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## CRIMES AND OFFENSES Offenses Against Public Order and Safety: Provide Definition and Procedure for Use of Pen Register and Trap and Trace Device

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## CRIMES AND OFFENSES

### *Offenses Against Public Order and Safety: Provide Definition and Procedures for Use of Pen Register and Trap and Trace Device*

**CODE SECTIONS:** O.C.G.A. §§ 16-11-60 (amended), -64.1, -64.2 (new)  
**BILL NUMBER:** HB 340  
**ACT NUMBER:** 461  
**GEORGIA LAWS:** 1995 Ga. Laws 1051, §§ 2, 3  
**SUMMARY:** The Act defines the terms “pen register” and “trap and trace device” and explicitly excludes them from the definition of “devices.” The Act provides that a court order should be obtained before either a pen register or trap and trace device is installed. However, the Act allows for installation without an order in certain emergency situations.<sup>1</sup>  
**EFFECTIVE DATE:** July 1, 1995

#### *History*

Law enforcement personnel have at their disposal various wiretapping devices to aid them in criminal investigation.<sup>2</sup> Code section 16-11-64 sets out the procedure for obtaining a warrant to use a listening device to obtain evidence.<sup>3</sup> Code section 16-11-60 formerly defined “device” as “an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds or for observing, photographing, recording, or transmitting visual images and which involves in its operation electricity, electronics, infrared, laser or similar beams.”<sup>4</sup>

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1. HB 340 addresses three different subject matters. Only sections 2 and 3, discussing pen registers, will be covered in this *Peach Sheet*<sup>™</sup>. Section 1 addresses trade secrets. Section 4 addresses automobile forfeiture and is covered in a separate *Peach Sheet* within this issue. See *Legislative Review*, 12 GA. ST. U. L. REV. 108 (1995).

2. 1968 Ga. Laws 6 (formerly found at O.C.G.A. § 16-11-60 (1992)).

3. 1982 Ga. Laws 2319 (codified at O.C.G.A. § 16-11-64 (1992)).

4. 1968 Ga. Laws 6, § 1, at 1334 (formerly found at O.C.G.A. § 16-11-60 (1992)).

Pen registers attach to a phone line and record the phone number which is being dialed out on that line.<sup>5</sup> Pen registers do not monitor or record any conversation.<sup>6</sup> In *Smith v. Maryland*,<sup>7</sup> the United States Supreme Court ruled that one has no legitimate expectation of privacy in the telephone numbers one dials; therefore, the attachment of a pen register is not a search and does not require a warrant.<sup>8</sup> Despite the ruling in *Smith*, the Georgia Supreme Court in *Ellis v. State* held that pen registers fall within the statutory definition of device.<sup>9</sup> Accordingly, officers in Georgia were required to obtain a warrant, pursuant to Code section 16-11-64, prior to using pen registers.<sup>10</sup> As a direct result of this ruling, sections 2 and 3 of HB 340 were introduced.<sup>11</sup>

### HB 340

Representative Roy E. Barnes, in drafting this Act, used the federal pen register and trap and trace device legislation as a guide.<sup>12</sup>

Section 2 of the Act amends Code section 16-11-60 by adding language defining "pen register"<sup>13</sup> and "trap and trace device."<sup>14</sup> It also amends the definition of "device" to expressly exempt pen registers and trap and trace devices.<sup>15</sup>

Section 3 of the Act creates two new code sections. First, section 3 provides the procedural requirements for obtaining court orders for the installation of pen registers and trap and

5. *Ellis v. State*, 353 S.E.2d 19, 21 (Ga. 1987).

6. *See id.*

7. 442 U.S. 735 (1979).

8. *Id.* at 745-46.

9. *Ellis*, 353 S.E.2d at 22.

10. *Id.*

11. Telephone Interview with Rep. Roy E. Barnes, House District No. 33 (Apr. 26, 1995) [hereinafter Barnes Interview].

12. Telephone Interview with David Fowler, Coordinator of the Drug Prosecutions Divisions of the Prosecuting Attorney's Council of Georgia (July 13, 1995). The federal legislation is found at 18 U.S.C. §§ 3121-3127 (1994).

13. O.C.G.A. § 16-11-60(2) (Supp. 1995).

14. *Id.* § 16-11-60(4). Trap and trace devices are similar to pen registers, except that they identify the originating number of an incoming call. *Id.*

15. *Id.* § 16-11-60(1).

trace devices.<sup>16</sup> Second, section 3 provides an emergency procedure whereby pen registers and trap and trace devices may be installed without obtaining an order.<sup>17</sup>

Very specific guidelines accompany the emergency procedure.<sup>18</sup> The emergency situation must involve an immediate threat of death or serious bodily injury or “[c]onspiratorial activities characteristic of organized crime.”<sup>19</sup> Additionally, the use of the device without an order must not offend any federal laws, and an order must be obtained, as outlined in Code section 16-11-64.1, within forty-eight hours of the installation of the device.<sup>20</sup>

The original form of the bill did not include the “within 48 hours” language, but was amended by the House Judiciary Committee to incorporate this limitation.<sup>21</sup> The House Judiciary Committee decided that a check on the power of law enforcement personnel was necessary to prevent abuse.<sup>22</sup> The Committee believed that requiring law enforcement agents to justify their actions within forty-eight hours would provide this check.<sup>23</sup> Thus, the language attempts to balance the needs of law enforcement and the Fourth Amendment rights of individuals.<sup>24</sup>

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16. *Id.* § 16-11-64.1.

17. *Id.* § 16-11-64.2.

18. *Id.*

19. *Id.* § 16-11-64.2(1)(A)-(B).

20. *Id.* § 16-11-64.2.

21. Barnes Interview, *supra* note 11.

22. Telephone Interview with Rep. Cathy Cox, House District No. 160 (Aug. 24, 1995).

23. *Id.*

24. *Id.*