VIRGINIA ACTS OF ASSEMBLY -- 2002 SESSION

CHAPTER 91

An Act to amend and reenact § 19.2-68 of the Code of Virginia, relating to authorization for wiretaps.

[H 41]

Approved March 4, 2002

Be it enacted by the General Assembly of Virginia:

1. That § 19.2-68 of the Code of Virginia is amended and reenacted as follows:

§ 19.2-68. Application for and issuance of order authorizing interception; contents of order; recording and retention of intercepted communications, applications and orders; notice to parties; introduction in evidence of information obtained.

A. Each application for an order authorizing the interception of a wire, electronic or oral communication shall be made in writing upon oath or affirmation to the appropriate judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall be verified by the Attorney General to the best of his knowledge and belief and shall include the following information:

1. The identity of the attorney for the Commonwealth and law-enforcement officer who requested the Attorney General to apply for such order;

2. A full and complete statement of the facts and circumstances relied upon by the applicant to justify his 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, (ii) except as provided in subsection I, 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 communications sought to be intercepted, (iv) 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 if tried or to be too dangerous;

4. A statement of the period of time for which the interception is required to be maintained. 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, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

5. A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept wire, electronic or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application;

6. 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 such results; and

7. If authorization is requested for observation or monitoring by a police department of a county, or city or by law-enforcement officers of the United States, a statement containing the name of the police department or United States agency, and an explanation of the reasons such observation or monitoring is necessary.

The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

B. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing interception of wire, electronic or oral communications within the territorial jurisdiction of the court in which the judge is sitting, and outside that jurisdiction but within the Commonwealth in the case of a mobile interception device authorized by a court of competent jurisdiction within such jurisdiction, if the judge determines on the basis of the facts submitted by the applicant that:

1. There is probable cause for belief that an individual is committing, has committed or is about to commit an offense enumerated in § 19.2-66 of this chapter;

2. There is probable cause for belief that particular communications concerning that offense will be obtained through such 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 interception under this chapter is the only alternative investigative procedure available;

4. Except as provided in subsection I, there is probable cause for belief that the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person;

5. A wire, electronic or oral communication shall be deemed to be intercepted pursuant to subsection B of this section in the jurisdiction where the communication is actually intercepted and the monitoring of such intercepted communication may be at any location within the Commonwealth of Virginia. For the purposes of this section, the definition of "intercept" means the acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

C. Each order authorizing the interception of any wire, electronic or oral communication shall specify:

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

2. 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 enumerated in § 19.2-66 to which it relates;

4. That such interception is to be conducted only by the Department of State Police;

5. If observation or monitoring by the police department of a county, or city or by law-enforcement officers of the United States is authorized, only that police department or agency *or the officers from any police department of a town which originated the investigation leading to the application* shall observe or monitor the interception; and

6. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of wire or electronic communications service, landlord, custodian or other person shall furnish the Department of State Police forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian or person is providing the person whose communications are to be intercepted. Any provider of wire or electronic communications service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the Commonwealth for reasonable and actual expenses incurred in providing such facilities or assistance, to be paid out of the criminal fund.

D. No order entered under this section may authorize the interception of any wire, electronic or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days which period begins to run on the earlier of the day on which the investigative or law-enforcement officer begins to conduct an interception under the order or ten days after the date of entry of the order. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection A of this section and the court's making the findings required by subsection B of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event 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.

E. Whenever an order authorizing interception is entered pursuant to this chapter, the order shall require reports to be made 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. Such reports shall be made at such intervals as the judge shall require.

F. 1. The contents of any wire, electronic or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. Should it not be possible to record the intercepted communication, a detailed resume of such communication shall forthwith be reduced to writing and filed with the court. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations and shall not be duplicated except upon order of the court as hereafter provided. Immediately upon the expiration of the period of the order, or extensions thereof, such recording or detailed resume shall be made available to the judge issuing such order and sealed under his directions. Custody of any recordings or detailed resumes shall be vested with the court and shall not be destroyed for a period of ten years from the date of the order and then only by direction of the court; provided, however, should any interception fail to reveal any information related to the offense or offenses for which it was authorized, such recording or resume shall be destroyed after the expiration of sixty days after the notice required by subdivision 4 of this subsection is served. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections A and B of § 19.2-67 for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or

disclosure of the contents of any wire, electronic or oral communication or evidence derived therefrom under subsection C of § 19.2-67.

2. Applications made and orders granted or denied under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

3. Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying court.

4. Within a reasonable time but not later than ninety days after the filing of an application for an order of authorization which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of:

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

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

(c) The fact that during the period wire, electronic or oral communications were or were not intercepted; and

(d) The fact that unless he files a motion with the court within sixty days after the service of notice upon him, the recordation or resume may be destroyed in accordance with subdivision 1 of this subsection.

The judge, upon the filing of a motion, shall make available to such person or his counsel for inspection the intercepted communications, applications and orders. The serving of the inventory required by this subsection may be postponed for additional periods, not to exceed thirty days each, upon the ex parte showing of good cause to a judge of competent jurisdiction.

G. The contents of any intercepted wire, electronic or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a state court unless each party to the communication and to such proceeding, not less than ten days before the trial, hearing or proceeding, has been furnished with a copy of the court order, accompanying application under which the interception was authorized and the contents of any intercepted wire, electronic or oral communication that is to be used in any trial, hearing or other proceeding in a state court. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving such information; provided that such information in any event shall be given prior to the day of the trial, and the inability to comply with such ten-day period shall be grounds for the granting of a continuance to either party.

The judge who considers an application for an interception under this chapter, whether issuing or denying the order, shall be disqualified from presiding at any trial resulting from or in any manner connected with such interception, regardless of whether the evidence acquired thereby is used in such trial.

H. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the Commonwealth, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:

1. The communication was unlawfully intercepted, or was not intercepted in compliance with this chapter; or

2. The order of the authorization or approval under which it was intercepted is insufficient on its face; or

3. The interception was not made in conformity with the order of authorization or approval; or

4. The interception is not admissible into evidence in any trial, proceeding or hearing in a state court under the applicable rules of evidence.

Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted pursuant to subdivision 1, 2 or 3 of this subsection, the contents of the intercepted wire, electronic or oral communication or evidence derived therefrom shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person, or his counsel, for inspection the intercepted communication.

I. The requirements of subdivision 2 of subsection A and subdivision 4 of subsection B of this section relating to the specification of the facilities from which, or the place where, the communication is 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 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

(b) The judge finds that such specification is not practical; or

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

(a) 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

(b) the judge finds that such purpose has been adequately shown.

The interception of a communication under an order issued pursuant to 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. A provider of wire or electronic communications service that has received an order issued pursuant to this subdivision 2 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. The court, upon notice to the Attorney General, shall decide the motion expeditiously.