

**CHAPTER 587**

**H.B. No. 10**

**An Act relating to the interception and use of wire or oral communications and creating the offense of unlawful installation or use of a pen register.**

*Be it enacted by the Legislature of the State of Texas:*

**SECTION 1.** Chapter 275, Acts of the 67th Legislature, Regular Session, 1981, shall not be in force after September 1, 1993.

**SECTION 2.** Section 1, Article 18.20, Code of Criminal Procedure, 1965, is amended by adding Subdivisions (13) and (14), to read as follows:

(13) *“Residence” means a structure or the portion of a structure used as a person’s home or fixed place of habitation to which the person indicates an intent to return after any temporary absence.*

(14) *“Pen register” means a mechanical or electronic device that attaches to a telephone line and is capable of recording outgoing numbers dialed from that line but is not capable of recording the origin of an incoming communication to that line or the content of a communication carried between that line and another line.*

**SECTION 3.** Section 8(a), Article 18.20, Code of Criminal Procedure, 1965, is amended to read as follows:

(a) To be valid, an application for an order authorizing the interception of a wire or oral communication must be made in writing under oath to a judge of competent jurisdiction and must state the applicant’s authority to make the application. An applicant must include the following information in the application:

(1) the identity of the prosecutor making the application and of the officer requesting the application;

(2) a full and complete statement of the facts and circumstances relied on by the applicant to justify his belief that an order should be issued, including:

(A) details about the particular offense that has been, is being, or is about to be committed;

(B) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

(C) a particular description of the type of communication sought to be intercepted; and

(D) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(3) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed or to be too dangerous if tried;

(4) a statement of the period of time for which the interception is required to be maintained and, if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication is first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur after the described type of communication is obtained;

(5) a statement whether ~~or not~~ a covert entry will be necessary to properly and safely install the wiretapping or electronic surveillance or eavesdropping equipment *and*, [s] if a covert entry is requested, a statement as to why such an entry is necessary and proper under the facts of the particular investigation, *including a full and complete statement as to whether other investigative techniques have been tried and have failed or why they reasonably appear to be unlikely to succeed or to be too dangerous if tried or are not feasible under the circumstances or exigencies of time [shall be required];*

(6) a full and complete statement of the facts concerning all applications known to the prosecutor making the application that have been previously made to a judge for authorization to intercept wire or oral communications involving any of the persons, facilities, or places specified in the application and of the action taken by the judge on each application; and

(7) if the application is for the extension of an order, a statement setting forth the results already obtained from the interception or a reasonable explanation of the failure to obtain results.

**SECTION 4.** Section 9, Article 18.20, Code of Criminal Procedure, 1965, is amended by redesignating current Subsections (e) and (f) as Subsections (g) and (h) and adding new Subsections (e) and (f) to read as follows:

(e) *An order entered pursuant to this section may not authorize a covert entry into a residence solely for the purpose of intercepting a wire communication.*

(f) *An order entered pursuant to this section may not authorize a covert entry into or onto a premises for the purpose of intercepting an oral communication unless:*

(1) *the judge, in addition to making the determinations required under Subsection (a) of this section, determines that:*

(A)(i) the premises into or onto which the covert entry is authorized or the person whose communications are to be obtained has been the subject of a pen register previously authorized in connection with the same investigation;

(ii) the premises into or onto which the covert entry is authorized or the person whose communications are to be obtained has been the subject of an interception of wire communications previously authorized in connection with the same investigation; and

(iii) that such procedures have failed; or

(B) that the procedures enumerated in Paragraph (A) reasonably appear to be unlikely to succeed or to be too dangerous if tried or are not feasible under the circumstances or exigencies of time; and

(2) the order, in addition to the matters required to be specified under Subsection (b) of this section, specifies that the covert entry is for the purpose of intercepting oral communications of two or more persons and that there is probable cause to believe they are committing, have committed, or are about to commit a particular offense enumerated in Section 4 of this article.

(g) [(e)] Whenever an order authorizing interception is entered pursuant to this article, the order may require reports to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Reports shall be made at any interval the judge requires.

(h) [(f)] A judge who issues an order authorizing the interception of a wire or oral communication may not hear a criminal prosecution in which evidence derived from the interception may be used or in which the order may be an issue.

**SECTION 5.** Chapter 18, Code of Criminal Procedure, 1965, is amended by adding Article 18.21 to read as follows:

**Art. 18.21. PEN REGISTERS**

**Sec. 1. DEFINITIONS.** In this article:

(1) "Department" means the Department of Public Safety.

(2) "Pen register" means a mechanical or electronic device that attaches to a telephone line and is capable of recording outgoing numbers dialed from that line but is not capable of recording the origin of an incoming communication to that line or the content of a communication carried between that line and another line.

**Sec. 2. APPLICATION AND ORDER.** (a) A peace officer commissioned by the department may request an attorney for the state to file an application with a judge of the judicial district in which the proposed installation will be made for the installation and use of a pen register to obtain information material to the investigation of a criminal offense. A district or criminal district attorney may on his own motion file an application under this section. The district or criminal district attorney who is acting on his own motion must make the application personally and may not do so through an assistant or some other person acting on his behalf.

(b) The application must be made in writing under oath and must include the name of the subscriber, the telephone number or numbers, and the location of the telephone instrument or instruments on which the pen register will be utilized. The application must also state that the installation and utilization of the pen register will be material to the investigation of a criminal offense.

(c) On presentation of the application, the judge may order the installation and utilization of the pen register by a peace officer commissioned by the department, and in the order the judge shall direct a communications common carrier, as defined by Section 153(h), Title 47, United States Code, to furnish all information, facilities, and technical assistance necessary to facilitate the installation and utilization of the pen register by the department unobtrusively and with a minimum of interference to the services provided by the carrier. The carrier is entitled to compensation at the prevailing rates for the facilities and assistance provided to the department.

(d) An order for the installation and utilization of a pen register is valid for not more than 30 days from the date the order is granted, unless prior to the expiration of the order, the district or criminal district attorney who made the original application or the department, through the attorney for the state, applies for and obtains from the court an extension of the order. The period of extension may not exceed 30 days for each extension granted.

(e) The district court shall seal an application and order for the installation and utilization of a pen register granted under this article. The contents of an application or order may not be disclosed except in the course of a judicial proceeding and an unauthorized disclosure is punishable as contempt of court.

**SECTION 6.** Chapter 16, Penal Code, is amended by adding Section 16.03 to read as follows:

**Sec. 16.03. UNLAWFUL USE OF PEN REGISTER.** (a) Except as authorized by a court order obtained under Article 18.21, Code of Criminal Procedure, 1965, a person commits an offense if he knowingly installs or utilizes a pen register to record telephone numbers dialed from a telephone instrument.

*(b) In this section, "pen register" has the same meaning as is given that term in Article 18.21, Code of Criminal Procedure, 1965.*

*(c) It is an exception to the application of Subsection (a) of this section that an officer, employee, or agent of a communications common carrier, as defined by Section 153(h), Title 47, United States Code, installs or utilizes a device or equipment to record the numbers dialed from a telephone instrument in the normal course of business of the carrier or assists a peace officer commissioned by the Department of Public Safety in executing an order issued under Article 18.21, Code of Criminal Procedure, 1965.*

*(d) It is an affirmative defense to prosecution under this section that the installation or utilization of a pen register was made by an officer, agent, or employee of a lawful enterprise while engaged in an activity that is a necessary incident to the rendition of service or to the protection of property of or services provided by the enterprise, and was not made for the purpose of gathering information for a law enforcement agency or private investigative agency, other than information related to the theft of communication or information services provided by the enterprise.*

*(e) An offense under this section is a felony of the third degree.*

*(f) A pen register used in violation of this section is subject to seizure and may be forfeited to the Department of Public Safety in the manner provided for disposition of seized property by Article 18.18, Code of Criminal Procedure, 1965, as amended.*

**SECTION 7.** If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

**SECTION 8.** The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on March 6, 1985, by the following vote: Yeas 131, Nays 17;  
House concurred in Senate amendments to H.B. No. 10 on May 21, 1985, by a non-record vote; passed by the Senate, with amendments, on May 16, 1985, by the following vote: Yeas 27, Nays 4.

Approved: June 13, 1985

Effective: August 26, 1985