireless Industry Survey 2* (Jun. 30, 2009), available at [http://files.ctia.org/pdf/CTIA\\_Survey\\_Midyear\\_2009\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Midyear_2009_Graphics.pdf) (reporting 276,610,580 cellphone subscribers); U.S. Census Bureau, *Population Finder*, at [http://factfinder.census.gov/servlet/SAFFPopulation?\\_submenuId=population\\_0&\\_sse=on](http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on) (accessed Feb. 12, 2010) (estimating total population of United States at 307,006,550 people).

4 See, e.g., Patrick McArdle, *Murder Suspect's Cell Phone Leads to Arrest*, Bennington Banner, Jan. 26, 2010 at A1 (reporting that Vermont police “tracked [a criminal defendant’s] cell phone usage to the home of Patrick Potter on Cass Terrace” in Manchester); Matt Richtel, *Live Tracking of Mobile Phones Prompts Court Fights on Privacy*, N.Y. Times, Dec. 10, 2005, at A1 (“In recent years, law enforcement officials have turned to cellular technology as a tool for easily and secretly monitoring the movements of suspects as they occur.”).

5 See Ellen Nakashima, *Cellphone Tracking Powers on Request: Secret Warrants Granted Without Probable Cause*, Wash. Post, Nov. 23, 2007 at A1 (reporting that the federal government is “routinely asking courts to order cellphone companies to furnish real-time tracking data so they can pinpoint the whereabouts” of suspects, with some judges granting access to such data “without requiring the government to demonstrate that there is probable cause to believe that a crime is taking place or that the inquiry will yield evidence of a crime.”). See also Declan McCullagh, *Feds Push for Tracking Cell Phones*, CNet News, Feb. 11, 2010, [http://news.cnet.com/8301-13578\\_3-10451518-38.html](http://news.cnet.com/8301-13578_3-10451518-38.html) (“Obtaining location details is now ‘commonplace,’ says Al Gidari, a partner in the Seattle offices of Perkins Coie who represents wireless carriers. ‘It’s in every pen register order these days.’”).

6 Brief of the United States at 28, *In the Matter of the Application of the United States for an Order Directing a Provider of Electronic Comm’n Serv. to Disclose Records to the Gov’t*, No. 08-4227 (3d Cir. Feb. 13, 2009).

under the Vermont and United States Constitutions.

31. Nonetheless, information on the defendant's practices and procedures in obtaining cellphone location data is absent from public discourse.
32. The ACLU of Vermont believes that providing Vermonters with information about whether and how the defendant obtains cellphone location data is vital to the public understanding of the privacy risks involved in carrying a cellphone.

***The ACLU of Vermont's Public Records Request***

33. Accordingly, the ACLU of Vermont tendered a written public records request to the defendant on February 5, 2010 (attached hereto as Appendix "A").
34. In relevant part,<sup>7</sup> the request sought production of:

Any record(s) showing requests filed by the Attorney General's office in any court since January 1, 2008 for the obtainment of mobile telephone location information from any telecommunications provider or mobile phone carrier.

App. A at 1.

35. As a means of sharpening the defendant's focus, the ACLU of Vermont suggested that the defendant's response include, but not be limited to:
  - (a) the date on which the request was filed,
  - (b) the court in which the request was filed,
  - (c) the docket number and name of the matter, and
  - (d) the name of the telecommunications provider or mobile phone carrier from which the data was sought.

*Id.*

---

<sup>7</sup> The ACLU of Vermont's letter requested two categories of public records. The defendant's inability to locate any items responsive to the second category of requested documents – those "showing requests made by the Attorney General's office to any mobile phone carrier . . . for the obtainment of mobile telephone location information absent a court order mandating that the carrier or provider furnish the information" – is not contested in this action. App. A at 1.

***The Defendant's Refusal to Produce the Requested Records***

36. On February 11, 2010, the defendant responded to the ACLU of Vermont's request by letter (attached hereto as Appendix "B").
37. In relevant part, the defendant refused to provide any documents responsive to the ACLU of Vermont's request.
38. Instead, the defendant asserted that any responsive records would be exempt from disclosure:

Any records possessed by the Attorney General's Office that are within the scope of your request are exempt from disclosure under the Public Records Act. More specifically, any such records would be exempt pursuant to 1 V.S.A. § 317(c)(1) because the records are by law designated confidential and § 317(c)(5) because the records deal with the detection and investigation of crime.

App. B at 1.

39. The defendant's denial identified Janet Murnane as the designated official to whom its denial could be appealed. App. B at 2.
40. The ACLU timely appealed by letter to Ms. Murnane on February 12, 2010, fulfilling Vt. Stat. Ann. tit. 1, § 318(c)(1) (attached hereto as Appendix "C").
41. On February 19, 2010, Ms. Murnane replied by letter and refused to produce the documents requested (attached hereto as Appendix "D").
42. The entirety of Ms. Murnane's analysis supporting the continued withholding of responsive documents reads as follows:

I have reviewed your request and the basis for this office's partial denial of your request. It is my determination that the requested records are not documents subject to disclosure under the Public Records Act. The requested records would be exempt pursuant to 1 V.S.A. § 317(c)(1) as records designated confidential by law and § 317(c)(5) as records relating to the detection and investigation of crime. Without waiving either exemption, I can represent to you that this [o]ffice does not have any documents relating to mobile

telephone location information that have been received from any telecommunications provider or phone carrier.

App. D at 1.

43. The defendant's final determination did not contain a list or index identifying which purported exemption applied to the specific records that fall within the scope of the ACLU of Vermont's request.
44. The defendant's final determination did not specify what source of law rendered the affected records "by law designated confidential" independent of the crime detection exemption codified at Vt. Stat. Ann. tit. 1, § 317(c)(5).
45. The defendant's final determination did not include "a brief statement" of the "supporting facts for denial" as required by Vt. Stat. Ann. tit. 1, § 318(c)(1).
46. The defendant's final determination made no offer to produce responsive documents in any form, redacted or otherwise.
47. Having exhausted the Public Records Act's appeal process without obtaining production of the public records at issue, the ACLU of Vermont now contests the defendant's continued withholding of the records in this Court as the means of last recourse permitted by the Act. *See* Vt. Stat. Ann. tit. 1, § 319(a).

***The ACLU of Vermont's First Count Against the Defendant***

48. Paragraphs 1-47 are incorporated as if set forth at length herein.
49. The defendant has contravened the law of Vermont by refusing to produce documents responsive to a public records request absent an applicable exemption to the Public Records Act.

*The ACLU of Vermont's Second Count Against the Defendant*

50. Paragraphs 1-49 are incorporated as if set forth at length herein.
51. The defendant has contravened the law of Vermont by failing to identify the factual basis for its refusal to produce documents responsive to a public records request.

*Request for Relief*

52. Wherefore, the ACLU of Vermont is entitled to have this Court:
  - a. Declare that the defendant's failure to identify any factual basis for its denial of the ACLU of Vermont's request is unlawful,
  - b. Declare that the defendant's withholding of the public records requested is unlawful,
  - b. Enjoin the defendant from withholding the public records requested,
  - c. Award the ACLU of Vermont the legal costs and fees incurred to bring this action and force the defendant to obey the law, and
  - d. Fashion any other remedy as it sees fit.

Respectfully submitted,  
The American Civil Liberties Union of Vermont and  
the American Civil Liberties Union Foundation of Vermont

\_\_\_\_\_/s/\_\_\_\_\_  
Dan Barrett  
Staff Attorney  
ACLU Foundation of Vermont  
137 Elm Street  
Montpelier, VT  
05602  
(802) 223-6304

*Counsel for the plaintiffs*  
March 15, 2010