

SUBJECT: Revising electronic surveillance laws

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 9 ayes — Keel, Riddle, Ellis, Denny, Dunnam, Hodge, P. Moreno, Pena,
Talton

0 nays

WITNESSES: None

BACKGROUND: Penal Code, sec. 16.02 makes it a state-jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000) unlawfully to intercept, use, or disclose wire, oral, or electronic communications.

Code of Criminal Procedure, art. 18.20 governs the interception and use of wire, oral, or electronic communications. It specifies which judges may consider interception applications; offenses for which interceptions may be authorized; when law enforcement officers or others may disclose the contents of intercepted communications; emergency installations of intercepting devices; procedures for obtaining an interception order and for preserving intercepted communications; when the contents of an intercepted wire or other communication are admissible in evidence; and when civil causes of action are authorized by those whose communications are intercepted, disclosed, or used in violation of the law. Interception means the aural or other acquisition of the contents of a wire, oral, or electronic communication through an electronic, mechanical, or other device.

The presiding judge of the Court of Criminal Appeals, by order filed with the clerk of that court, must appoint one district judge from each administrative judicial district to serve as the judge of competent jurisdiction to consider interception applications.

DIGEST: HB 2474 would make it an affirmative defense to prosecution for unlawful interception, use, or disclosure of wire, oral, or electronic communications that a person acting under color of law intercepted a wire or electronic communication, if:

- the communication was made by a computer trespasser and transmitted to, through, or from a protected computer;
- the interception did not acquire a communication other than one transmitted to or from the computer trespasser; and
- the owner of the protected computer consented to the interception of the computer trespasser's communications on the protected computer.

It also would be an affirmative defense to prosecution if a person acting under color of law intercepted a wire or electronic communication and the actor was engaged lawfully in a criminal investigation and had reasonable suspicion to believe that the contents of a computer trespasser's communications likely to be obtained would be material to the investigation.

Computer trespasser would mean a person who gained access to a protected computer without the owner's effective consent and had no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer. Protected computer would mean a computer, computer network, or computer system owned by a financial institution or governmental entity or used by or for such an institution or entity.

HB 2474 would specify that only a judge of competent jurisdiction could authorize the interception of wire, oral, or electronic communications. However, a district judge for the county in which the device would be installed or used, or a judge or justice of a court of appeals or higher court, could consent to an emergency installation of an intercepting device to provide evidence of the commission of a felony, or of a threat, attempt, or conspiracy to commit a felony, in an immediate life-threatening situation. Oral or written consent would expire 48 hours after the grant of consent or at the conclusion of the emergency justifying the interception, whichever occurred first. Immediate life-threatening situation would mean a hostage, barricade, or other emergency situation in which a person unlawfully and directly threatened another with death or exposed another to a substantial risk of serious bodily injury.

Any provider of wire or electronic communications service or other person furnishing facilities or technical assistance would be entitled to compensation by the applicant of the intercepting device for reasonable expenses incurred.

The applicant could request a hearing to determine the reasonableness of an expense claimed.

An investigative or law enforcement officer who obtained knowledge of the contents of a wire, oral, or electronic communication or of evidence derived from the communication could disclose the content or evidence to a federal law enforcement officer or agent or to a law enforcement officer or agent of another state. The bill also would specify that a prosecutor could file an application for an interception order under state or federal law.

A computer trespasser or a user, aggrieved person, subscriber, or customer of a communications common carrier or electronic communications service would not have a cause of action against the carrier or service, its officers, employees, or agents for providing information, facilities, or assistance as required by legislative authority or a court order, warrant, or subpoena.

HB 2474 would define new technology, including ESN reader, mobile tracking device, pen register, and trap-and-trace device. Pen register would mean a device that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, if the information does not include the contents of the communication. The term would not include a device used by a provider or customer of a wire or electronic communication service for purposes of billing for communications services or cost accounting, security control, or other similar purposes.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

HB 2474 would update state laws relating to electronic surveillance to reflect changes in technology and in federal law. The bill would add definitions for computer trespasser and protected computer to address the situation in which a hacker enters someone else's computer. In such a case, the bill would allow law enforcement to intercept the hacker's communications and would clarify that hackers do not have a cause of action against the carrier or service for providing information, facilities, or assistance. The bill also would update the definitions of pen register and trap-and-trace device to match changes in federal law due to changes in technology.

HB 2474 would clarify when an emergency installation and use of intercepting device is justified. The revised definition of an immediate life-threatening situation would mirror more closely the definitions used in the Penal Code. To give greater protection to those targeted by an interception, the bill would clarify which judges have the authority to issue an interception order or an emergency order. Only a district judge or a judge of a higher court could consent to an emergency interception, rather than any magistrate. Furthermore, only a judge of competent jurisdiction, which is a limited pool, could issue a regular order authorizing interception of wire, oral, or electronic communications.

The bill would help resolve potential conflicts by allowing an applicant to request a hearing to determine the reasonableness of expenses claimed by a provider who had furnished technical assistance. Current law does not specify how any conflicts over expenses should be resolved.

HB 2474 also would help educate law enforcement and prosecutors that a state prosecutor can apply for an interception order under federal or state law. Although this option is available to them now, most prosecutors are unaware of it.

The author plans to introduce a floor amendment that would address telephone companies' concerns about the definition of a pen register by excluding from the definition devices used by a provider in the ordinary course of business.

**OPPONENTS
SAY:**

The bill's definition of a pen register is so broad that it inadvertently could sweep in equipment that phone companies routinely use as part of their daily business. Phone companies should not be subject to the requirements for interception devices contained in the Code of Criminal Procedure when conducting routine business.

NOTES:

The companion bill, SB 1411 by Deuell, was scheduled for public hearing by the Senate Criminal Justice Committee on May 6.