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Bill Analysis

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Primary Sponsor: Rep. Holmes

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SUMMARY

- Generally prohibits flight data gathered by an unmanned aerial vehicle (UAV), also known as a drone, and information obtained through that data from use in a criminal proceeding, unless the data and information was gathered under the authority of a court-issued search warrant.
- Sets forth the information that law enforcement must include in an affidavit accompanying a request for a warrant to use a UAV, including the locations where the UAV system will operate and whether data collection will concern an individual or group of individuals.
- Establishes circumstances in which a warrant is not required for the use of a UAV, including patrolling within 25 miles of an international border, when exigent circumstances exist, and for patrols during environmental or weather disasters.
- Establishes specific procedures that law enforcement must follow in order to utilize a UAV, including a requirement to document and verify all flight logistics.
- Prohibits law enforcement from using a UAV armed with a lethal weapon and from generally conducting surveillance with a UAV of individuals who are lawfully exercising their constitutional rights.
- Allows a person accused of a crime that includes evidence gathered by a UAV to obtain, via the discovery process, information relating to that person acquired by the UAV.
- Specifies that UAV flight logistics are public records unless they qualify for a public records exemption under the Public Records Law.

DETAILED ANALYSIS

Criminal evidence derived from drones

Background

The Fourth Amendment to the United States Constitution generally prohibits unreasonable searches and seizures. It also generally requires searches to be based on probable cause and made pursuant to a court-issued search warrant. However, the U.S. Supreme Court has recognized several exceptions to the warrant requirement. For example, the Fourth Amendment does not protect a person's property that is open to the plain view of law enforcement. Under this exception, the Court has found that law enforcement traveling in a manned aircraft in the public airways does not need "to obtain a warrant in order to observe what is visible to the naked eye."¹ The Court has not yet addressed a similar case involving unmanned aerial vehicles (UAVs), otherwise known as drones.²

Warrant requirement

The bill generally excludes flight data collected by a UAV, and information obtained through that data, from use in a criminal proceeding unless the data and information was obtained as follows:

1. Pursuant to the authority granted under a properly issued search warrant; or
2. Under exigent circumstances³ that constitute an exception to the general search warrant requirement.

Under the bill, flight data includes data collected by a UAV during its flight, including images, videos, or other forms of observation recording.⁴

Affidavit

Under current law, to obtain a search warrant, a law enforcement agency must submit an affidavit to the appropriate court. The affidavit must describe the place to be searched, the person to be searched, the property to be searched, the relevant criminal offense, and the facts

¹ *California v. Ciraolo*, 476 U.S. 207, 218 (1986).

² At least one state appeals court in Michigan has found that aerial surveillance by law enforcement with a UAV does require a warrant under the Fourth Amendment. The court reasoned that "low-altitude, unmanned, specifically-targeted drone surveillance of a private individual's property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo*. . . We conclude that drone surveillance of this nature intrudes into persons' reasonable expectations of privacy, so such surveillance implicates the Fourth Amendment and is illegal without a warrant." *Long Lake Twp. v. Maxon*, 2019 Mich. App. LEXIS 6512.

³ Exigent circumstances generally include a situation that demands unusual or immediate action that requires the circumvention of usual procedures. *Black's Law Dictionary*, 8th Ed., 260.

⁴ R.C. 4561.60(A) and 4561.61(A).

underlying the need for the warrant.⁵ Under the bill, for purposes of an affidavit for a search warrant for the use of a UAV, the judge or magistrate must require the affidavit also to include the following information:

1. The individuals who will have the power to authorize the use of the UAV system (a UAV system includes the UAV and associated elements, including communication links and components that control the UAV that are required for the remote pilot in command to operate the UAV in Ohio's air space);
2. The locations where the UAV system will operate;
3. The maximum period that the UAV system will operate for each flight; and
4. Whether the UAV system will collect flight data and related information about an individual or group of individuals.⁶

If the affidavit indicates that the UAV will collect information specified in (4) above, the judge or magistrate must require the law enforcement agency to include the following additional information along with the affidavit:

1. The circumstances when the UAV system will be used;
2. The specific types of flight data and information the agency intends to collect about the individual or individuals who are the subject of the search;
3. How the data and information collected and any related conclusions drawn from that data and information will be used, disclosed, or otherwise handled;
4. The period of time for which the data and information will be retained; and
5. Whether the data and information will be destroyed, and if so, when and how the information will be destroyed.⁷

A judge or magistrate that receives an affidavit for a search warrant from a law enforcement agency for the use of a UAV must comply with the requirements of the United States Constitution, the Ohio Constitution, the Revised Code, including the law governing search warrants, and any other applicable law.⁸

UAV data prior to search warrant

The bill specifies that flight data and information obtained through that data may not be used in an affidavit to obtain a search warrant unless one of the following apply:

⁵ R.C. 2933.23, not in the bill.

⁶ R.C. 4561.60(F) and 4561.62(A).

⁷ R.C. 4561.62(B).

⁸ R.C. 4561.62.

1. The data or information was obtained under a previously issued search warrant or the use of the UAV that obtained the data or information operated under exigent circumstances; or
2. The data or information was obtained during the monitoring of public lands or international borders.⁹

Thus, a law enforcement agency generally may not use a UAV to scan for criminal activity, and then use that flight data and related information to justify obtaining a search warrant to collect additional data for criminal prosecution.

UAV searches that do not require a warrant

The bill allows a law enforcement agency to use a UAV for surveillance without a search warrant as follows:

1. To patrol within 25 miles of a national border for purposes of policing that border to prevent or deter the illegal entry of any individual, illegal substance, or contraband;
2. When exigent circumstances exist and the agency reasonably suspects that absent swift, preventative action, there is an imminent danger to the life of an individual or bodily harm to an individual;
3. During or immediately after an environmental or weather-related catastrophe to allow the agency to better preserve public safety, to protect property, to survey environmental damage in order to determine if a state of emergency should be declared, or to conduct surveillance for the assessment and evaluation of damage, erosion, flood, or contamination; and
4. For research, education, training, testing, or development efforts related to UAVs or UAV systems, their technologies, and their potential applications, undertaken by or in conjunction with a school, an institution of higher education, or a public or private collaborator.¹⁰

Requirements and prohibitions for law enforcement

Requirements for use of a UAV

Under the bill, a law enforcement agency must do all of the following relative to its use of a UAV:

1. Ensure that the agency and any peace officer employed by the agency documents all flight logistics for each surveillance flight of UAV taken by or on behalf of the agency (flight logistics include the data pertaining to a UAV's flight, including the flight's duration, path, and mission objective);
2. Verify that the flight logistics for each surveillance flight is accurate and complete; and

⁹ R.C. 4561.61(B).

¹⁰ R.C. 4561.63.

3. Retain the flight logistics for at least five years.

A law enforcement agency must retain all flight data for up to 90 days unless the data is (1) relevant to an ongoing investigation or (2) accompanied by a written statement that articulates a reasonable suspicion that the data contains evidence of a crime. The flight logistics are public records unless they qualify for a public records exemption under the Public Records Law.¹¹

UAV prohibitions

Under the bill, a law enforcement agency may not use, authorize the use of, or issue a permit for the use of a UAV:

1. Armed with any lethal weapon; or
2. In order to conduct surveillance of individuals who are lawfully exercising their constitutional rights unless that surveillance is otherwise authorized under the bill's provisions for a search warrant or exceptions to a search warrant.

An agency also may not authorize the use of or issue a permit for the use of a UAV for the surveillance of one private individual by another private individual unless the agency obtains express, informed consent from one of the following:

1. The individual being surveilled; or
2. The owner of the real property on which the person being surveilled is present.¹²

Obtaining the data through discovery

Under the bill, a person accused of a crime that includes evidence gathered by a UAV may obtain, via the subpoena and discovery process, information relating to that person acquired in the course of surveillance of that person by the UAV. However, the person may not obtain information related to the operational capabilities and technical conduct of the UAV.¹³

HISTORY

Action	Date
Introduced	11-09-21

H0486-I-134/ts

¹¹ R.C. 4561.60(B) and 4561.65(A), (B), and (D).

¹² R.C. 4561.64.

¹³ R.C. 4561.65(C).