

By: Deuell

S.B. No. 1411

A BILL TO BE ENTITLED

1 AN ACT

2 relating to electronic surveillance.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

4 SECTION 1. Subsections (a) and (c), Section 16.02, Penal
5 Code, are amended to read as follows:

6 (a) In this section, "computer trespasser," "covert entry,"
7 "communication common carrier," "contents," "electronic
8 communication," "electronic, mechanical, or other device,"
9 "immediate life-threatening situation," "intercept,"
10 "investigative or law enforcement officer," "member of a law
11 enforcement unit specially trained to respond to and deal with
12 life-threatening situations," "oral communication," "protected
13 computer," [~~"electronic communication"~~] "readily accessible to
14 the general public," and "wire communication" have the meanings
15 given those terms in Article 18.20, Code of Criminal Procedure.

16 (c) It is an affirmative defense to prosecution under
17 Subsection (b) that:

18 (1) an operator of a switchboard or an officer,
19 employee, or agent of a communication common carrier whose
20 facilities are used in the transmission of a wire or electronic
21 communication intercepts a communication or discloses or uses an
22 intercepted communication in the normal course of employment while
23 engaged in an activity that is a necessary incident to the rendition
24 of service or to the protection of the rights or property of the

1 carrier of the communication, unless the interception results from
2 the communication common carrier's use of service observing or
3 random monitoring for purposes other than mechanical or service
4 quality control checks;

5 (2) an officer, employee, or agent of a communication
6 common carrier provides information, facilities, or technical
7 assistance to an investigative or law enforcement officer who is
8 authorized as provided by this section [~~article~~] to intercept a
9 wire, oral, or electronic communication;

10 (3) a person acting under color of law intercepts:

11 (A) a wire, oral, or electronic communication, if
12 the person is a party to the communication or if one of the parties
13 to the communication has given prior consent to the interception;

14 (B) a wire, oral, or electronic communication, if
15 the person is acting under the authority of Article 18.20, Code of
16 Criminal Procedure; or

17 (C) a wire or electronic communication made by a
18 computer trespasser and transmitted to, through, or from a
19 protected computer, if:

20 (i) the interception did not acquire a
21 communication other than one transmitted to or from the computer
22 trespasser;

23 (ii) the owner of the protected computer
24 consented to the interception of the computer trespasser's
25 communications on the protected computer; and

26 (iii) the actor was lawfully engaged in an
27 ongoing criminal investigation and the actor had reasonable

1 suspicion to believe that the contents of the computer trespasser's
2 communications likely to be obtained would be material to the
3 investigation;

4 (4) a person not acting under color of law intercepts a
5 wire, oral, or electronic communication, if:

6 (A) the person is a party to the communication;
7 or

8 (B) [~~if~~] one of the parties to the communication
9 has given prior consent to the interception, unless the
10 communication is intercepted for the purpose of committing an
11 unlawful [~~any criminal or tortious act in violation of the~~
12 ~~constitution or laws of the United States or of this state or for~~
13 ~~the purpose of committing any other injurious~~] act;

14 (5) a person acting under color of law intercepts a
15 wire, oral, or electronic communication if:

16 (A) oral or written consent for the interception
17 is given by a magistrate before the interception;

18 (B) an immediate life-threatening situation
19 exists;

20 (C) the person is a member of a law enforcement
21 unit specially trained to:

22 (i) respond to and deal with
23 life-threatening situations; or

24 (ii) install electronic, mechanical, or
25 other devices; and

26 (D) the interception ceases immediately on
27 termination of the life-threatening situation;

1 (6) an officer, employee, or agent of the Federal
2 Communications Commission intercepts a communication transmitted
3 by radio or discloses or uses an intercepted communication in the
4 normal course of employment and in the discharge of the monitoring
5 responsibilities exercised by the Federal Communications
6 Commission in the enforcement of Chapter 5, Title 47, United States
7 Code;

8 (7) a person intercepts or obtains access to an
9 electronic communication that was made through an electronic
10 communication system that is configured to permit the communication
11 to be readily accessible to the general public;

12 (8) a person intercepts radio communication, other
13 than a cordless telephone communication that is transmitted between
14 a cordless telephone handset and a base unit, that is transmitted:

15 (A) by a station for the use of the general
16 public;

17 (B) to ships, aircraft, vehicles, or persons in
18 distress;

19 (C) by a governmental, law enforcement, civil
20 defense, private land mobile, or public safety communications
21 system that is readily accessible to the general public, unless the
22 radio communication is transmitted by a law enforcement
23 representative to or from a mobile data terminal;

24 (D) by a station operating on an authorized
25 frequency within the bands allocated to the amateur, citizens band,
26 or general mobile radio services; or

27 (E) by a marine or aeronautical communications

1 system;

2 (9) a person intercepts a wire or electronic
3 communication the transmission of which causes harmful
4 interference to a lawfully operating station or consumer electronic
5 equipment, to the extent necessary to identify the source of the
6 interference;

7 (10) a user of the same frequency intercepts a radio
8 communication made through a system that uses frequencies monitored
9 by individuals engaged in the provision or the use of the system, if
10 the communication is not scrambled or encrypted; or

11 (11) a provider of electronic communications service
12 records the fact that a wire or electronic communication was
13 initiated or completed in order to protect the provider, another
14 provider furnishing service towards the completion of the
15 communication, or a user of that service from fraudulent, unlawful,
16 or abusive use of the service.

17 SECTION 2. Section 1, Article 18.20, Code of Criminal
18 Procedure, is amended by amending Subdivisions (14) and (22) and
19 adding Subdivisions (24), (25), and (26) to read as follows:

20 (14) "Pen register," "ESN reader," "trap and trace
21 device," and "mobile tracking device" have the meanings assigned by
22 Article 18.21 [~~means a device that attaches to a telephone line and~~
23 ~~records or decodes electronic or other impulses to identify numbers~~
24 ~~dialed or otherwise transmitted on the telephone line. The term~~
25 ~~does not include a device used by a provider or customer of.~~

26 [~~(A) a wire or electronic communication service~~
27 ~~for purposes of charging a fee for the service, or~~

1 ~~[(B) a wire communication service during the~~
2 ~~ordinary course of the provider's or customer's business, including~~
3 ~~cost accounting and security control].~~

4 (22) "Immediate life-threatening situation" means a
5 hostage, barricade, or other [similar] emergency situation in which
6 a person unlawfully and [human life is] directly:

7 (A) threatens another with death; or

8 (B) exposes another to a substantial risk of
9 serious bodily injury [threatened].

10 (24) "Access," "computer," "computer network,"
11 "computer system," and "effective consent" have the meanings
12 assigned by Section 33.01, Penal Code.

13 (25) "Computer trespasser" means a person who:

14 (A) is accessing a protected computer without
15 effective consent of the owner; and

16 (B) has no reasonable expectation of privacy in
17 any communication transmitted to, through, or from the protected
18 computer. The term does not include a person who accesses the
19 computer under an existing contractual relationship with the owner
20 or operator of the protected computer.

21 (26) "Protected computer" means a computer, computer
22 network, or computer system that is:

23 (A) owned by a financial institution or
24 governmental entity; or

25 (B) used by or for a financial institution or
26 governmental entity and conduct constituting an offense affects
27 that use.

1 SECTION 3. Section 4, Article 18.20, Code of Criminal
2 Procedure, is amended to read as follows:

3 Sec. 4. OFFENSES FOR WHICH INTERCEPTIONS MAY BE AUTHORIZED.
4 A judge of competent jurisdiction may issue an order authorizing
5 interception of wire, oral, or electronic communications only if
6 the prosecutor applying for the order shows probable cause to
7 believe that the interception will provide evidence of the
8 commission of:

9 (1) a felony under Section 19.03(a)(3) or Section
10 43.26, Penal Code;

11 (2) a felony under:

12 (A) Chapter 481, Health and Safety Code, other
13 than felony possession of marihuana;

14 (B) Section 485.033, Health and Safety Code; or

15 (C) Chapter 483, Health and Safety Code; or

16 (3) an attempt, conspiracy, or solicitation to commit
17 an offense listed in this section.

18 SECTION 4. Subsection (a), Section 7, Article 18.20, Code
19 of Criminal Procedure, is amended to read as follows:

20 (a) An investigative or law enforcement officer who, by any
21 means authorized by this article, obtains knowledge of the contents
22 of a wire, oral, or electronic communication or evidence derived
23 from the communication may disclose the contents or evidence to
24 another investigative or law enforcement officer, including a
25 federal law enforcement officer or agent or a law enforcement
26 officer or agent of another state, to the extent that the disclosure
27 is appropriate to the proper performance of the official duties of

1 the officer making or receiving the disclosure.

2 SECTION 5. Section 8A, Article 18.20, Code of Criminal
3 Procedure, is amended by amending Subsections (b), (c), and (e) and
4 adding Subsection (g) to read as follows:

5 (b) A peace officer designated under Subsection (a) or under
6 Section 5(b) may possess, install, operate, or monitor an
7 electronic, mechanical, or other device to intercept wire, oral, or
8 electronic communications if the officer:

9 (1) reasonably believes an immediate life-threatening
10 situation exists that:

11 (A) is within the territorial jurisdiction of the
12 officer or another officer the officer is assisting; and

13 (B) requires interception of communications
14 before an order authorizing the interception can, with due
15 diligence, be obtained under this section;

16 (2) reasonably believes there are sufficient grounds
17 under this section on which to obtain an order authorizing the
18 interception; and

19 (3) obtains [~~from a magistrate~~] oral or written
20 consent to the interception before beginning the interception from:

21 (A) a district judge for the county in which the
22 device will be installed or used; or

23 (B) a judge or justice of a court of appeals or of
24 a higher court.

25 (c) An official described in Subsection (b)(3) [A
26 magistrate] may give oral or written consent to the interception of
27 communications under this section to provide evidence of the

1 commission of a felony, or of a threat, attempt, or conspiracy to
2 commit a felony, in an immediate life-threatening situation. Oral
3 or written consent given under this section expires 48 hours after
4 the grant of consent or at the conclusion of the emergency
5 justifying the interception, whichever occurs first.

6 (e) A judge of competent jurisdiction under Section 3 or
7 under Subsection (b) may issue a written [an] order authorizing
8 interception of communications under this section during the
9 48-hour period prescribed by Subsection (d)(2). A written order
10 under this section expires on the 30th day after execution of the
11 order or at the conclusion of the emergency that initially
12 justified the interception, whichever occurs first. If an order is
13 denied or is not issued within the 48-hour period, the officer shall
14 terminate use of and remove the device promptly on the earlier of:

15 (1) the denial;

16 (2) the end of the emergency that initially justified
17 the interception; or

18 (3) the expiration of 48 hours.

19 (g) A peace officer may certify to a communications common
20 carrier that the officer is acting lawfully under this section.

21 SECTION 6. Subsection (c), Section 9, Article 18.20, Code
22 of Criminal Procedure, is amended to read as follows:

23 (c) On request of the applicant for an order authorizing the
24 interception of a wire, oral, or electronic communication, the
25 judge may issue a separate order directing that a provider of wire
26 or electronic communications service, a communication common
27 carrier, landlord, custodian, or other person furnish the applicant

1 all information, facilities, and technical assistance necessary to
2 accomplish the interception unobtrusively and with a minimum of
3 interference with the services that the provider, carrier,
4 landlord, custodian, or other person is providing the person whose
5 communications are to be intercepted. Any provider of wire or
6 electronic communications service, communication common carrier,
7 landlord, custodian, or other person furnishing facilities or
8 technical assistance is entitled to compensation by the applicant
9 for reasonable expenses incurred in providing the facilities or
10 assistance at the prevailing rates. The interception order may
11 include an order to:

12 (1) install or use a pen register, ESN reader, trap and
13 trace device, or mobile tracking device or similar equipment that
14 combines the function of a pen register and trap and trace device;
15 or

16 (2) disclose a stored communication, information
17 subject to an administrative subpoena, or information subject to
18 access under Article 18.21.

19 SECTION 7. Section 16, Article 18.20, Code of Criminal
20 Procedure, is amended by adding Subsection (g) to read as follows:

21 (g) A computer trespasser or a user, aggrieved person,
22 subscriber, or customer of a communications common carrier or
23 electronic communications service does not have a cause of action
24 against the carrier or service, its officers, employees, or agents,
25 or other specified persons for providing information, facilities,
26 or assistance as required by a good faith reliance on:

27 (1) legislative authority; or

1 (2) a court order, warrant, subpoena, or certification
2 under this article.

3 SECTION 8. Section 1, Article 18.21, Code of Criminal
4 Procedure, is amended to read as follows:

5 Sec. 1. DEFINITIONS. In this article:

6 (1) "Aural transfer," "communication common carrier,"
7 "computer trespasser," "electronic communication," "electronic
8 communications service," "electronic communications system,"
9 "electronic storage," "immediate life-threatening situation,"
10 "member of a law enforcement unit specially trained to respond to
11 and deal with life-threatening situations," [~~"pen register,"~~
12 "readily accessible to the general public," "user," and "wire
13 communication" have the meanings assigned by Article 18.20.

14 (2) "Authorized peace officer" means:

15 (A) a sheriff or a sheriff's deputy;

16 (B) a constable or deputy constable;

17 (C) a marshal or police officer of an
18 incorporated city [~~, town, or village~~];

19 (D) a ranger or officer commissioned by the Public
20 Safety Commission or the director of the Department of Public
21 Safety;

22 (E) an investigator of a prosecutor's [~~the~~
23 ~~district attorney's, criminal district attorney's, or county~~
24 ~~attorney's~~] office;

25 (F) a law enforcement agent of the Alcoholic
26 Beverage Commission;

27 (G) a law enforcement officer commissioned by the

1 Parks and Wildlife Commission; or

2 (H) an enforcement officer appointed by the
3 executive director of [~~employed by~~] the Texas Department of
4 Criminal Justice under [~~pursuant to~~] Section 493.019, Government
5 Code.

6 (3) "Department" means the Department of Public
7 Safety.

8 (4) "ESN reader" means a device that records the
9 electronic serial number from the data track of a wireless
10 telephone, cellular telephone, or similar communication device
11 that transmits its operational status to a base site, if the device
12 does not intercept the contents of a communication.

13 (5) "Mobile tracking device" means an electronic or
14 mechanical device that permits tracking the movement of a person,
15 vehicle, container, item, or object. The term does not include a
16 device designed, made, adapted, or capable of:

17 (A) intercepting the content of a communication;
18 or

19 (B) functioning as a pen register, ESN reader,
20 trap and trace device, or similar equipment.

21 (6) "Pen register" means a device or process that
22 records or decodes dialing, routing, addressing, or signaling
23 information transmitted by an instrument or facility from which a
24 wire or electronic communication is transmitted, if the information
25 does not include the contents of the communication. The term does
26 not include a device used by a provider or customer of a wire or
27 electronic communication service in the ordinary course of the

1 provider's or customer's business for purposes of:

2 (A) billing or recording as an incident to
3 billing for communications services; or

4 (B) cost accounting, security control, or other
5 ordinary business purpose.

6 (7) "Prosecutor" means a district attorney, criminal
7 district attorney, or county attorney performing the duties of a
8 district attorney.

9 (8) "Remote computing service" means the provision to
10 the public of computer storage or processing services by means of an
11 electronic communications system.

12 (9) [(5)] "Supervisory official" means:

13 (A) an investigative agent or an assistant
14 investigative agent who is in charge of an investigation;

15 (B) an equivalent person at an investigating
16 agency's headquarters or regional office; and

17 (C) the principal prosecuting attorney of the
18 state or of a political subdivision of the state or the first
19 assistant or chief assistant prosecuting attorney in the office of
20 either.

21 ~~(10) [(6)] "Tracking device" means an electronic or~~
22 ~~mechanical device that permits only tracking the movement of a~~
23 ~~person or object.~~

24 ~~[(7)]~~ "Trap and trace device" means a device or
25 process that records an incoming electronic or other impulse that
26 identifies the originating number or other dialing, routing,
27 addressing, or signaling information reasonably likely to identify

1 the source of [~~an instrument or device from which~~] a wire or
2 electronic communication, if the information does not include the
3 contents of the communication [~~was transmitted~~]. The term does not
4 include a device or telecommunications network used in providing:

5 (A) a caller identification service authorized
6 by the Public Utility Commission of Texas under Subchapter E,
7 Chapter 55, Utilities Code;

8 (B) the services referenced in Section
9 55.102(b), Utilities Code; or

10 (C) a caller identification service provided by a
11 commercial mobile radio service provider licensed by the Federal
12 Communications Commission.

13 [~~(8) "ESN reader" means a device that records the~~
14 ~~electronic serial number from the data track of a wireless~~
15 ~~telephone, cellular telephone, or similar communication device~~
16 ~~that transmits its operational status to a base site.~~

17 [~~(9) "Prosecutor" means a district attorney, criminal~~
18 ~~district attorney, or county attorney performing the duties of a~~
19 ~~district attorney.~~]

20 SECTION 9. Subsections (b) and (c), Section 2, Article
21 18.21, Code of Criminal Procedure, are amended to read as follows:

22 (b) A prosecutor may file an application under this section
23 or under federal law on the prosecutor's own motion or on the
24 request of an authorized peace officer, regardless of whether the
25 officer is commissioned by the department. A prosecutor who files
26 an application on the prosecutor's own motion or who files an
27 application for the installation and use of a pen register, ESN

1 reader, or similar equipment on the request of an authorized peace
2 officer not commissioned by the department must make the
3 application personally and may not do so through an assistant or
4 some other person acting on the prosecutor's behalf. A prosecutor
5 may make an application through an assistant or other person acting
6 on the prosecutor's behalf if the prosecutor files an application
7 for the installation and use of:

8 (1) a pen register, ESN reader, or similar equipment
9 on the request of an authorized peace officer who is commissioned by
10 the department; or

11 (2) a trap and trace device or similar equipment on the
12 request of an authorized peace officer, regardless of whether the
13 officer is commissioned by the department.

14 (c) The application must:

15 (1) be made in writing under oath;

16 (2) include the name of the subscriber and the
17 telephone number and location of the communication device on which
18 the pen register, ESN reader, trap and trace device, or similar
19 equipment will be used, to the extent that information is known or
20 is reasonably ascertainable; and

21 (3) state that the installation and use of the device
22 or equipment will likely produce information that is ~~[be]~~ material
23 to an ongoing criminal ~~[the]~~ investigation ~~[of a criminal offense]~~.

24 SECTION 10. Subsections (a) through (f), Section 14,
25 Article 18.21, Code of Criminal Procedure, are amended to read as
26 follows:

27 (a) A district judge may issue an order for the installation

1 and use within the judge's judicial district of a [~~one or more~~]
2 mobile tracking device [~~devices and for their use~~].

3 (b) The order may authorize the use of a mobile tracking
4 device [~~devices~~] outside the judicial district but within the
5 state, if the device is installed within the district.

6 (c) A district judge may issue the order only on the
7 application of an authorized peace officer. An application must be
8 written and signed and sworn to or affirmed before the judge. The
9 affidavit must:

10 (1) state the name, department, agency, and address of
11 the applicant;

12 (2) identify the vehicle, container, or item to which,
13 in which, or on which the mobile tracking device is to be attached,
14 [~~or~~] placed, or otherwise installed;

15 (3) [~~and~~] state the name of the owner or possessor of
16 the [~~that~~] vehicle, container, or item described in Subdivision
17 (2);

18 (4) [~~(3)~~] state the judicial jurisdictional area in
19 which the vehicle, container, or item described in Subdivision (2)
20 is expected to be found; and

21 (5) [~~(4)~~] state the facts and circumstances that
22 provide the applicant with a reasonable suspicion that:

23 (A) criminal activity has been, is, or will be
24 committed; [~~in progress~~] and

25 (B) [~~that~~] the installation and use of a mobile
26 tracking device is [~~reasonably~~] likely to produce [~~yield~~]
27 information that is material [~~relevant~~] to an ongoing criminal

1 ~~[the]~~ investigation of the ~~[that]~~ criminal activity described in
2 Paragraph (A).

3 (d) Within ~~[The judge that issued an order shall be notified~~
4 ~~in writing within]~~ 72 hours after the time the mobile tracking
5 device was ~~[has been]~~ activated in place on or within the vehicle,
6 container, or item, the applicant shall notify in writing the judge
7 who issued an order under this section.

8 (e) An order under this section ~~[authorizing the use of a~~
9 ~~mobile tracking device]~~ expires not later than the 90th day after
10 the date that the device has been activated in place on or within
11 the vehicle, container, or item. For good cause shown, the judge
12 may grant an extension for an additional 90-day period.

13 (f) The applicant shall remove or cause to be removed a [A]
14 mobile tracking device ~~[shall be removed]~~ as soon as is practicable
15 after the authorization period expires. If removal is not
16 practicable, monitoring of the device shall cease on expiration of
17 the authorization order.

18 SECTION 11. Section 16, Article 18.21, Code of Criminal
19 Procedure, is amended to read as follows:

20 Sec. 16. LIMITATION. A governmental agency authorized to
21 install and use a pen register under this article or other law must
22 use reasonably available technology to only record and decode
23 electronic or other impulses used to identify the numbers dialed,
24 routed, addressed, or otherwise processed or transmitted by a wire
25 or electronic communication so as to not include the contents of the
26 communication.

27 SECTION 12. This Act takes effect September 1, 2003.

1 SECTION 13. (a) The changes in law made by this Act by
2 amending Subsections (a) and (c), Section 16.02, Penal Code, apply
3 only to an offense committed on or after the effective date of this
4 Act. For purposes of this section, an offense is committed before
5 the effective date of this Act if any element of the offense occurs
6 before that date.

7 (b) An offense committed before the effective date of this
8 Act is covered by the law in effect when the offense was committed,
9 and the former law is continued in effect for that purpose.

10 SECTION 14. The changes in law made by this Act by amending
11 Section 4, Subsection (e), Section 8A, and Section 9, Article
12 18.20, and Section 14, Article 18.21, Code of Criminal Procedure,
13 apply only to an interception order granted on or after the
14 effective date of this Act. An interception order granted before
15 the effective date of this Act is covered by the law in effect when
16 the order was granted, and the former law is continued in effect for
17 that purpose.

18 SECTION 15. The changes in law made by this Act by amending
19 Subsections (b) and (c), Section 8A, Article 18.20, Code of
20 Criminal Procedure, apply only to a request for oral or written
21 consent made on or after the effective date of this Act. A request
22 for oral or written consent made before the effective date of this
23 Act is covered by the law in effect when the order was granted, and
24 the former law is continued in effect for that purpose.