March 26, 2012

Amy Miller
ACLU Nebraska Foundation
941 'O' Street
Suite 706
Lincoln, Nebraska 68508

RE: Request for Police Department Records – Cell Phone Location Records

Dear Ms. Miller:

On behalf of Chief of Police Alexis Hayes I am responding to your request for Omaha Police Department records. You ask for a copies of a number of records relating to tracking of cell phone users’ locations. Your request is made under the provisions of the Nebraska Public Records Act, Neb. Rev. Stat. sections 84-712 et seq. This is the response required by section 84-712(4). I realize this response is woefully late and I thank you for the clarification you sent and your patience in waiting for this response.

GENERAL EXPLANATION

As an administrative function the Police Department does not track in any readily accessible manner the instances when cell phone location information is obtained. The Department is, thus, unable to gather the information or documents sought by most of your request. The Police Department does not have any automated method to retrieve documentation showing that cell phone subscriber information was sought or obtained in any particular criminal investigation.

Cell phone location information is obtained only during criminal investigations and all documentation is case-specific. Absent exigent circumstances, a subpoena issued by a prosecutor or search warrant issued by a judge is required to obtain the information. The information obtained would be documented on investigative reports maintained as part of the investigation. To the extent your request extends to the reports documenting applications for subpoenas or search warrants for subscriber information or information obtained through that process, it is denied. These records were created or maintained as part of a law enforcement investigation and are withheld pursuant to Neb. Rev. Stat. § 84-712.05(5) (Reiss. 2008). See, Fourcloud v. City of Fremont, 3 NCA 986.
(1993). The records being withheld were created by Omaha police personnel during investigations of reported or observed criminal activity. If the records were placed into public court files, copies will be provided at your expense if you can provide the case identification number. The Department has no automated method to identify which of the subpoena or warrant documents were subsequently revealed in an open court proceeding.

The Department also has no way of retrieving the subpoena or search warrant records and is unable to describe the specific contents. Typically, the application will recite facts alleged to provide probable cause for the subpoena or warrant and information identifying the cell phone. A sample of a typical warrant application and proposed order is enclosed for your information.

SPECIFIC RESPONSES

Your request is itemized by categories and I’ll respond using the categories you presented.

• Policies, procedures and practices to obtain cell phone location records.

The Department’s written policy does not specifically address obtaining cell phone location information but considers that situation to fall within the Department’s non-emergency telephone services policy. A copy of that policy is enclosed (Paragraphs II. and III. on page 2, Telephone – Emergency Service Center). In addition, telephone subscriber information can be obtained through the use of search warrants. A copy of Department written policy for warrant applications is enclosed (Warrants – Applications). A sample of a typical application for a search warrant for electronic communication information and typical warrant is enclosed.

• Data retention policies, detailing how long cell phone location records are kept, databases in which they are placed, and agencies (federal, state and local) with which they are shared

Although the Nebraska Records Management Act, Neb. Rev. Stat. § 84-1201, et seq. does not apply to metropolitan class cities, OPD records are generally kept in accordance with the schedules published by the Secretary of State. Those schedules suggest law enforcement records be kept a minimum of four years.

The Omaha Police Department does not have any databases containing cell phone location records outside of the electronic storage in which all police records are kept, including the case-specific police records. For the reasons stated, above, those case-specific records cannot be provided without identifying information. Information in the records, whether obtained
by subpoena, search warrant, or otherwise, is shared with other law enforcement agencies only upon request and a showing of need.

- The use of cell phone location records to identify "communities of interest (detailing those persons who have been called, or called by a target)" in investigations.

  No such records exist outside of the case-specific records discussed, above.

- The use of cell phone location records to identify all of the cell phones at a particular location.

  No such records exist.

- Your use of "digital fences" (systems whereby you are notified whenever a cell phone comes within a specific geographic area).

  No such records exist outside of, possibly, instances of such use in a particular criminal investigation.

- The legal standard (e.g. probable cause, relevance) you proffer to obtain cell phone location records

  The legal standard used to obtain information depends on the nature of the investigation and circumstances. Generally, probable cause is required to obtain a warrant and relevance to the investigation is required for a subpoena. The warrant application is reviewed by a judge and a request for subpoena is reviewed by prosecutors. In exigent circumstances, a request is made to the telephone company with showing of such circumstances.

- Judicial decisions and orders ruling on your applications to obtain cell phone location records.

  No such records exist outside of the case-specific records discussed, above. Any judicial decisions and orders would be publicly available from the courts and are as readily accessible to you as to the Department.

- Statistics regarding your use of cell phone location records, including the number of emergency requests for which no court order was obtained.

  No such records exist.
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- The form in which cell phone location records are provided (hard copy, through specific online databases).

  No such records exist outside of the case-specific records discussed, above. The records in criminal investigations are typically created on paper and converted to electronic form for long-term maintenance.

- Communications with cell phone companies and providers of location-based services regarding cell phone location records, including company manuals, pricing, and data access policies, invoices reflecting payments for obtaining cell phone location records, and instances in which cell phone companies have refused to comply with a request or order.

Records of communications with a telephone company or provider of information that relate to a criminal investigation may exist only in the investigation files. As discussed, above, the Police Department has no way to retrieve these, if they exist, without first having a way to identify a particular investigation. Even if retrieval is efficiently possible, they are investigative records and would be withheld as explained, above. No manuals or records of company pricing data or access policies exist in the Police Department. The Finance Department has records of payments made to telephone companies for subpoena fees but these records do not detail if the subpoena sought cell phone records or other telephone information. Copy costs would need to be paid before a search for such payment records could be made. No records of refusals are known to exist in any department.

Section 84-712.03 of the Nebraska Revised Statutes may grant you the right to administrative or judicial review of this response. Please consult that statute for further information. Chief of Police Hayes is the public employee responsible for the decision to deny a portion of your request. Contact me at (402) 444-5137 if you have questions about the legal basis for this response.

Sincerely,

[Signature]

Thomas O. Mumgaard
Deputy City Attorney