

Hall of the House of Representatives
88th General Assembly - Regular Session, 2011
Amendment Form

Subtitle of House Bill No. 1944

TO CREATE STATEWIDE WIRETAP AUTHORITY FOR LAW ENFORCEMENT
AGENCIES.

Amendment No. 1 to House Bill No. 1944

Amend House Bill No. 1944 as originally introduced:

Page 1, delete Section 1 in its entirety and substitute:

"SECTION 1. Arkansas Code Title 16, Chapter 82 is amended to create a new subchapter to read as follows:

Subchapter 1 – Wiretap Authority

16-82-401. Definitions.

As used in this chapter:

(1) "Aggrieved person" means a person who is a party to any intercepted wire, oral, or electronic communication or a person against whom the interception is directed;

(2) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

(3) "Common carrier" means the same as defined in 47 U.S.C. § 153, as it existed on January 1, 2011;

(4) "Computer trespasser":

(A) Means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

(B) Does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer;

(5) "Contents", when used with respect to any wire communication, oral communication, or electronic communication includes any information concerning the substance, purport, or meaning of that communication;

(6) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system that affects interstate or foreign commerce, but does not include:

(A) Any wire communication or oral communication;

(B) Any communication made through a tone-only paging device;



(C) Any communication from a tracking device; or

(D) Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(7) "Electronic communication service" means any service that provides to users of the service the ability to send or receive a wire communication or electronic communications;

(8) "Electronic communications system" means any wire, radio, electromagnetic, photo-optical or photoelectronic facilities for the transmission of a wire communication or electronic communication, and any computer facilities or related electronic equipment for the electronic storage of a wire communication or electronic communication;

(9) "Electronic, mechanical, or other device" means any device or apparatus that can be used to intercept a wire communication, oral communication, or electronic communication other than:

(A) A telephone or telegraph instrument, equipment, or facility, or any component:

(i) Furnished to the subscriber or user by a provider of wire communication or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or

(ii) Being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his or her duties; or

(B) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(10) "Electronic storage" means:

(A) Any temporary, intermediate storage of a wire communication or electronic communication incidental to the electronic transmission thereof; and

(B) Any storage of a wire communication or electronic communication by an electronic communication service for purposes of backup protection of the wire communication or electronic communication;

(11) "Foreign intelligence information" means:

(A) Information, whether or not concerning a United States citizen or resident alien, that relates to the ability of the United States to protect against:

(i) Actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) Sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) Clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) Information, whether or not concerning a United States citizen or resident alien, with respect to a foreign power or foreign territory that relates to:

(i) The national defense or the security of the United States; or

(ii) The conduct of the foreign affairs of the United States;

(12) "Intercept" means the aural or other acquisition of the contents of any wire communication, electronic communication, or oral communication through the use of any electronic, mechanical, or other device.

(13) "Investigative or law enforcement officer" means any officer of the United States or of a state or political subdivision of the United States, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in this chapter;

(14) "Judge" means a judge of a circuit court; and

(15)(A) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that the oral communication is not subject to interception under circumstances justifying such expectation.

(B) "Oral communication" does not include an electronic communication;

(16) "Person" means any employee or agent of the United States or any state or political subdivision of the United States, and any individual, partnership, association, joint stock company, trust, or corporation;

(17) "Readily accessible to the general public" means, with respect to a radio communication, that the radio communication is not:

(A) Scrambled or encrypted;

(B) Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the radio communication;

(C) Carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) Transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or

(E) Transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the rules of the Federal Communications Commission, unless, in the case of a radio communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the radio communication is a two-way voice communication by radio;

(18) "User" means any person or entity who:

(A) Uses an electronic communication service; and

(B) Is authorized by the provider of the electronic communication service to engage in the use; and

(19) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including the use of such connection in a switching station, furnished or operated by any person engaged in providing or operating the facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

16-82-402. Issuance of an ex parte order authorizing the interception of wire, oral, or electronic communications.

An ex parte order authorizing or approving the interception of any

wire, oral, or electronic communication may be issued by any circuit court upon application of the prosecuting attorney of the judicial district having jurisdiction showing by affidavit that there is probable cause to believe that evidence will be obtained of the commission of a Class Y felony, Class A felony, Class B felony, or an offense involving the manufacturing or delivery of a controlled substance.

16-82-403. Application for an ex parte order.

(a)(1) Each application for an order authorizing or approving the interception of any wire, oral, or electronic communication shall be made in writing upon oath or affirmation to a circuit court judge and shall state the applicant's authority to make such application.

(2) Each application shall include the following information:

(A) The identity of the investigative or law enforcement officer making the application, and, if applicable, the officer authorizing the application;

(B) A complete statement of the facts and circumstances relied upon by the applicant to justify his or her belief that an order should be issued, including:

(i) Details as to the particular offense that has been, is being, or is about to be committed, except as provided in § 16-82-409;

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

(iii) A particular description of the type of communication sought to be intercepted; and

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

(C) A 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 if tried, or to be too dangerous;

(D)(i) A statement of the period of time for which the interception is required to be maintained.

(ii) If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, there shall be required a particular description of the facts establishing probable cause to believe that additional communications of the same type will subsequently occur;

(E) A complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any circuit court judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the circuit court judge on each application; and

(F) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain those results.

(b) The circuit court judge may require the applicant to furnish

additional testimony or documentary evidence in support of the application.

(c)(1) Applications made and orders granted under this section shall be sealed by the circuit court judge.

(2) Custody of the applications and orders shall be as the circuit court judge directs.

(3) The applications and orders shall be disclosed only upon a showing of good cause before a circuit court judge, and shall not be destroyed except on order of the circuit court judge to whom presented, and in any event shall be kept for ten (10) years.

16-82-404. Ex parte order.

(a) Upon an application, the circuit court judge may enter an ex parte order, as requested or as modified, authorizing or approving the interception of any wire, oral, or electronic communication within the territorial jurisdiction of the court in which the circuit court judge is sitting and outside that jurisdiction but within the state in the case of a mobile interception device, if the circuit court judge determines on the basis of the facts submitted by the applicant that:

(1) There is probable cause for belief that a person is committing, has committed, or is about to commit a Class Y felony, Class A felony, Class B felony, or an offense involving the manufacturing or delivery of a controlled substance;

(2) There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;

(3) Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous; and

(4) Except as provided in § 16-82-409, there is probable cause for belief that the facilities from which or the place where the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of an offense or are leased to, listed in the name of, or commonly used by the person alleged to be involved in the commission of the offense.

(b) Each order authorizing or approving wiretapping or eavesdropping shall specify:

(1) The identity of the person, if known, whose communications are to be intercepted;

(2) Except as otherwise provided in § 16-82-409, the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(3) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(4) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(5) The period of time during which an interception is authorized, including a statement as to whether or not the interception automatically terminates when the described communication is first obtained.

(c)(1) An order entered under this section may not authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the

authorization nor in any event longer than thirty (30) days.

(2) The thirty-day period begins the first day on which the investigative or law enforcement officer begins to conduct an interception under the order or ten (10) days after the order is entered, whichever occurs earlier.

(3) An extension of an order may be granted but only upon application for an extension made in accordance with § 16-82-403(a) and the court making the findings required by subsection (a) of this section.

(4) The period of an extension shall be no longer than the authorizing circuit court judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty (30) days.

(5) Every order and each extension of the order:

(A) Shall contain a provision that the authorization to intercept shall be executed as soon as practicable;

(B) Shall be conducted in such a way as to minimize the interception under this section; and

(C) Must terminate upon attainment of the authorized objective, or in any event in thirty (30) days.

(6) No more than three (3) extensions may be granted for any order entered under this section.

(7) In the event that the intercepted communication is in a code or foreign language and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception.

(8) An interception made under this section may be conducted in whole or in part by state law enforcement personnel or by an individual operating under a contract with state law enforcement personnel and acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(d)(1) If an order authorizing interception is entered under this section, the order may require reports to be made to the circuit court judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

(2) The report shall be made at such times as the circuit court judge may require.

(e) Information obtained under a court order authorizing interception of wire, oral, or electronic communications shall not be used, published, or divulged except in accordance with the provisions of this subchapter.

(f) An order authorizing the interception of a wire, oral, or electronic communication shall, upon request of the applicant, direct that a provider of wire or electronic communication service shall furnish the applicant all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that the service provider is according the person whose communications are to be intercepted.

(g) Any provider of wire or electronic communication service furnishing these facilities or technical assistance shall be compensated by the applicant for reasonable expenses incurred in providing the facilities or assistance.

16-82-405. Contents of intercepted communication.

(a)(1) The contents of any wire, oral, or electronic communication

intercepted by any means authorized by this section shall, if possible, be recorded on tape, wire, or other comparable device.

(2)(A) The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations.

(B) Immediately upon expiration of the period of the order or any extension, the recording shall be made available to the circuit court judge issuing the order and sealed under his or her directions.

(3) Custody of the recording shall be wherever the circuit court judge orders.

(4) A recording shall not be destroyed except upon an order of the circuit court judge and in any event shall be kept for ten (10) years.

(5) Duplicate recordings may be made for use or disclosure under the provisions of this section.

(6) The presence of the seal provided for by this subsection, or any satisfactory explanation for the absence, is a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived under this section.

(b)(1) The contents of any intercepted wire, oral, or electronic communication or the evidence derived from those sources shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a state court, unless each party, not less than ten (10) days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

(2) This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with the information ten (10) days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving this information.

16-82-406. Notice.

Within a reasonable time, but not later than ninety (90) days after the filing of an application for an order of approval under this section, which application is denied, or after the termination of the period of an order or extensions, the circuit court judge to whom the application was presented shall cause to be served on the persons named in the order or the application and the other parties to intercepted communications, as the circuit court judge may determine in his or her discretion is in the interest of justice, notice of the following:

(1) The fact of the entry of the order or application;

(2) The date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and

(3)(A) The fact that during the period wire, oral, or electronic communications were or were not intercepted.

(B) The circuit court judge, upon the filing of a motion, may, in his or her discretion, make available to any person or his or her counsel for inspection the portions of the intercepted communications, applications, and orders as the circuit court judge determines to be in the interest of justice.

(C) On an ex parte showing of good cause to a circuit court judge, the serving of the matter required by this subsection may be postponed.

16-82-407. Motion to suppress and appeal.

(a)(1) An aggrieved person in a trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority in this state, or a political subdivision, may move to suppress the contents of any intercepted wire, oral, or electronic communication or the evidence derived from those sources on the grounds that:

(A) The communication was unlawfully intercepted;

(B) The order of authorization or approval under which it was intercepted is insufficient on its face; or

(C) The interception was not made in conformity with the order of authorization or approval.

(2) This motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion.

(3) If the motion is granted, the contents of the intercepted wire, oral, or electronic communication or the evidence derived from those sources shall not be received as evidence.

(4) The remedies and sanctions provided for in this section with respect to the interception of electronic communications are the only judicial remedies and sanctions for unconstitutional violations of this section involving the communications.

(b)(1) In addition to any other right to appeal, the state has the right to appeal from an order granting a motion to suppress made under subsection (a) of this section, or the denial of an application for an order of approval, if the person making or authorizing the application certifies to the circuit court judge granting the motion or denying an application that the appeal is not taken for purposes of delay.

(2) An appeal shall be taken within thirty (30) days after the date the order was entered and shall be diligently prosecuted.

16-82-408. Disclosure of information.

(a) Any investigative or law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire, oral, or electronic communication or the evidence derived from those sources may disclose the contents to another investigative or law enforcement officer to the extent that this disclosure is appropriate in the proper performance of the official duties of the officer making or receiving the disclosure.

(b) Any investigative or law enforcement officer who, by any means authorized by this section, has obtained knowledge of the contents of any wire, oral, or electronic communication or the evidence derived from those sources may use those contents to the extent the use is appropriate in the official performance of his official duties.

(c) Any person who has received, by any means authorized by this section, any information concerning a wire, oral, or electronic communication or any evidence derived from those sources, intercepted in accordance with the provisions of this section, may disclose the contents of that communication or derivative evidence while giving testimony in any criminal proceeding in any court of this state or in a grand jury proceeding.

(d) No otherwise privileged wire, oral, or electronic communication

intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

(e)(1) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized in this section, intercepts wire, oral, or electronic communications relating to an offense other than one specified in the order of authorization or approval, the contents of the communication and the evidence derived from those sources may be disclosed or used as provided in subsections (a) and (d) of this section only if an offense other than one specified in the order is a felony offense.

(2) The contents thereof and the evidence derived from those sources, as authorized by this section, may be used under subsection (c) of this section only when authorized or approved by a circuit court judge when the circuit court judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this section.

(3) This application shall be made as soon as practicable.

16-82-409. When specification of facilities not required.

(a) The requirements of this section relating to the specification of the facilities from which, or the place where, the communications are to be intercepted do not apply if:

(1) In the case of an application with respect to the interception of an oral communication:

(A) The application is made by an investigative or law enforcement officer and is approved by the prosecuting attorney of the judicial district in which the application is sought;

(B) The application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(C) The circuit court judge finds that the specification is not practical; or

(2) In the case of an application with respect to the interception of a wire or electronic communication:

(A) The application is made by an investigative or law enforcement officer and is approved by the prosecuting attorney of the judicial district in which the application is sought;

(B) The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(C) The circuit court judge finds that such purpose has been adequately shown.

(b)(1) An interception of a communication under an order with respect to which the requirements of § 16-82-403(a), § 16-82-404(a), and § 16-82-404(b) do not apply under the provisions of this subsection shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order.

(2)(A) A provider of wire or electronic communications service that has received an order under § 16-82-409 may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion.

(B) The court, upon notice to the state, shall decide a motion brought under this subsection expeditiously.

16-82-410. Emergency interceptions.

(a) Any other provision of this subchapter notwithstanding, any investigative or law enforcement officer specifically designated by the prosecuting attorney of the judicial district having jurisdiction may intercept wire, oral, or electronic communications for a period not to exceed twenty-four (24) hours under the following circumstances:

(1) When an emergency situation exists that involves the holding of hostages or kidnapping by the use of physical force, a deadly weapon, or an explosive device, and there is imminent danger of serious bodily injury or death to any person, or where one or more suspects in a felony offense have barricaded themselves in a building and there is a reasonable belief that one (1) or more of the suspects is armed with a deadly weapon or explosive device; and

(2) There are reasonable and sufficient grounds present upon which an order could be entered to authorize such interception.

(b) An emergency interception shall terminate upon attainment of the authorized objective as set forth in this section or at the end of the twenty-four-hour period, whichever comes first.

(c)(1) The investigative or law enforcement officer designated under this subsection and the official making the designation shall submit an application for the interception of wire, oral, or electronic communications to a circuit court judge within the twenty-four-hour period described in this section.

(2) The application shall be submitted regardless of whether the interception was terminated within the twenty-four-hour period.

(3) The application shall comply in all respects with the requirements of this section.

(d)(1) If, after the application described in this section is made, the application is denied, any interception shall immediately cease.

(2) In this case, all recordings shall be sealed by the court as soon as practicable, and an inventory shall be served in accordance with this subchapter.

(3) Any communication of this nature shall not be admissible in a legal action against a person whose communication was intercepted.

(e) All provisions of this subchapter shall be applicable with respect to the execution of any interception under emergency circumstances.

16-82-411. Reports to the Administrative Office of the Courts and attorney general.

(a) All courts having jurisdiction to issue orders under this subchapter shall submit to the Administrative Office of the Courts:

(1) The number of applications for orders permitting wiretapping or eavesdropping;

(2) Whether the applications were granted or denied;

(3) The period for which an interception was authorized; and

(4) Whether any extensions were granted on the original order.

(b) Prosecuting attorneys shall report annually to the Attorney General information as to:

(1) The number of applications made for orders permitting the

interception of wire, oral, or electronic communications;
(2) The offense specified in the order or application;
(3) The nature of the facilities from which, or the place where, communications were to be intercepted;
(4) A general description of the interceptions made under any order or extension, including:
(A) The nature and frequency of incriminating communications intercepted;
(B) The nature and frequency of other communications intercepted;
(C) The number of persons whose communications were intercepted; and
(D) The nature, amount, and cost of the manpower and other resources used in the interceptions;
(5) The number of arrests resulting from interceptions made under the order or extension and the offenses for which arrests were made;
(6) The number of motions to suppress made with respect to the interceptions and the number granted or denied;
(7) The number of convictions resulting from the interceptions and the offenses for which the convictions were obtained; and
(8) A general assessment of the importance of the interceptions.
(c) These reports shall be submitted to the Attorney General by August 1 of each year and shall include all orders and applications made during the preceding year."

The Amendment was read _____
By: Representative Perry
BPG/LNS - 03/18/11 09:11
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Chief Clerk