

1-1 By: Madden (Senate Sponsor - Whitmire) H.B. No. 2354  
1-2 (In the Senate - Received from the House April 26, 2011;  
1-3 April 29, 2011, read first time and referred to Committee on  
1-4 Criminal Justice; May 12, 2011, reported favorably by the  
1-5 following vote: Yeas 7, Nays 0; May 12, 2011, sent to printer.)

1-6 A BILL TO BE ENTITLED  
1-7 AN ACT

1-8 relating to the installation and use of a pen register, ESN reader,  
1-9 trap and trace device, mobile tracking device, or similar equipment  
1-10 in a correctional facility operated by or under contract with the  
1-11 Texas Department of Criminal Justice.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Sections 1(2) and (3-a), Article 18.21, Code of  
1-14 Criminal Procedure, are amended to read as follows:

1-15 (2) "Authorized peace officer" means:

1-16 (A) a sheriff or a sheriff's deputy;

1-17 (B) a constable or deputy constable;

1-18 (C) a marshal or police officer of an  
1-19 incorporated city;

1-20 (D) a ranger or officer commissioned by the  
1-21 Public Safety Commission or the director of the Department of  
1-22 Public Safety;

1-23 (E) an investigator of a prosecutor's office;

1-24 (F) a law enforcement agent of the Alcoholic  
1-25 Beverage Commission;

1-26 (G) a law enforcement officer commissioned by the  
1-27 Parks and Wildlife Commission; or

1-28 (H) an enforcement officer appointed by the  
1-29 inspector general [~~executive director~~] of the Texas Department of  
1-30 Criminal Justice under Section 493.019, Government Code.

1-31 (3-a) "Designated law enforcement office or agency"  
1-32 means:

1-33 (A) the sheriff's department of a county with a  
1-34 population of 3.3 million or more; [~~or~~]

1-35 (B) a police department in a municipality with a  
1-36 population of 500,000 or more; or

1-37 (C) the office of inspector general of the Texas  
1-38 Department of Criminal Justice.

1-39 SECTION 2. Sections 2(b), (d), (e), (i), (j), (k), (l), and  
1-40 (m), Article 18.21, Code of Criminal Procedure, are amended to read  
1-41 as follows:

1-42 (b) A prosecutor may file an application under this section  
1-43 or under federal law on the prosecutor's own motion or on the  
1-44 request of an authorized peace officer, regardless of whether the  
1-45 officer is commissioned by the department. A prosecutor who files  
1-46 an application on the prosecutor's own motion or who files an  
1-47 application for the installation and use of a pen register, ESN  
1-48 reader, or similar equipment on the request of an authorized peace  
1-49 officer not commissioned by the department, other than an  
1-50 authorized peace officer employed by a designated law enforcement  
1-51 office or agency, must make the application personally and may not  
1-52 do so through an assistant or some other person acting on the  
1-53 prosecutor's behalf. A prosecutor may make an application through  
1-54 an assistant or other person acting on the prosecutor's behalf if  
1-55 the prosecutor files an application for the installation and use  
1-56 of:

1-57 (1) a pen register, ESN reader, or similar equipment  
1-58 on the request of:

1-59 (A) an authorized peace officer who is  
1-60 commissioned by the department; or

1-61 (B) an authorized peace officer of a designated  
1-62 law enforcement office or agency; or

1-63 (2) a trap and trace device or similar equipment on the  
1-64 request of an authorized peace officer, regardless of whether the

2-1 officer is commissioned by the department.

2-2 (d) On presentation of the application, the judge may order  
 2-3 the installation and use of the pen register, ESN reader, or similar  
 2-4 equipment by an authorized peace officer commissioned by the  
 2-5 department or an authorized peace officer of a designated law  
 2-6 enforcement office or agency, and, on request of the applicant, the  
 2-7 judge shall direct in the order that a communication common carrier  
 2-8 or a provider of electronic communications service furnish all  
 2-9 information, facilities, and technical assistance necessary to  
 2-10 facilitate the installation and use of the device or equipment by  
 2-11 the department or designated law enforcement office or agency  
 2-12 unobtrusively and with a minimum of interference to the services  
 2-13 provided by the carrier or service. The carrier or service is  
 2-14 entitled to compensation at the prevailing rates for the facilities  
 2-15 and assistance provided to the department or a designated law  
 2-16 enforcement office or agency.

2-17 (e) On presentation of the application, the judge may order  
 2-18 the installation and use of the trap and trace device or similar  
 2-19 equipment by the communication common carrier or other person on  
 2-20 the appropriate line. The judge may direct the communication  
 2-21 common carrier or other person, including any landlord or other  
 2-22 custodian of equipment, to furnish all information, facilities, and  
 2-23 technical assistance necessary to install or use the device or  
 2-24 equipment unobtrusively and with a minimum of interference to the  
 2-25 services provided by the communication common carrier, landlord,  
 2-26 custodian, or other person. Unless otherwise ordered by the court,  
 2-27 the results of the trap and trace device or similar equipment shall  
 2-28 be furnished to the applicant, designated by the court, at  
 2-29 reasonable intervals during regular business hours, for the  
 2-30 duration of the order. The carrier is entitled to compensation at  
 2-31 the prevailing rates for the facilities and assistance provided to  
 2-32 the designated law enforcement office or agency.

2-33 (i) A peace officer of a designated law enforcement office  
 2-34 or agency is authorized to possess, install, operate, or monitor a  
 2-35 pen register, ESN reader, or similar equipment if the officer's  
 2-36 name is on the list submitted to the director of the department  
 2-37 under Subsection (k).

2-38 (j) Each designated law enforcement office or agency shall:  
 2-39 (1) adopt a written policy governing the application  
 2-40 of this article to the office or agency; and  
 2-41 (2) submit the policy to the director of the  
 2-42 department, or the director's designee, for approval.

2-43 (k) If the director of the department or the director's  
 2-44 designee approves the policy submitted under Subsection (j), the  
 2-45 inspector general of the Texas Department of Criminal Justice or  
 2-46 the inspector general's designee, or the sheriff or chief of a  
 2-47 designated law enforcement agency~~[, as applicable,]~~ or the  
 2-48 sheriff's or chief's designee, as applicable, shall submit to the  
 2-49 director a written list of all officers in the designated law  
 2-50 enforcement office or agency who are authorized to possess,  
 2-51 install, monitor, or operate pen registers, ESN readers, or similar  
 2-52 equipment.

2-53 (l) The department may conduct an audit of a designated law  
 2-54 enforcement office or agency to ensure compliance with this  
 2-55 article. If the department determines from the audit that the  
 2-56 designated law enforcement office or agency is not in compliance  
 2-57 with the policy adopted by the office or agency under Subsection  
 2-58 (j), the department shall notify the office or agency in writing  
 2-59 that it is not in compliance. If the department determines that the  
 2-60 office or agency still is not in compliance with the policy 90 days  
 2-61 after the date the office or agency receives written notice under  
 2-62 this subsection, the office or agency loses the authority granted  
 2-63 by this article until:

2-64 (1) the office or agency adopts a new written policy  
 2-65 governing the application of this article to the office or agency;  
 2-66 and

2-67 (2) the department approves the written policy.

2-68 (m) The inspector general of the Texas Department of  
 2-69 Criminal Justice or the sheriff or chief of a designated law

3-1 enforcement agency, as applicable, shall submit to the director of  
3-2 the department a written report of expenditures made by the  
3-3 designated law enforcement office or agency for the purchase and  
3-4 maintenance of a pen register, ESN reader, or similar equipment,  
3-5 authorized under this article [~~pursuant to Subsection (i)~~]. The  
3-6 director of the department shall report those [~~such~~] expenditures  
3-7 publicly on an annual basis via the department's website, or other  
3-8 comparable means.

3-9 SECTION 3. Section 6(e), Article 18.21, Code of Criminal  
3-10 Procedure, is amended to read as follows:

3-11 (e) The service provider may not destroy or permit the  
3-12 destruction of the copy until the information has been delivered to  
3-13 the designated law enforcement office or agency or until the  
3-14 resolution of any court proceedings, including appeals of any  
3-15 proceedings, relating to the subpoena or court order requesting the  
3-16 creation of the copy, whichever occurs last.

3-17 SECTION 4. Section 6(g)(2), Article 18.21, Code of Criminal  
3-18 Procedure, is amended to read as follows:

3-19 (2) The subscriber or customer shall give written  
3-20 notice to the service provider of the challenge to the subpoena or  
3-21 court order. The authorized peace officer or designated law  
3-22 enforcement office or agency requesting the subpoena or court order  
3-23 shall be served a copy of the papers filed by personal delivery or  
3-24 by registered or certified mail.

3-25 SECTION 5. Section 15, Article 18.21, Code of Criminal  
3-26 Procedure, is amended to read as follows:

3-27 Sec. 15. SUBPOENA AUTHORITY. (a) The director of the  
3-28 department or [~~the~~] the director's designee, the inspector general of  
3-29 the Texas Department of Criminal Justice or the inspector general's  
3-30 designee, or the sheriff or chief of a designated law enforcement  
3-31 agency[~~the~~] or the sheriff's or chief's designee[~~the~~] may issue an  
3-32 administrative subpoena to a communications common carrier or an  
3-33 electronic communications service to compel the production of the  
3-34 carrier's or service's business records that:

- 3-35 (1) disclose information about:
  - 3-36 (A) the carrier's or service's customers; or
  - 3-37 (B) users of the services offered by the carrier  
3-38 or service; and
- 3-39 (2) are material to a criminal investigation.

3-40 (b) Not later than the 30th day after the date on which the  
3-41 administrative subpoena is issued under Subsection (a), the  
3-42 inspector general of the Texas Department of Criminal Justice or  
3-43 the sheriff or chief of a designated law enforcement agency, as  
3-44 applicable, shall report the issuance of the subpoena to the  
3-45 department.

3-46 (c) If, based on reports received under Subsection (b), the  
3-47 department determines that a designated law enforcement office or  
3-48 agency is not in compliance with the policy adopted by the office or  
3-49 agency under Section 2(j), the department shall notify the office  
3-50 or agency in writing that it is not in compliance. If the  
3-51 department determines that the office or agency still is not in  
3-52 compliance with the policy 90 days after the date the office or  
3-53 agency receives written notice under this subsection, the office or  
3-54 agency loses the authority granted by this article until:

- 3-55 (1) the office or agency adopts a new written policy  
3-56 governing the application of this article to the office or agency;  
3-57 and
- 3-58 (2) the department approves the written policy.

3-59 SECTION 6. This Act takes effect September 1, 2011.

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