

**SUBJECT:** Revising regulation of interception of communications

**COMMITTEE:** Criminal Jurisprudence — favorable, without amendment

**VOTE:** 6 ayes — Hinojosa, Dunnam, Keel, Talton, Kitchen, Martinez Fischer  
0 nays  
3 absent — Garcia, Green, Shields

**SENATE VOTE:** On final passage, April 17 — voice vote

**WITNESSES:** For — *Registered but did not testify:* Kevin Lawrence, Texas Municipal Police Association  
  
Against — None  
  
On — *Registered but did not testify:* David M. Boatright and James Brubaker, Texas Department of Public Safety

**BACKGROUND:** **Issuing wire taps.** Code of Criminal Procedure (CCP), art. 18.20 sets forth the procedures for interception and use of wire, oral, or electronic communications. Wire taps can be used only in investigating felony drug crimes (except felony possession of marihuana) under the Texas Controlled Substances Act, the Dangerous Drugs Act, or delivery to a minor of abusable glues or aerosol paints. Only authorized officers of the Texas Department of Public Safety (DPS) may own, possess, install, operate, and monitor intercepting devices.

A judge must authorize interception. At the applicant's request, the order can direct the provider of wire or electronic communications services, a landlord, custodian, or other relevant person to give the applicant all information and assistance necessary to accomplish the interception unobtrusively. Federal law (18 U.S.C.A., sec. 2518) allows an order separate from the interception order to be issued directly to the service provider or other relevant person. The intent of this law is to prevent providers from being inundated with huge orders mostly irrelevant to them.

Texas law requires that the interception last no longer than necessary to achieve the objective of its authorization and in no case can it last longer than 30 days. Interception and recording of innocent conversations or communication must be minimized. 18 U.S.C.A., sec. 2518 requires that if the intercepted communication is in code or in a foreign language, that minimization may be performed by someone who can understand the code or language after the recording is completed.

**Pen registers and trap and trace devices.** CCP, art. 18.21 sets procedures for using pen registers and trap and trace devices, which are considered less invasive than wire taps. A pen register captures the numbers of outgoing telephone calls but not the content of those calls. A trap and trace device captures numbers of incoming calls, much like “caller ID” services.

Federal law does not require a peace officer to file an application or obtain an order before making an otherwise lawful search, with or without a warrant, of a location to determine the contents of a caller identification message, pager message, or voice message recorded in an end user’s device.

**Penalties for unlawfully intercepting, using, or disclosing wire, oral, or electronic communications.** Penal Code, sec. 16.02 sets criminal penalties for unlawful interception, use, or disclosure of wire, oral, or electronic communications. It is a defense to prosecution for this offense that the person is a member of a law enforcement unit specially trained to respond to and deal with life-threatening situations or to install electronic, mechanical, or other devices and that the interception ceased immediately when the life-threatening situation ended. The code defines a “immediate life-threatening situation” as one in which human life is directly threatened in either a hostage or barricade situation. “Member of a law enforcement unit specially trained to respond to and deal with life-threatening situations” means a peace officer who has received a minimum of 40 hours a year of training in hostage and barricade suspect situations. This training must be evidenced by the submission of appropriate documentation to the Commission on Law Enforcement Standards and Education.

Under CCP, art. 16.02 d(1), it is a state-jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000) intentionally to manufacture, assemble, possess, or sell a device when the

person knows or has reason to know that the device is designed primarily for nonconsensual interception of wire, electronic, or oral communications and that it or a component of it has been or will be used for an unlawful purpose. It also is a state jail felony to place an ad for such a device while knowing or having reason to know that it is designed primarily for nonconsensual interception of communications, promoting it for that purpose, or knowing or having reason to know that the advertisement will promote its illegal use. It is a defense to prosecution that the manufacture, assembly, or possession is by:

- ! a communication common carrier or a provider of wire or electronic communications service or an officer, agent, employee, or person under contract with either of these acting in the normal course of business;
- ! an officer, agent, or employee of a person under contract with, bidding on contracts with, or doing business with the United States or Texas acting in the normal course of the activities of the U.S. or Texas; or
- ! a law enforcement agency that has an established unit specifically designated to respond to and deal with life-threatening situations or specifically trained to install wire, oral, or electronic communications intercept equipment.

DIGEST:

**Interception of wire, oral, or electronic communications.** SB 1345 would provide that intercepting a communication in violation of CCP, art. 18.20, Penal Code, sec. 16.02, or federal law or disclosing the contents of such communication or of evidence derived from it would violate the law. The contents and evidence could be used in a civil proceeding if it arose from a violation of any penal law, as opposed to specific codes. Contents intercepted outside of Texas could be admitted as evidence if the communication was intercepted in compliance with the law of that jurisdiction.

**Crimes for which interception would be permitted.** Interceptions could be authorized for investigation of capital murder for hire and child pornography or an attempt, conspiracy, or solicitation to commit these crimes or any of the drug crimes already covered in current law.

**Procedure for a peace officer to use an intercepting device.** SB 1345 would establish a procedure for the emergency installation and use of an

intercepting device by a peace officer, other than a DPS officer. The prosecutor of the county where the device was to be installed would have to designate in writing each peace officer in the county who was a member of a law enforcement unit specially trained to respond to and deal with life-threatening situations (for example, a SWAT team member) and who was authorized to possess an intercepting device and was responsible for the installation, operation, and monitoring of the device during an immediate life-threatening situation. The designated peace officer could possess, install, operate, or monitor the device if the officer reasonably believed that an immediate life-threatening situation existed that was within the officer's jurisdiction or that of an officer that he or she was assisting and that the situation required the interception before a court order possibly could be obtained. The officer would have to believe there were sufficient grounds to obtain the order and would have to obtain oral or written consent from a magistrate before beginning the interception.

The officer would have to report the installation or use of a device promptly to the county prosecutor and would have to obtain a written order from a judge within 48 hours. If the order were not issued within 48 hours or were denied, the officer would have to stop using the device immediately. The state could not use any evidence obtained from an unauthorized device.

**Interception procedure.** SB 1345 would track federal law in allowing a judge to issue an order separate from the general wiretap order to the communications company or person who would help fulfill the order. It also would track federal law in allowing intercepted communication in code or a foreign language to be minimized of innocent communication as soon as an expert in that language or code was available.

**Use of pen registers, trap and trace devices, and ESN readers.** SB 1345 would define "ESN reader" in CCP, art. 18.21 as a device that 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. The electronic serial number does not include the contents of a conversation, but rather identifies the mobile telephone.

The bill would provide the same procedure for applying for all of these devices, striking the current procedure for pen register application and use

and combining it with the others. A prosecutor with jurisdiction could file an application for the use of these devices with a district judge in the judicial district. The judicial district would have to be a district in which one of the following was located:

- ! the site of the proposed installation or use of the device or equipment;
- ! the site of the communication device on which the device or equipment was proposed to be installed or used;
- ! the billing, residential, or business address of the subscriber to the electronic communications service on which the device or equipment was proposed to be installed or used;
- ! the headquarters of the office of the prosecutor filing the application or a law enforcement agency that asked the prosecutor to file an application or that proposed to execute an order authorizing installation and use of the device or equipment; or
- ! the headquarters of a service provider ordered to install the device or equipment.

A prosecutor could file an application on his or her own motion or on request of a peace officer, regardless of whether the officer was commissioned by DPS. The prosecutor would have to make the application personally and not through an assistant, unless a commissioned DPS officer requested a pen register, ESN reader, or similar equipment, or unless any authorized peace officer, regardless of whether commissioned by DPS, requested a trap and trace device or similar equipment.

The application would have to include the location of the communication device on which the pen register, ESN reader, trap and trace device, or similar equipment would be used and would have to state that its use would be material to the investigation of a criminal offense. The bill would strike the section of the law that prohibits the contents of an application from being disclosed except in the course of a judicial proceeding and that punishes unauthorized disclosure by contempt of court.

In accordance with federal law, a peace officer would not have to file an application or obtain an order before making an otherwise lawful search, with or without a warrant, of a location to determine the contents of a caller

identification message, pager message, or voice message recorded in an end user's device.

**Emergency installation of pen register or trap and trace device.** A peace officer authorized under Penal Code, art. 18.20 to possess, install, operate, or monitor such devices could install and use a pen register or trap and trace device if the officer reasonably believed that an immediate life-threatening situation existed within the officer's territorial jurisdiction or that of another officer that he or she was assisting and that the situation required installation of a device before authorization could be obtained. The officer would have to believe there were sufficient grounds to obtain the order and would have to report the device's installation or use promptly to the county prosecutor and obtain a written order from a judge within 48 hours. If the order were not issued within 48 hours or were denied, the officer would have to stop using the device immediately. The state could not use any evidence obtained from an unauthorized device.

An order would not be required for mobile tracking devices, such as a global positioning system (GPS) device installed in or on an item of property by its owner or with the owner's consent. This device could be monitored by a private entity in an emergency.

**Penalties for unlawfully intercepting, using, or disclosing wire, oral, or electronic communications.** SB 1345 would create a defense to prosecution under Penal Code, art. 16.02 d(1) for a member of DPS who was trained specifically to install wire, oral, or electronic communications equipment or for a member of a local law enforcement agency that had an established unit designated to respond to and deal with life-threatening situations.

The bill would take effect September 1, 2001.

**SUPPORTERS  
SAY:**

SB 1345 would clarify the Code of Criminal Procedure and Penal Code with regard to procedures for intercepting communications. It would make these two sections of Texas law consistent with each other with respect to wire taps. For example, the 74th Legislature decriminalized the emergency installation of an intercepting device by a specially trained police officer in the Penal Code but did not update the Code of Criminal Procedure to provide a legal outline of the procedure. SB 1345 would do that. The bill

also would clarify who can possess and use intercepting equipment and under what circumstances an emergency intercept can be conducted, and it would specify the procedural rules for implementing that intercept.

This bill would conform Texas law regarding intercepting communications with federal statutes. For example, it would allow intercepted communication that is encoded or in a foreign language to be held until an expert who could translate it was available. Under current law requiring the minimization of recording innocent communications, it is unclear whether this type of communication can be recorded. Also, the bill would allow for a separate judicial order from the general wiretap order to be given to an assisting telecommunications company so that sensitive information contained in the general order would not be given out.

SB 1345 would modernize the law to catch up with current technology by including, for example, procedures for tracking mobile telephone communication. Also, it would exempt companies that install GPS devices at a property owner's request from being subject to tracking device laws. This would include companies that install GPS devices in automobiles to provide mobile mapping or antitheft services to customers.

Intercepting electronic and wire information would be useful in murder-for-hire and child pornography cases. In the former, the hiring often is done by telephone, and recording a conversation would provide valuable evidence in a murder trial. In the latter, trading of pornographic photographs often occurs over the Internet. If law enforcement could intercept these images as they were being downloaded, cases could be proved even if the criminal deleted all images from his or her computer before a search could be made of the premises. It would make sense to expand wiretapping to these kinds of cases because they often provide evidence over telephone, cable, or ISDN lines, unlike assault cases or other violent crimes.

**OPPONENTS  
SAY:**

SB 1345 would expand the state's authority to intercept communications to situations where it is not vital to investigating the crime. Child pornography and capital murder-for-hire cases generate evidence beyond telephone or electronic communications that can be used to try a case. Suspected child pornographers already can have their computers searched, for example. Expanding authorization to intercept communications to new crimes would

open the door to allowing police to listen in on conversations of people suspected of any number of different violations. The public's right to privacy should not be compromised further.