

BILL ANALYSIS

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S.B. 33
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

This bill would allow for the audio or video monitoring of a resident's room in a state supported living center (SSLC), and would provide the parameters for both the resident and the SSLC to follow in relation to monitoring.

In 2009, the legislature recognized the need for video surveillance at SSLCs to help protect residents from and uncover abuse and neglect that was occurring. The concern was that many residents of SSLCs often do not report abuse and neglect on their own either because they have limited communication abilities or are fearful of retaliation from the SSLC staff. Legislation was passed to limit the use of surveillance to public areas of the SSLCs to ensure that residents still retained some sense of privacy even though the potential for abuse still applied in private areas (i.e., a resident's room). Currently under state law, audio or video monitoring in an SSLC is only allowed in these public, common areas.

Guardians and parents of residents who do not have the capacity to communicate for themselves want the right to install video equipment in their loved ones' rooms (with consent of all other persons occupying the room) in order to ensure that their loved ones are not being abused and neglected.

In 2001, the legislature determined that residents in nursing homes should have the right to install and use video equipment in their rooms to monitor the care and treatment they receive while in their rooms. The proposed legislation would ensure the same protections for SSLC residents as Texas does for nursing home residents. The nursing home law only requires that residents or guardians, if they see abuse or neglect on the tape, must turn it over to the investigative body of that facility. The Department of Family and Protective Services' Adult Protective Services division investigates abuse and neglect in nursing homes and SSLCs, and the office of the inspector general at the Health and Human Services Commission investigates abuse at SSLCs.

This bill would allow for the audio or video monitoring of a resident's room in a SSLC, at the expense of the parent or guardian, and provides the parameters for both the resident and the SSLC to follow in relation to monitoring.

As proposed, S.B. 33 amends current law relating to the electronic monitoring of residents at state supported living centers and provides criminal penalties.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 2 (Sections 555.154-555.157 and 555.159-555.160, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 555.025(c), Health and Safety Code, to prohibit the Department of Aging and Disability Services (DADS), except as provided by Subchapter E, from installing or operating video surveillance equipment in a private space or in a location in which video surveillance equipment can capture images within a private space.

SECTION 2. Amends Chapter 555, Health and Safety Code, by adding Subchapter E, as follows:

SUBCHAPTER E. ELECTRONIC MONITORING OF RESIDENT'S ROOM

Sec. 555.151. **DEFINITIONS.** Defines "authorized electronic monitoring" and "electronic monitoring device" in this subchapter.

Sec. 555.152. **CRIMINAL AND CIVIL LIABILITY.** (a) Provides that it is a defense to prosecution under Section 16.02 (Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications), Penal Code, or any other statute of this state under which it is an offense to intercept a communication or disclose or use an intercepted communication, that the communication was intercepted by an electronic monitoring device placed in a resident's room.

(b) Provides that this subchapter does not affect whether a person may be held to be civilly liable under other law in connection with placing an electronic monitoring device in a resident's room or in connection with using or disclosing a tape or recording made by the device except:

(1) as specifically provided by this subchapter; or

(2) to the extent that liability is affected by a consent or waiver signed under this subchapter, or the fact that authorized electronic monitoring is required to be conducted with notice to persons who enter a resident's room.

(c) Provides that a communication or other sound acquired by an audio electronic monitoring device installed under the provisions of this subchapter concerning authorized electronic monitoring is not considered to be an oral communication as defined by Section 1 (Definitions), Article 18.20, Code of Criminal Procedure; or a communication as defined by Section 123.001 (Definitions), Civil Practice and Remedies Code.

Sec. 555.153. **COVERT USE OF ELECTRONIC MONITORING DEVICE; LIABILITY OF DEPARTMENT OR CENTER.** (a) Provides that the placement and use of an electronic monitoring device in a resident's room, for purposes of this subchapter, are considered to be covert if the placement and use of the device are not open and obvious; and the state supported living centers and the ICF-MR component of the Rio Grande State Center (center) and DADS are not informed about the device by the resident, by a person who placed the device in the room, or by a person who is using the device.

(b) Prohibits DADS and the center from being held to be civilly liable in connection with the covert placement or use of an electronic monitoring device in a resident's room.

Sec. 555.154. **REQUIRED FORM ON ADMISSION.** Requires the executive commissioner of the Health and Human Services Commission (executive commissioner) by rule to prescribe a form that is required to be completed on a resident's admission to a center by or on behalf of the resident. Requires that the form state:

(1) that a person who places an electronic monitoring device in a resident's room or who uses or discloses a tape or other recording made by the device may be civilly liable for any unlawful violation of the privacy rights of another;

(2) that a person who covertly places an electronic monitoring device in a resident's room or who consents to or acquiesces in the covert placement of the

device in a resident's room has waived any privacy right the person may have had in connection with images or sounds that may be acquired by the device;

(3) that a resident or the resident's guardian or legal representative is entitled to conduct authorized electronic monitoring under this subchapter, and that if the center refuses to permit the electronic monitoring or fails to make reasonable physical accommodations for the authorized electronic monitoring the person should contact DADS;

(4) the basic procedures that are required to be followed to request authorized electronic monitoring;

(5) the manner in which this subchapter affects the legal requirement to report abuse or neglect when electronic monitoring is being conducted; and

(6) any other information regarding covert or authorized electronic monitoring that the executive commissioner considers advisable to include on the form.

Sec. 555.155. AUTHORIZED ELECTRONIC MONITORING: WHO MAY REQUEST. (a) Authorizes only the resident, if a resident has capacity to request electronic monitoring and has not been judicially declared to lack the required capacity, to request authorized electronic monitoring under this subchapter.

(b) Authorizes only the guardian of the resident, if a resident has been judicially declared to lack the capacity required for taking an action such as requesting electronic monitoring, to request electronic monitoring under this subchapter.

(c) Authorizes only the legal representative of the resident, if a resident does not have capacity to request electronic monitoring but has not been judicially declared to lack the required capacity, to request electronic monitoring under this subchapter. Requires the executive commissioner by rule to prescribe:

(1) guidelines that will assist the center, family members of residents, advocates for residents, and other interested persons to determine when a resident lacks the required capacity; and

(2) who may be considered to be a resident's legal representative for purposes of this subchapter, including persons who may be considered the legal representative under the terms of an instrument executed by the resident when the resident had capacity, and persons who may become the legal representative for the limited purpose of this subchapter under a procedure prescribed by the executive commissioner.

Sec. 555. 156. AUTHORIZED ELECTRONIC MONITORING: FORM OF REQUEST; CONSENT OF OTHER RESIDENTS IN ROOM. (a) Requires a resident or the guardian or legal representative of a resident who wishes to conduct authorized electronic monitoring to make the request to the center on a form prescribed by the executive commissioner.

(b) Requires that the form prescribed by the executive commissioner require the resident or the resident's guardian or legal representative to:

(1) release the center from any civil liability for a violation of the resident's privacy rights in connection with the use of the electronic monitoring device;

(2) choose, when the electronic monitoring device is a video surveillance camera, whether the camera will always be unobstructed or whether the camera should be obstructed in specified circumstances to protect the dignity of the resident; and

(3) obtain the consent of other residents in the room, using a form prescribed for this purpose by the executive commissioner, if the resident resides in a multiperson room.

(c) Authorizes that consent under Subsection (b)(3) be given only:

(1) by the other resident or residents in the room;

(2) by the guardian of a person described by Subdivision (1), if the person has been judicially declared to lack the required capacity; or

(3) by the legal representative who under Section 555.155(c) is authorized to request electronic monitoring on behalf of a person described by Subdivision (1), if the person does not have capacity to sign the form but has not been judicially declared to lack the required capacity.

(d) Requires that the form prescribed by the executive commissioner under Subsection (b)(3) condition the consent of another resident in the room on the other resident also releasing the center from any civil liability for a violation of the person's privacy rights in connection with the use of the electronic monitoring device.

(e) Authorizes another resident in the room to condition consent on the camera being pointed away from the consenting resident when the proposed electronic monitoring device is a video surveillance camera; and condition consent on the use of an audio electronic monitoring device being limited or prohibited.

(f) Requires that authorized electronic monitoring, if authorized electronic monitoring is being conducted in a resident's room and another resident is moved into the room who has not yet consented to the electronic monitoring, cease until the new resident has consented in accordance with this section.

(g) Authorizes the executive commissioner to include other information that the executive commissioner considers to be appropriate on either of the forms that the executive commissioner is required to prescribe under this section.

(h) Authorizes the executive commissioner by rule to prescribe the place or places that a form signed under this section is required to be maintained and the period for which it is required to be maintained.

(i) Prohibits authorized electronic monitoring from commencing until all request and consent forms required by this section have been completed and returned to the center; and requires that authorized electronic monitoring be conducted in accordance with any limitation placed on the monitoring as a condition of the consent given by or on behalf of another resident in the room.

Sec. 555.157. **AUTHORIZED ELECTRONIC MONITORING: GENERAL PROVISIONS.** (a) Requires a center to permit a resident or the resident's guardian or legal representative to monitor the resident's room through the use of electronic monitoring devices.

(b) Requires the center to require a resident who conducts authorized electronic monitoring or the resident's guardian or legal representative to post and maintain a conspicuous notice at the entrance to the resident's room. Requires that the notice state that the room is being monitored by an electronic monitoring device.

(c) Provides that authorized electronic monitoring conducted under this subchapter is not compulsory and is authorized to be conducted only at the request of the resident or the resident's guardian or legal representative.

(d) Prohibits a center from refusing to admit an individual to residency in the center and from removing a resident from the center because of a request to conduct authorized electronic monitoring. Prohibits a center from removing a resident from the center because covert electronic monitoring is being conducted by or on behalf of a resident.

(e) Requires a center to make reasonable physical accommodation for authorized electronic monitoring, including providing a reasonably secure place to mount the video surveillance camera or other electronic monitoring device, and providing access to power sources for the video surveillance camera or other electronic monitoring device.

(f) Requires the resident or the resident's guardian or legal representative to pay for all costs associated with conducting electronic monitoring, other than the costs of electricity. Provides that the resident or the resident's guardian or legal representative is responsible for all costs associated with installation of equipment and maintaining the equipment.

(g) Authorizes a center to require an electronic monitoring device to be installed in a manner that is safe for residents, employees, or visitors who may be moving about the room. Authorizes the executive commissioner by rule to adopt guidelines regarding the safe placement of an electronic monitoring device.

(h) Authorizes the center, if authorized electronic monitoring is conducted, to require the resident or the resident's guardian or legal representative to conduct the electronic monitoring in plain view.

(i) Authorizes, but does not require, a center to place a resident in a different room to accommodate a request to conduct authorized electronic monitoring.

Sec. 555.158. REPORTING ABUSE OR NEGLECT. (a) Requires a person who is conducting authorized electronic monitoring under this subchapter and who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse or neglect caused by another person to report the abuse or neglect to the Department of Family and Protective Services (DFPS) as required by Chapter 48 (Investigations and Protective Services for Elderly and Disabled Persons), Human Resources Code, and to the Health and Human Services Commission's office of inspector general (inspector general).

(b) Requires a person to report abuse based on the person's viewing of or listening to a tape or recording only if the incident of abuse is acquired on the tape or recording. Requires a person to report neglect based on the person's viewing of or listening to a tape or recording only if it is clear from viewing or listening to the tape or recording that neglect has occurred. Requires a person, if the incident of abuse or neglect is acquired by a person's viewing of or listening to a tape or recording, to report the abuse or neglect to DFPS and the inspector general; and provide the tape or recording to DFPS and the inspector general.

(c) Requires the person who possesses the tape or recording to provide the center with a copy at the center's expense if abuse or neglect of a resident is reported to the center and the center requests a copy of any relevant tape or recording made by an electronic monitoring device.

Sec. 555.159. USE OF TAPE OR RECORDING BY AGENCY OR COURT. (a) Authorizes a tape or recording created through the use of covert or authorized electronic monitoring described by this subchapter, subject to applicable rules of evidence and procedure and the requirements of this section, to be admitted into evidence in a civil or criminal court action or administrative proceeding.

(b) Prohibits a court or administrative agency from admitting into evidence a tape or recording created through the use of covert or authorized electronic monitoring or taking or authorizing action based on the tape or recording unless:

(1) if the tape or recording is a video tape or recording, the tape or recording shows the time and date that the events acquired on the tape or recording occurred;

(2) the contents of the tape or recording have not been edited or artificially enhanced; and

(3) if the contents of the tape or recording have been transferred from the original format to another technological format, the transfer was done by a qualified professional and the contents of the tape or recording were not altered.

(c) Requires a person who sends more than one tape or recording to DFPS to identify for DFPS each tape or recording on which the person believes that an incident of abuse or evidence of neglect may be found. Authorizes the executive commissioner by rule to encourage persons who send a tape or recording to DFPS to identify the place on the tape or recording where an incident of abuse or evidence of neglect may be found.

Sec. 555.160. NOTICE AT ENTRANCE TO CENTER. Requires each center to post a notice at the entrance to the center stating that the rooms of some residents may be being monitored electronically by or on behalf of the residents and that the monitoring is not necessarily open and obvious. Requires the executive commissioner by rule to prescribe the format and the precise content of the notice.

Sec. 555.161. ENFORCEMENT. Authorizes DFPS to impose appropriate sanctions under this chapter on a director of a center who knowingly refuses to permit a resident or the resident's guardian or legal representative to conduct authorized electronic monitoring; refuses to admit an individual to residency or allows the removal of a resident from the center because of a request to conduct authorized electronic monitoring; allows the removal of a resident from the center because covert electronic monitoring is being conducted by or on behalf of the resident; or violates another provision of this subchapter.

Sec. 555.162. INTERFERENCE WITH DEVICE; CRIMINAL PENALTY. (a) Provides that a person who intentionally hampers, obstructs, tampers with, or destroys an electronic monitoring device installed in a resident's room in accordance with this subchapter or a tape or recording made by the device commits an offense. Provides that an offense under this subsection is a Class B misdemeanor.

(b) Provides that it is a defense to prosecution under Subsection (a) that the person took the action with the effective consent of the resident on whose behalf the electronic monitoring device was installed or the resident's guardian or legal representative.

Sec. 555.163. FAILURE TO REPORT; CRIMINAL PENALTY. (a) Provides that a person commits an offense if the person has cause to believe that a resident's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report to DFPS and the inspector general in accordance with Section 555.158(a).

(b) Provides that an offense under this section is a Class A misdemeanor.

SECTION 3. Provides that the change in law made by this Act applies only to an offense committed on or after the effective date of this Act. Provides that an offense committed before the effective date of this Act is governed by the law in effect on the date the offense was

committed, and the former law is continued in effect for that purpose. Provides that, for purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 4. Requires the executive commissioner, not later than September 1, 2013, to develop the forms required by Sections 555.154 and 555.156, Health and Safety Code, as added by this Act; and develop the guidelines required by Section 555.155, Health and Safety Code, as added by this Act.

SECTION 5. Effective date: upon passage or September 1, 2013.