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September 22, 2022

Joseph Chacon, Chief of Police
Austin Police Department
715 E. 8th Street
Austin, TX 78701

RE: Response to APD's November 2021 Changes to General Order 427

Dear Chief Chacon:

I am writing to provide feedback and preliminary recommendations on APD's November 2021 changes to General Order (GO) 427. This GO is now titled "Geolocates, Pen Registers, and/or Trap and Trace Devices."¹ OPO's recommendations are based on research into best practices and direct discussions with APD command staff whom APD Executive Staff designated to speak on this topic.

Going forward, we invite APD to collaborate on developing processes to incorporate community input into future policy changes. We look forward to addressing the issues identified and improving these policies for the benefit of the community and APD's sworn personnel.

Sincerely,

Sylvia Hardman

Sylvia Hardman, Acting Director

Enclosure: (1)

APD redlined edits to 427 Geolocates, Pen Registers, and/or Trap and Trace Devices

¹ General Order 427 was previously titled Exigent Mobile Phone Ping Requests. The title was changed to Geolocates, Pen Registers, and/or Trap and Trace Devices as a part of the November 2021 changes.



Recommendations for Improvement: GO 427 Geolocates, Pen Registers, and/or Trap and Trace Devices

General Recommendations

After reviewing GO 427 Geolocates, Pen Registers, and/or Trap and Trace Devices and discussing APD's use of geolocates and PRTTs² with APD command staff, OPO finds that certain revisions would improve the policy overall.

Recommendations

OPO recommends that APD make the following overarching changes:

1. Revise the policy to include more of a distinction between this process and the process to obtain a search warrant. This explanation should cross-reference GO 405.3 Search Warrants and explain when each process is applicable.
2. Revise the policy to add language differentiating exigent and non-exigent uses of PRTTs.
3. Replace vague language such as "very near future"³ with clearer language that provides more concrete direction and parameters.

Section 427.1 Purpose and Scope

Recommendations

1. OPO recommends that the Purpose and Scope section discuss privacy concerns and considerations more explicitly. Currently, the language references individuals' rights under the United States Constitution but does not discuss the privacy implications inherent in the use of geolocates and/or PRTTs.

² PRTT is the acronym adopted by APD in the General Orders to refer to ESN readers, pen registers, trap and trace devices, and similar equipment.

³ See GO 427.6.2(b) (stating, "An example of a situation where a supervisor should circumvent this process and contact the Watch Lieutenant directly is when there is real and credible information that someone is going to commit an act of violence in the **very near future** and an immediate geolocate is the only way to prevent the violence from taking place. A reasonable belief must exist that waiting for the extra step of notifying the investigative unit is likely to result in loss of life or serious bodily injury.") (emphasis added)



Section 427.3 Definitions

OPO supports APD's decision to add 8 additional terms to the list of definitions under General Order 427.

Recommendations:

1. OPO recommends that, in addition to those 8 terms, APD define other terms that have a specific meaning within the policy and based on APD's use of the technology. Terms that should be defined include, but are not limited to, the following:
 - a. Mobile devices;
 - i. This term has been broadened from cell phones and could potentially include tablets, smartwatches, and other wearable devices. Per APD command staff, this GO is applicable to phone devices that have a current cell phone provider.
 - b. Trap and trace devices;
 - c. Exigent circumstances;
 - d. Subscriber;
 - e. Customer;
 - f. Legal standing;
 - g. Reasonable belief;
 - h. Act of violence.

2. OPO also recommends that APD review its definition for "ESN reader". The revised policy states that these definitions are pulled from Texas Code of Criminal Procedure Article 18B, however, APD's definitions are unclear and do not reflect the language of Article 18B.

- a. Example:

APD policy defines the term "ESN reader" as follows:

"as defined under CCP Art. 18B.001(9), means a device used to record the electronic serial number from the data track of a wireless telephone, cellular telephone, or similar communication device that transmits its operational status to a base site, if the device does not intercept the contents of the communication." (emphasis added)

Texas Code of Criminal Procedure Article 18B.001(9) defines "ESN reader" as follows:

"(9) "ESN reader" means a device that, without intercepting the contents of a communication, records the electronic serial number from the data track of a wireless telephone, cellular telephone, or similar communication device that transmits its operational status to a base site.

Here, the italicized portion of APD's definition makes the definition unclear and confuses the intended language of Article 18B. In both the Code of Criminal Procedure and APD's



definition, the word “device” is used to refer to both ESN readers and communication devices. As a result, APD’s definition could be read to attach the issue of interception to the communication device and not the ESN reader, which would be incorrect.

3. OPO recommends that APD cite its definition for the Communications Assistance for Law Enforcement Act (CALEA) to the Federal Communications Commission (FCC), as the revised definition is restated verbatim from content on the FCC website.

Section 427.4 DLEA Requirement

APD’s revision states, in part, that “[t]he supervisor, or designee, will personally be present during the operation and/or will oversee the operation of any pen register, trap and trace device, ESN readers, or similar equipment that combines the function of a pen register and trap and trace device, or the ability to facilitate and gather prospective location information.”

Recommendations:

1. OPO recommends that APD revise this policy to explicitly state that any designee must also be properly trained as outlined under 427.4 (i.e., training on legal issues regarding possession, issuance, operation, improper use, and investigative use of PRRTs).

Section 427.6.3 Installation and Use of an Exigent Geolocate and/or PRRT

Recommendations

1. OPO recommends that the policy be revised to clarify the following:
 - a. APD’s role versus DPS’ role in installation.
 - b. The meaning and scope of language like “cellular telephones and other mobile devices,” “providers,” “remote computing services,” “social media platforms,” and “other internet-connected services.”

Section 427.7.2 Supervisor Responsibilities

Recommendations

1. OPO recommends that subsection (b)(1) be removed or revised.
 - a. This section currently makes supervisors responsible for “acquisition, operation, and maintenance of specialized equipment and/or software related to the utilization of geolocates and/or pen registers.” Per APD command staff, APD only gets information from providers and does not directly operate or maintain the equipment.



Section 427.8 Administrative Subpoenas

Recommendations

1. OPO recommends that the policy be revised to require documentation as it relates to seeking approval for an administrative subpoena and issuing the subpoena.
2. OPO also recommends that the policy be revised to provide information about when administrative subpoenas may be appropriately utilized.

