

BILL ANALYSIS

Senate Research Center
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S.B. 1345
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Criminal Justice
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DIGEST AND PURPOSE

During the 75th Legislature, the provisions of the Code of Criminal Procedure pertaining to the intercepting and use of wire, oral, and electronic communications were amended to correct problems with proper venue caused by significant changes in technology and deregulation of the telecommunications industry. Currently, Article 18.21 (Pen Registers and Trap and Trace devices; Access to Stored Communications; Mobil Tracking Devices), does not address those venue problems. Certain articles within the Code of Criminal Procedure are inconsistent with federal law. Also, articles within the Penal Code and the Code of Criminal Procedure governing the possession and use of intercepting devices and their respective use under emergency circumstances are in conflict with one another. The current statutes do not prescribe procedural rules for conducting an emergency intercept such as those governing the use of an emergency pen register. As proposed, S.B. 1345 amends articles within the Code of Criminal Procedure to make these laws consistent regarding the possession and use of intercept and pen register equipment, define who can own and possess the enumerated equipment, and specify circumstances under which an emergency intercept can be conducted and the procedural rules for implementing such an intercept. S.B. 1345 also allows the Department of Public Safety to utilize federal agents and contract monitors to assist in monitoring a wire, oral, or electronic communication intercept. S.B. 1345 allows for post-intercept minimization of communications that were in a foreign language or code that was not readily translatable, and allows for a separate telecommunications company order that would only provide the telephone companies with information needed to provide assistance to the law enforcement agency without the additional sensitive information contained in current orders. S.B. 1345 allows for judicial review of the use of a device to determine the Electronic Serial Number of a wireless telephone and provide an exception to the tracking device law for companies that install global positioning tracking devices on vehicles for security purposes pursuant to an owner's request.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 1, Article 18.20, Code of Criminal Procedure, to define "immediate life-threatening situation" and "member of a law enforcement unit specially trained to respond to and deal with life-threatening situations."

SECTION 2. Amends Section 2, Article 18.20, Code of Criminal Procedure, to authorize the contents of an intercepted communication and evidence derived from an intercepted communication to be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States or of this state or a political subdivision of this state unless:

- the communication was intercepted in violation of this article, Section 16.02 (Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications), Penal

Code, or federal law; or

- the disclosure of the contents of the intercepted communication or evidence derived from the communication, rather than information, would be in violation of this article, Section 16.02, Penal Code, or federal law.

Authorizes the contents and evidence derived from an intercepted communication to be received in a civil trial, hearing, or other proceeding only if the civil trial, hearing, or other proceeding arises out of a violation of a penal law, rather than the Penal Code, Code of Criminal Procedure, Controlled Substances Act, or Dangerous Drug Act. Provides that this section does not prohibit the use or admissibility of the contents of a communication or evidence derived from the communication if the communication was intercepted in a jurisdiction outside of the state in compliance with the law of that jurisdiction.

SECTION 3. Amends Section 4, Article 18.20, Code of Criminal Procedure, to authorize a judge to issue an order authorizing interception of wire, oral, or electronic communications only if the prosecutor applying for the order shows probable cause to believe that the interception will provide evidence of the commission of certain types of felonies and offenses.

SECTION 4. Amends Section 5(a), Article 18.20, Code of Criminal Procedure, to provide that only the Department of Public Safety (DPS), except as provided by Section 8A, is authorized by this article to own, possess, install, operate, or monitor an electronic, mechanical, or other device. Authorizes DPS to be assisted by an investigative or law enforcement officer or other person in the operation and monitoring of an interception of wire, oral, or electronic communications, provided that the officer or other person meets certain requirements.

SECTION 5. Amends Article 18.20, Code of Criminal Procedure, by adding Section 8A, as follows:

Sec. 8A. EMERGENCY INSTALLATION AND USE OF INTERCEPTING DEVICE.

Requires the prosecutor in a county in which an electronic, mechanical, or other device is to be installed or used to intercept wire, oral, or electronic communications to designate in writing certain peace officers in the county, other than commissioned DPS officers. Authorizes a peace officer designated under this section or under Section 5(b) to possess, install, operate, or monitor an electronic, mechanical, or other device to intercept wire, oral, or electronic communications under certain circumstances. Authorizes a magistrate to give oral or written consent to the interception of communications under this section. Requires an officer, if an officer installs or uses a device under this section, to promptly report the installation or use to the prosecutor in the county in which the device is installed or used, and within 48 hours after the installation is complete or the interception begins, whichever occurs first, to obtain a written order from a judge of competent jurisdiction authorizing the interception. Authorizes a judge to issue an order authorizing interception of communications under this section during the 48-hour period prescribed by this section. Requires the officer, if an order is denied or is not issued within the 48-hour period, to terminate use of and remove the device promptly on the earlier of the denial or the expiration of 48 hours. Prohibits the state from using as evidence in a criminal proceeding any information gained through the use of a device installed under this section if authorization for the device is not sought or is sought but not obtained.

SECTION 6. Amends Sections 9(c) and (d), Article 18.20, Code of Criminal Procedure, to authorize, rather than require, a judge to issue a separate order directing certain individuals to furnish the applicant certain information necessary to accomplish the interception unobtrusively, on request of the applicant. Authorizes minimization to be accomplished as soon as practicable after the interception, if the intercepted communication is in code or a foreign language and an expert in that code or language is not reasonably available during the period of interception.

SECTION 7. Amends Section 1, Article 18.21, Code of Criminal Procedure, to define “ESN reader”

and “prosecutor.” Makes conforming changes.

SECTION 8. Amends Section 2, Article 18.21, Code of Criminal Procedure, as follows:

Sec. 2. New heading: APPLICATION AND ORDER. Authorizes a prosecutor with jurisdiction in a county within a judicial district described by this section, rather than an authorized peace officer commissioned by the department, to file an application for the installation and use of a pen register, ESN reader, trap and trace device, or similar equipment that combines the function of a pen register and a trap and trace device with a district judge in the judicial district. Requires the judicial district to be a district in which certain sites and offices are located. Authorizes a prosecutor, rather than a district or criminal district attorney, to file an application under this section on the prosecutor’s own motion or on the request of an authorized peace officer, regardless of whether the officer is commissioned by the department. Requires a prosecutor who files an application on the prosecutor’s own motion or who files an application for installation and use of a pen register, ESN reader, or similar equipment on the request of an authorized peace officer not commissioned by the department to make the application personally and prohibits the prosecutor from doing so through an assistant or some other person acting on the prosecutor’s behalf. Authorizes a prosecutor to make an application through an assistant or other person acting on the prosecutor’s behalf if the prosecutor files an application for the installation and use of certain equipment. Requires the application to meet certain requirements and contain certain information. Authorizes, rather than requires, the judge to direct the communication common carrier or other certain individuals to furnish all information, facilities, and technical assistance necessary to perform certain requirements. Provides that a peace officer is not required to file an application or obtain an order under this section before the officer makes an otherwise lawful search, with or without a warrant, to determine the contents of a caller identification message, pager message, or voice message that is contained within the memory of an end-user’s identification, paging, or answering device. Deletes text that authorized a police officer to request an attorney for the state to file an application with a judge regarding the installation of certain devices. Deletes text regarding the prohibition against the contents of an application or order being disclosed except in the course of a judicial proceeding and that unauthorized disclosure is punishable as contempt of court. Makes conforming and nonsubstantive changes.

SECTION 9. Amends Section 3, Article 18.21, Code of Criminal Procedure, as follows:

Sec. 3. New heading: EMERGENCY INSTALLATION AND USE OF PEN REGISTER OR TRAP AND TRACE DEVICE. Authorizes a peace officer authorized to possess, install, operate, or monitor a device under Section 8A, Article 18.20, to install and use a pen register or trap and trace device under certain circumstances. Prohibits the state from using as evidence in a criminal proceeding any information gained through the use of certain devices installed under this section if an authorized peace officer does not apply for or applies for but does not obtain authorization for certain devices. Makes conforming and nonsubstantive changes.

SECTION 10. Amends Section 14, Article 18.21, Code of Criminal Procedure, to provide that this section does not apply to a global positioning or similar device installed in or on an item of property by the owner or with the consent of the owner of the property. Authorizes the device to be monitored by a private entity in an emergency.

SECTION 11. Amends Section 16.02, Penal Code, to provide that it is an affirmative defense to prosecution under this section if the manufacture, assembly, possession, or sale of electronic, mechanical, or other device that is designed primarily for purpose of nonconsensual interception of wire, electronic, or oral communication is by a member of DPS who is specifically trained to install wire, oral, or electronic communications intercept equipment. Makes conforming and nonsubstantive changes.

SECTION 12. Makes application of this Act prospective.

SECTION 13. Effective date: September 1, 2001.