

ACT 218

H.B. NO. 2434-78

A Bill for an Act Relating to Electronic Eavesdropping.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Purpose.

- (1) In order to protect effectively the privacy of wire and oral communications while fighting serious or organized crime and to protect the integrity of court and administrative proceedings, it is necessary for the Legislature to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of wire and oral communications, and the use of the contents thereof in evidence in courts and administrative proceedings.
- (2) Organized criminals make extensive use of wire communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.
- (3) To safeguard the privacy of innocent persons, the interception of wire communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire communications should further be limited to the most serious offenses and less serious offenses only when organized crime is involved, with assurances that the interception is justified and that the information obtained thereby will not be misused.

SECTION 2. Chapter 803, Hawaii Revised Statutes, is amended by adding a new part to read as follows:

"PART IV. ELECTRONIC EAVESDROPPING.

Sec. 803-41 Definitions. In this part:

- (1) "Wire communication" means any communication 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 furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications;
- (2) "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 expectation;
- (3) "Intercept" means the aural acquisition of the contents of any wire communication through the use of any electronic, mechanical, or other device;
- (4) "Electronic, mechanical, or other 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, (i) 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 (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;
- (5) "Person" means any official, employee, or agent of the United States or this State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;
- (6) "Investigative or law enforcement officer" means any officer of the State or political subdivision thereof, who is empowered by the law of this State to conduct investigations of or to make arrests for offenses enumerated in this part;
- (7) "Contents" when used with respect to any wire communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;
- (8) "Organized crime" means any combination or conspiracy to engage in criminal activity;
- (9) "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Sec. 803-42 Interception and disclosure of wire or oral communications prohibited.

- (1) Except as otherwise specifically provided in this part any person who:
 - (a) Wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
 - (b) Wilfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any wire or oral communication;
 - (c) Wilfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or
 - (d) Wilfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;
 shall be guilty of a class C felony.
- (2) (a) It shall not be unlawful under this part 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 or property of the carrier of such communication; provided that such communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.
- (b) It shall not be unlawful under this part for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.
 - (c) It shall not be unlawful under this part for a person to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act; provided that installation in any private place, without consent of the person or persons entitled to privacy therein, of any device for recording, amplifying, or broadcasting sounds or events in that place, or use of any such unauthorized installation, or installation or use outside a private place of such device to intercept sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy therein is prohibited.
 - (d) It shall not be unlawful under this part for any person to intercept a wire or oral communication or to disclose or use the contents of an intercepted communication, when such interception is pursuant to a valid court order under this chapter or as otherwise authorized by law; provided that a communications carrier with knowledge of an interception of communications accomplished through the use of the communication carrier's facilities shall report the fact and duration of the interception to the administrative director of the courts of this State.
 - (e) Good faith reliance upon a court order shall be a complete defense to any criminal prosecution for illegal interception, disclosure, or use.

Sec. 803-43 Devises to intercept wire or oral communications prohibited; penalty; confiscation. Any person, other than a communications or other common carrier and its duly authorized officers and employees, or any person acting under color of law, who, in this State, manufactures, assembles, possesses, or

distributes, or who attempts to distribute, any electronic, mechanical, or other device, knowing or having reason to know that the device or the design of the device renders it primarily useful for the purpose of wiretapping, wire interception, or eavesdropping, shall be guilty of a class C felony. Any police officer may confiscate any such electronic, mechanical, or other device in violation of this section, and upon conviction the devices shall be destroyed or otherwise disposed of as ordered by the court.

Sec. 803-44 Application for court order to intercept wire communications.

The attorney general of this State, or a designated deputy attorney general in the attorney general's absence or incapacity, or the prosecuting attorney of each county, or a designated deputy prosecuting attorney in the prosecuting attorney's absence or incapacity, may make application to a circuit court judge, designated by the chief justice of the Hawaii supreme court, in the county where the interception is to take place, for an order authorizing or approving the interception of wire communications, and such court may grant in conformity with section 803-46 an order authorizing, or approving the interception of wire communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of murder, kidnapping, or felony criminal property damage involving the danger of serious bodily injury as defined in H.R.S. Section 707-700(3), or involving organized crime and any of the following felony offenses: extortion; criminal coercion; bribery of a juror, of a witness, or of a police officer; receiving stolen property; gambling; and sales of dangerous, harmful or detrimental drugs.

Section 803-45 Authorization for disclosure and use of intercepted wire communications.

(1) Any investigative or law enforcement officer who, by any means authorized by this part, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer, who by any means authorized by this part, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this part, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this part may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding in any court or before the grand jury in this State.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this part shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized, intercepts

communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by the designated circuit court where such court finds on subsequent application, made as soon as practicable, that the contents were otherwise intercepted in accordance with the provisions of this part.

(6) No testimony or evidence relating to a wire or oral communication or any evidence derived therefrom intercepted in accordance with the provisions of this part shall be admissible in support of any misdemeanor charge.

Sec. 803-46 Procedure for interception of wire communication. (1) Each application for an order authorizing or approving the interception of a wire communication shall be made in writing upon oath or affirmation to a designated circuit court and shall state the applicant's authority to make such application. Each application shall include the following information:

- (a) The identity of the investigative or law enforcement officer(s) requesting the application, the official(s) applying for a wiretap order;
- (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 (i) details as to the particular offense that has been, is being, or is about to be committed, (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 communications sought to be intercepted, (iv) the identity or description of all persons, if known, committing the offense and whose communications are to be intercepted, and where appropriate (v) the involvement of organized crime;
- (c) A full and complete statement of the facts concerning how the interception is to be accomplished, and if physical entry upon private premises is necessary, facts supporting such necessity;
- (d) A full and complete statement of facts 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;
- (e) A statement of facts indicating 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 obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
- (f) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court for authorization to intercept, or for approval of interceptions of, wire communications involving any of the

same persons, facilities or places specified in the application, and the action taken by the court on each such application; and

- (g) 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) An *in camera* adversary hearing shall be held on any wiretap application or application for extension. Upon receipt of the application the designated judge shall appoint an attorney to oppose the application. The attorney shall be appointed and compensated in the same manner as attorneys are appointed to represent indigent criminal defendants. The appointed attorney shall be given at least twenty-four hours notice of the hearing and shall be served with copies of the application, proposed order, if any, and supporting documents with the notice. At the hearing, the attorney appointed may cross-examine witnesses and present arguments in opposition to the application. The affiant supporting the application shall be present at the hearing. If an interlocutory appeal is taken by the State from the denial of an application, the appointed attorney shall be retained to answer the appeal or another attorney shall be appointed for the appeal. The designated circuit court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. A transcript of the hearing shall be made and kept with application and orders.

(3) Upon such application and after such adversary hearing, the court may enter an order, as requested or as modified, authorizing or approving interception of wire communications within the county in which the court is sitting, if the court determines on the basis of the facts submitted by the applicant that:

- (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit murder, kidnapping, or felony criminal property damage involving the danger of serious bodily injury or that an individual is committing, has committed, or is about to commit one of the other offenses specified in section 803-44 and that organized crime is involved;
- (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 have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and
- (d) There is probable cause for belief that the facilities from which, or the place where, the wire 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.

If the order allows physical entry to accomplish the interception, the issuing judge shall find that the interception could not be accomplished by means other than physical entry.

(4) Each order authorizing or approving the interception, of any wire communication shall specify:

- (a) The identity or description of all persons, if known, whose com-

- 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, and the means by which such interceptions shall be made;
- (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 the persons applying for the application;
- (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; and
- (f) How the interception is to be accomplished.

An order authorizing the interception of a wire communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian, or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian, or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section shall authorize or approve the interception of any wire communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsections (1) and (2) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing circuit court deems necessary to achieve the purposes for which it was granted and in no event for longer than fifteen 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 part, and shall terminate upon attainment of the authorized objective, or in any event in thirty days or in fifteen days in case of an extension.

- (a) The interception shall be conducted in such a way as to minimize the resulting invasion of privacy including but not limited to the following methods of minimization:
 - (i) Conversations that appear unlikely to result in incriminating conversations relating to the offense for which the order is issued shall be subject to intermittent monitoring; and
 - (ii) Privileged conversations, including those between a person and his spouse, attorney, physician, or clergyman, shall not be intercepted unless both parties to the conversation are named or described in the wiretap application and order.

- (b) In determining whether incriminating statements are likely to occur during a conversation the following factors should be considered:
 - (i) The parties to the conversation;
 - (ii) The particular offense being investigated;
 - (iii) The subject matter of the conversation;
 - (iv) The subject matter of previous conversations between the same parties and whether any incriminating statements occurred; and
 - (v) The hour and day of the conversation.
- (6) Whenever an order authorizing interception is entered pursuant to this part, the order shall require reports to be made to the court which 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 court may require.
- (7) (a) The contents of any wire communication intercepted by any means authorized by this part shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the court issuing such order and sealed under the court's directions. Custody of the recordings shall be wherever the court orders. Recordings and other evidence of the contents of conversations and applications and orders shall be destroyed upon the expiration of the statute of limitations of the particular offense for which the order was issued: six years in the case of class A felonies and three years in the case of class B and C felonies. However, upon the request of all the parties to particular conversations, evidence of conversations between those parties shall be destroyed (i) if there are no incriminating statements; (ii) if any incriminating statements relate to only misdemeanor offenses; or (iii) if the interception of the conversations is determined to have been illegal. Duplicate recordings may be made for use or disclosure pursuant to the provisions of sections 803-45(1) and (2) 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 communication or evidence derived therefrom under section 803-45(3).
- (b) Applications made and order granted under this part, transcripts of hearings on applications, and evidence obtained through court-ordered wiretaps shall be sealed by the designated circuit court. Custody of the above shall be whenever the court directs.
- (c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying court.
- (d) Within a reasonable time but no later than ninety days after the termination of the period of an order or extensions thereof, the issuing court shall cause to be served, on the persons named in the order, on all other known parties to intercepted communications, and to such other

persons as the court may determine is in the interest of justice, an inventory which shall include notice of:

- (i) The fact of the entry of the order;
- (ii) The date of the entry and the period of authorized, or approved interception;
- (iii) The fact whether during the period wire communications were intercepted; and
- (iv) The fact whether any incriminating statements were intercepted.

The designated circuit court, upon the filing of a motion, shall make available to such person or his counsel for inspection after the inventory has been served all portions of the intercepted communications which contain conversations of that person, applications, orders, transcripts of hearings, and other evidence obtained as a result of the use of wiretap orders. The court may order such additional disclosure as the court determines to be in the interest of justice. On an ex parte showing of good cause to a court the serving of the inventory required by this subsection may be postponed.

(8) The contents of any intercepted wire communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in any court of this State unless each party, not less than thirty days before the trial, hearing or proceeding, has been furnished with copies of the documents required to be disclosed, and contents of intercepted communications or other evidence obtained as a result of wiretapping which is sought to be admitted in evidence. This thirty-day period may be shortened or waived by the court if it finds that the party will not be prejudiced by the delay in receiving such information.

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

- (i) The communication was unlawfully intercepted;
- (ii) The order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) The interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceedings 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 communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this part. The court, or other official before whom the motion is made, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection portions of the recording which contain intercepted communications of the defendant or evidence derived therefrom, the applications, orders, transcript of

hearing, and such additional evidence as the court determines to be in the interest of justice.

(b) In addition to any other right to appeal the State shall have the right to appeal:

- (i) From an order granting a motion to suppress made under paragraph (a) of this subsection if the attorney general or prosecuting attorney, or their designated representatives, shall certify to the court or other official granting such motion that the appeal shall be taken within thirty days after the date the order of suppression was entered and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the supreme court may adopt;
- (ii) From an order denying an application for an order of authorization or approval, and such an appeal shall be *in camera* and in preference to all other pending appeals in accordance with rules promulgated by the supreme court.

Sec. 803-47 Reports concerning intercepted wire communications. (1) In January of each year, the attorney general and county prosecuting attorneys of this State shall report to the administrative director of the courts of this State and to the administrative office of the United States Courts:

- (a) The fact that an order or extension was applied for;
- (b) The kind of order or extension applied for;
- (c) The fact that the order or extension was granted as applied for, was modified, or was denied;
- (d) The period of interceptions authorized by the order, and the number and duration of any extensions of the order;
- (e) The offense specified in the order or application, or extension of an order;
- (f) The identity of the investigative or law enforcement officer and agency requesting the application and the person authorizing the request for application;
- (g) The nature of the facilities from which or the place where communications were to be intercepted;
- (h) A general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;
- (i) The number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;
- (j) The number of trials resulting from such interceptions;
- (k) The number of motions to suppress made with respect to such interceptions, and the number granted or denied;
- (l) The number of convictions resulting from such interceptions and the

offenses for which the convictions were obtained and a general assessment of the importance of the interceptions;

- (m) The information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year and not yet reported; and
- (n) Other information required by the rules and regulations of the administrative office of the United States Courts.

(2) In March of each year the administrative director of the courts shall transmit to the legislature a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the administrative director of the courts by the attorney general and prosecuting attorneys.

Sec. 803-48 Recovery of civil damages authorized. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this part shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person:

- (a) Actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation;
- (b) Punitive damages; and
- (c) A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order shall constitute a complete defense to any civil action brought under this part.

Sec. 803-49 Severability. If any portion or subsection of this part or the application thereof to any person or circumstances is invalid, such invalidity shall not affect other sections or applications of the part which can be given effect without the invalid section or application, and to this end the provisions of this part are declared to be severable.

Sec. 803-50 Duration. This Act shall be effective for a period of six years beginning _____ and terminating _____."

SECTION 3. This Act shall take effect upon its approval.

(Approved June 5, 1978.)