

VIRGINIA ACTS OF ASSEMBLY -- 2005 RECONVENED SESSION

CHAPTER 934

An Act to amend and reenact §§ 19.2-61, 19.2-66, 19.2-68, and 19.2-70.2 of the Code of Virginia, relating to jurisdiction for orders for and occurrence of wiretaps.

[H 2869]

Approved April 6, 2005

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-61, 19.2-66, 19.2-68, and 19.2-70.2 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-61. Definitions.

As used in this chapter:

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

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

"Communications common carrier" means any person engaged as a common carrier for hire in communication by wire or radio or in radio transmission of energy;

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

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

(a) Any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire 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 such service and used in the ordinary course of the subscriber's or user's business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law-enforcement officer in the ordinary course of his duties;

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

"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 photooptical system. The term does not include:

1. Any wire communication or oral communication as defined herein;
2. Any communication made through a tone-only paging device;
3. Any communication from an electronic or mechanical device which permits the tracking of the movement of a person or object; or
4. Any electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

"Electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

"Electronic communication system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

"Electronic storage" means any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof and any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

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

"Investigative or law-enforcement officer" means any officer of the United States or of a state or political subdivision thereof, 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 such offenses;

"Judge of competent jurisdiction" means a judge of any circuit court of the Commonwealth with general criminal jurisdiction;

"Monitor" or "monitoring" means the actual auditory or visual acquisition of an intercepted communication by any means;

"Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations

but does not include any electronic communication;

"Pen register" means a device or process 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; however, such information shall not include the contents of any communication. The term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of the provider's or customer's business;

"Person" means any employee or agent of the Commonwealth or a political subdivision thereof, and any individual, partnership, association, joint stock company, trust or corporation;

"Readily accessible to the general public" means, with respect to a radio communication, that such communication is not (i) scrambled or encrypted; (ii) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication; (iii) carried on a subcarrier or other signal subsidiary to a radio transmission; (iv) transmitted over a communication system provided by a communications common carrier, unless the communication is a tone-only paging system communication; or (v) 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 communication transmitted on a frequency allocated under Part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

"Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system;

"Trap and trace device" means a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing and signaling information reasonably likely to identify the source of a wire or electronic communication; however, such information shall not include the contents of any communication;

"User" means any person or entity who uses an electronic communication service and is duly authorized by the provider of such service to engage in such use;

"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, including the use of such connection in a switching station, furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications.

§ 19.2-66. When Attorney General or Chief Deputy Attorney General may apply for order authorizing interception of communications.

A. The Attorney General or Chief Deputy Attorney General, if the Attorney General so designates in writing, in any case where the Attorney General is authorized by law to prosecute or pursuant to a request in his official capacity of an attorney for the Commonwealth in any city or county, may apply to a judge of competent jurisdiction ~~for the jurisdiction where the proposed intercept is to be made~~ for an order authorizing the interception of wire, electronic or oral communications by the Department of State Police, when such interception may reasonably be expected to provide evidence of the commission of a felonious offense of extortion, bribery, kidnapping, murder, any felony violation of § 18.2-248 or § 18.2-248.1, any felony violation of Chapter 29 (§ 59.1-364 et seq.) of Title 59.1, any felony violation of Article 2 (§ 18.2-38 et seq.), Article 2.1 (§ 18.2-46.1 et seq.), Article 2.2 (§ 18.2-46.4 et seq.), Article 5 (§ 18.2-58 et seq.), Article 6 (§ 18.2-59 et seq.) or any felonies that are not Class 6 felonies in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, or any conspiracy to commit any of the foregoing offenses. The Attorney General or Chief Deputy Attorney General may apply for authorization for the observation or monitoring of the interception by a police department of a county or city or by law-enforcement officers of the United States. Such application shall be made, and such order may be granted, in conformity with the provisions of § 19.2-68. ~~Application for installation of a mobile interception device may be made to and granted by any court of competent jurisdiction in the Commonwealth.~~

B. The application for an order under subsection B of § 19.2-68 for the interception of a wire, electronic or oral communication shall be made in the jurisdiction where there is probable cause to believe that an offense listed in subsection A of this section was committed, is being committed, or will be committed.

1. In the case of an application for a wire or electronic interception, a judge of competent jurisdiction shall have the authority to issue an order under subsection B of § 19.2-68 if the person or persons whose communications are to be intercepted live, work, subscribe to a wire or electronic communication system, maintain an address or a post office box, or are making the communication within the territorial jurisdiction of the court.

2. In the case of an application for an oral intercept, a judge of competent jurisdiction shall have the authority to issue an order under subsection B of § 19.2-68 if the physical location of the oral communication to be intercepted is within the territorial jurisdiction of the court.

3. *For the purposes of an order entered pursuant to subsection B of § 19.2-68 for the interception of a wire or electronic communication, such communication shall be deemed to be intercepted in the jurisdiction where the order is entered, regardless of the physical location or the method by which the communication is captured or routed to the monitoring location.*

§ 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 authorized~~ 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 *monitored* 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~~ 30 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~~ 10 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~~ 30 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~~ 30 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~~ 10 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~~ 60 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~~ 10 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~~ 90 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 withinsixty 60 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~~ 30 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~~ 10 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~~ 10-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~~ 10 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~~ 10-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.

§ 19.2-70.2. Application for and issuance of order for a pen register or trap and trace device; assistance in installation and use.

A. An investigative or law-enforcement officer may make application for an order or an extension of an order authorizing or approving the installation and use of a pen register or a trap and trace device, in writing under oath or equivalent affirmation, to a court of competent jurisdiction. The application shall include:

1. The identity of the officer making the application and the identity of the law-enforcement agency conducting the investigation; and

2. A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

The application may include a request that the order require information, facilities and technical assistance necessary to accomplish the installation be furnished.

B. *An application for an ex parte order authorizing the installation and use of a pen register or trap and trace device may be filed in the jurisdiction where the person or persons who subscribe to the wire or electronic communication system live, work, or maintain an address or a post office box. For the purposes of an order entered pursuant to this section for the installation and use of a pen register or trap and trace device, such installation shall be deemed to occur in the jurisdiction where the order is entered, regardless of the physical location or the method by which the information is captured or routed to the law-enforcement officer that made the application.* Upon application, the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device ~~within the jurisdiction of the court~~ if the court finds that the investigative or law-enforcement officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

The order shall specify:

1. The identity, if known, of the person in whose name the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied is listed or to whom the line or other facility is leased;

2. The identity, if known, of the person who is the subject of the criminal investigation;

3. The attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied; and

4. A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

C. Installation and use of a pen register or a trap and trace device shall be authorized for a period not to exceed ~~sixty~~ 60 days. Extensions of the order may be granted, but only upon application made and order issued in accordance with this section. The period of an extension shall not exceed ~~sixty~~ 60 days.

D. An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

1. The order and application be sealed until otherwise ordered by the court;

2. Information, facilities and technical assistance necessary to accomplish the installation be furnished if requested in the application; and

3. The person owning or leasing the line or other facility to which the pen register or trap and trace device is attached or applied, or who is obligated by the order to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

E. Upon request of an investigative or a law-enforcement officer authorized by the court to install and use a pen register, a provider of wire or electronic communication service, a landlord, custodian or any other person so ordered by the court shall, as soon as practicable, furnish the officer with all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place.

F. Upon request of an investigative or law-enforcement officer authorized by the court to receive the results of a trap and trace device under this section, a provider of wire or electronic communication service, a landlord, custodian or any other person so ordered by the court shall, as soon as practicable, install the device on the appropriate line and furnish the officer with all additional information, facilities and technical assistance, including installation and operation of the device, unobtrusively and with a

minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place. Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the investigative or law-enforcement officer designated by the court at reasonable intervals during regular business hours for the duration of the order. Where the law-enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public, the agency shall ensure that a record will be maintained that will identify (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information that has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of such device. The record maintained hereunder shall be provided ex parte and under seal of the court that entered the ex parte order authorizing the installation and use of the device within ~~thirty~~ 30 days after termination of the order, including any extensions thereof.

G. A provider of a wire or electronic communication service, a landlord, custodian or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for reasonable and actual expenses incurred in providing such facilities and assistance. The expenses shall be paid out of the criminal fund.

H. No cause of action shall lie in any court against a provider of a wire or electronic communication service, its officers, employees, agents or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order issued pursuant to this section. Good faith reliance on a court order, a legislative authorization or a statutory authorization is a complete defense against any civil or criminal action based upon a violation of this chapter.