

MAINE STATE LEGISLATURE

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ONE HUNDRED AND SIXTH LEGISLATURE

Legislative Document

No. 1108

S. P. 377

In Senate, February 28, 1973

Referred to Committee on Judiciary. Sent down for concurrence and ordered printed.

HARRY N. STARBRANCH, Secretary

Presented by Senator Joly of Kennebec.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-THREE

AN ACT Regulating the Interception of Wire and Oral Communications.

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 15, c. 102, additional. Title 15 of the Revised Statutes is amended by adding a new chapter 102, to read as follows:

CHAPTER 102

INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

§ 709. Offenses

1. Interception, oral communications prohibited. Except as otherwise specifically provided in this chapter, any person who willfully intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire or oral communication shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than 5 years, or by both.

2. Editing of tape recordings in judicial proceedings prohibited. Except as otherwise specifically provided in this chapter, any person who willfully edits, alters or tampers with any tape, transcription or other sound recording, or knows of such editing, altering or tampering, and presents such recording in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made and the original state of the recording, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than 5 years, or by both.

3. Disclosure, or use of wire or oral communications prohibited. Except as otherwise specifically provided in this chapter, any person who:

A. Willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

B. Willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be punished by imprisonment for not more than 2 years or by a fine of not more than \$5,000, or by both.

4. Disclosure of contents of applications, warrants, renewals and returns prohibited. Except as otherwise specifically provided in this chapter, any person who willfully discloses to any person any information concerning or contained in the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this chapter, or the contents of any document, tape or recording kept in accordance with section 712, shall be punished by imprisonment for not more than 2 years or by a fine of not more than \$5,000, or by both.

5. Duty to report. Any communications common carrier shall promptly report to the Attorney General any facts coming to its attention in the conduct of its business which may indicate a possible violation of this section and such carrier shall adopt reasonable rules to assure compliance with this subsection, provided such carrier shall not be liable to any person who may claim an injury arising out of any such report, if made in good faith. Any violation of this subsection shall be punishable by a fine of not more than \$5,000.

6. Possession of interception devices prohibited. A person who has in his possession any device, contrivance, machine or apparatus designed or commonly used for intercepting wire or oral communications defined in this chapter, under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for interception, or knowing the same is intended to be so used, shall be punished by imprisonment for not more than 2 years or by a fine of not more than \$5,000, or by both.

§ 710. Exceptions

1. Permitted interception of wire or oral communications. It shall not be a violation of this chapter:

A. For an operator of a switchboard, or an officer, employee or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights of property of the carrier of such communication, provided that said communication common carriers shall not utilize service observing or random monitoring, except for mechanical or service quality control checks.

2. Permitted disclosure and use of intercepted wire or oral communications

A. Any law enforcement officer who, by means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence to another law enforcement officer to the extent that such disclosure is appro-

priate to the proper performance of the official duties of the officer making and receiving the disclosure.

B. Any law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents in the proper discharge of his official duties.

C. Any person who has obtained, by any means authorized by this chapter, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

D. The contents of any wire or oral communication intercepted in accordance with this chapter, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

§ 711. Warrants ; application ; procedure

The Attorney General, may apply ex parte to a judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, and such judge may grant, in conformity with this section, an order authorizing the interception of wire or oral communications by law enforcement officers having responsibility for the investigation of the designated offense as to which the application is made.

1. Application. Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a Superior Court Justice and shall state the applicant's authority to make such application. Each application shall include the following information :

A. The identity of the law enforcement officer making the application and the officer authorizing the application ;

B. 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 details as to the particular designated offense that has been, is being, or is about to be committed, a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, a particular description of the type of communications sought to be intercepted, and the identity of the person, if known, committing the offense and whose communications are to be intercepted ;

C. 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 ;

D. 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 author-

ization for interception should not automatically terminate when the described type of communication has been first obtained, the application must specifically state facts establishing probable cause to believe that additional communications of the same type will occur thereafter ;

E. 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, or for approval of interceptions of, wire 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 ; 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 such results.

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

3. Ex parte order. Upon such application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that :

A. There is probable cause for belief that a person is committing, has committed or is about to commit a designated offense as defined in this chapter ;

B. There is probable cause for belief that particular communications concerning that offense will be obtained through such interception ;

C. Normal investigative procedures have been tried and having failed or reasonably appear to be unlikely to succeed, if tried, or to be too dangerous ;

D. There is probable cause for belief that the facilities from which, or the place where, the wire 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.

4. Specifications. Each order authorizing or approving the interception of any wire or oral communication shall specify :

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

B. The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted ;

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

D. The identity of the agency authorized to intercept the communications and of the person authorizing the application ; and

E. 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.

5. Limitations. No order entered under this section may authorize the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection 1 and the court making the findings required by subsection 3. 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 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 30 days.

6. Return. Within 14 days after termination of the warrant or the last extension thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, stating:

A. The nature and location of the communications facilities or the place where the interceptions were made;

B. The period of time during which such interceptions were made;

C. The names of the parties to the communications intercepted, if known; and

D. A brief summary of evidence or information obtained by the intercept;

E. Whenever an order authorizing interception is entered pursuant to this chapter, the order may 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 may require.

7. Recording. The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Not later than 21 days after the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the judge and in any event shall be kept for 10 years. Duplicate recordings may be made for use or disclosure pursuant to section 710, subsection 2 for investigations. The presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under section 710, subsection 2, paragraph C.

A. Applications made and orders granted 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 10 years.

B. Any violation of this subsection may be punished as contempt of the issuing or denying judge.

C. Within a reasonable time, but not later than 90 days after the filing of an application for an order of approval under subsection 7, paragraph B, which is denied, or at 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:

- (1) The fact of the entry of the order or the application;
- (2) The date of the entry and the period of authorized, approved or disapproved interception or the denial of the application; and
- (3) The fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction, the serving of the inventory required by this subsection may be postponed.

8. As evidence. The contents of any intercepted wire 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 federal or state court unless each party, not less than 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. This 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 10 days before the trial, hearing or proceeding and that the party will not be prejudiced by the delay in receiving such information.

9. Suppression of contents; appeal. Any aggrieved person, in any trial before any court, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, 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.

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, the contents of the intercepted wire 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, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

In addition to any other right to appeal, the State shall have the right to appeal from an order granting a motion to suppress made under this subsection or the denial of an application for an order of approval, if the prosecuting attorney certifies to the judge granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within 10 days after the date the order was entered and shall be diligently prosecuted.

§ 712. Civil remedy

Any party to a conversation intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses such communications and shall be entitled to recover from any such persons:

1. Damages. Actual damages, but not less than liquidated damages, computed at the rate of \$50 per day for each day of violation;
2. Attorney's fee. A reasonable attorney's fee and other litigation disbursements reasonably incurred.

A good faith reliance on a warrant issued under this chapter shall constitute a complete defense to a civil or criminal action brought under this section.

§ 713. Definitions

The following words and phrases as used in this chapter, unless the context otherwise indicates, shall have the following meanings.

1. Aggrieved person. "Aggrieved person" means an individual who was a party to an intercepted wire or oral communication, or who was named in the warrant authorizing the interception, or whose property interests were invaded in the course of the interception.
2. Communication common carrier. "Communication common carrier" means any telephone or telegraph company.
3. Contents. "Contents," when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport or meaning of that communication.
4. Designated offense. "Designated offense" shall include the following offenses: Murder, kidnapping, gambling, robbery, bribery, extortion, selling

or dealing in narcotic drugs, or other dangerous drugs or any conspiracy to commit any of the foregoing offenses.

5. Intercepting device. "Intercepting device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

A. Any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or 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; or

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

6. Interception. "Interception" means to hear, record or aid another to hear or record the contents of any wire or oral communication through the use of any intercepting device by any person other than:

A. The sender or receiver of such communication;

B. A person within the range of normal unaided hearing or subnormal hearing corrected to not better than normal; or

C. A person given prior authority by such sender.

7. Judge of competent jurisdiction. "Judge of competent jurisdiction" means any Justice of the Superior Court.

8. Law enforcement officer. "Law enforcement officer" means any law enforcement officer of the United States, a state or a political subdivision of a state and any attorney authorized by law to participate in the prosecution of the designated offenses.

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

10. Person. "Person" means any individual, partnership, association, joint stock company, trust or corporation, or any other legal entity, whether or not any of the foregoing is an officer, agent or employee of the United States, a state or a political subdivision of a state.

11. Wire communication. "Wire communication" means any communication made in whole or in part through the use of facilities for transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception.

STATEMENT OF FACT

The purpose of this bill is to strictly regulate the interception of wire and oral communications and to create civil and criminal penalties wherein information of this type is misused.