

CRIMES CODE (18 PA.C.S.) AND JUDICIAL CODE (42 PA.C.S.) -
OMBINUS AMENDMENTS

Act of Jul. 7, 2017, P.L. 304, No. 22

Cl. 18

Session of 2017

No. 2017-22

SB 560

AN ACT

Amending Titles 18 (Crimes and Offenses) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in wiretapping and electronic surveillance, further providing for definitions, for exceptions to prohibition of interception and disclosure of communications, for exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices and for expiration of chapter; and providing for recordings by law enforcement officers.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The definition of "oral communication" in section 5702 of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

§ 5702. Definitions.

As used in this chapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Oral communication." Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include [any electronic communication.] **the following:**

(1) An electronic communication.

(2) A communication made in the presence of a law enforcement officer on official duty who is in uniform or otherwise clearly identifiable as a law enforcement officer and who is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) to intercept the communication in the course of law enforcement duties. As used in this paragraph only, "law enforcement officer" means a member of the Pennsylvania State Police, an individual employed as a police officer who holds a current certificate under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training), a sheriff or a deputy sheriff.

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Section 2. Sections 5704(13), (14) and (16), 5706(b) and 5781 of Title 18 are amended to read:

§ 5704. Exceptions to prohibition of interception and disclosure of communications.

It shall not be unlawful and no prior court approval shall be required under this chapter for:

* * *

(13) An investigative officer, a law enforcement officer or employees of the Department of Corrections for State

correctional facilities to intercept, record, monitor or divulge any [telephone calls] **oral communication, electronic communication or wire communication** from or to an inmate in a facility under the following conditions:

(i) The Department of Corrections shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging any [telephone calls] **oral communication, electronic communication or wire communication** from or to an inmate in a State correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their [telephone conversations] **oral communication, electronic communication or wire communication** may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording [a telephone conversation] **an oral communication, electronic communication or wire communication**, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.

(C) The contents of an intercepted and recorded [telephone conversation] **oral communication, electronic communication or wire communication** shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the Department of Corrections shall not intercept, record, monitor or divulge [any conversation] **an oral communication, electronic communication or wire communication** between an inmate and an attorney.

(iii) [Persons who are calling in to a facility to speak to an inmate shall be notified that the call may be recorded or monitored.] **Persons who are engaging in an oral communication, electronic communication or wire communication with an inmate shall be notified that the communication may be recorded or monitored. Notice may be provided by any means reasonably designed to inform the noninmate party of the recording or monitoring.**

(iv) The Department of Corrections shall promulgate guidelines to implement the provisions of this paragraph for State correctional facilities.

(14) An investigative officer, a law enforcement officer or employees of a county correctional facility to intercept, record, monitor or divulge [any telephone calls] **an oral communication, electronic communication or wire communication** from or to an inmate in a facility under the following conditions:

(i) The county correctional facility shall adhere to the following procedures and restrictions when intercepting, recording, monitoring or divulging [any telephone calls] **an oral communication, electronic communication or wire communication** from or to an inmate

in a county correctional facility as provided for by this paragraph:

(A) Before the implementation of this paragraph, all inmates of the facility shall be notified in writing that, as of the effective date of this paragraph, their [telephone conversations] **oral communications, electronic communications or wire communications** may be intercepted, recorded, monitored or divulged.

(B) Unless otherwise provided for in this paragraph, after intercepting or recording [a telephone conversation] **an oral communication, electronic communication or wire communication**, only the superintendent, warden or a designee of the superintendent or warden or other chief administrative official or his or her designee, or law enforcement officers shall have access to that recording.

(C) The contents of an intercepted and recorded [telephone conversation] **oral communication, electronic communication or wire communication** shall be divulged only as is necessary to safeguard the orderly operation of the facility, in response to a court order or in the prosecution or investigation of any crime.

(ii) So as to safeguard the attorney-client privilege, the county correctional facility shall not intercept, record, monitor or divulge [any conversation] **an oral communication, electronic communication or wire communication** between an inmate and an attorney.

(iii) [Persons who are calling into a facility to speak to an inmate shall be notified that the call may be recorded or monitored.] **Persons who are engaging in an oral communication, electronic communication or wire communication with an inmate shall be notified that the communication may be recorded or monitored. Notice may be provided by any means reasonably designed to inform the noninmate party of the recording or monitoring.**

(iv) The superintendent, warden or a designee of the superintendent or warden or other chief administrative official of the county correctional system shall promulgate guidelines to implement the provisions of this paragraph for county correctional facilities.

* * *

[(16) A law enforcement officer, whether or not certified under section 5724 (relating to training), acting in the performance of his official duties to intercept and record an oral communication between individuals in accordance with the following:

(i) At the time of the interception, the oral communication does not occur inside the residence of any of the individuals.

(ii) At the time of the interception, the law enforcement officer:

(A) is in uniform or otherwise clearly identifiable as a law enforcement officer;

(B) is in close proximity to the individuals' oral communication;

(C) is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or

advertisement of electronic, mechanical or other devices) to intercept the oral communication; and

(D) informs, as soon as reasonably practicable, the individuals identifiably present that he has intercepted and recorded the oral communication.

(iii) As used in this paragraph, the term "law enforcement officer" means a member of the Pennsylvania State Police or an individual employed as a police officer who holds a current certificate under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training).]

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§ 5706. Exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices.

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(b) Responsibility.--

(1) Except as provided under paragraph (2), the Attorney General and the district attorney or their designees so designated in writing shall have the sole responsibility to buy, possess and loan any electronic, mechanical or other device which is to be used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12) (relating to exceptions to prohibition of interception and disclosure of communications), 5712 (relating to issuance of order and effect), 5713 (relating to emergency situations) or 5713.1 (relating to emergency hostage and barricade situations).

(2) The division or bureau or section of the Pennsylvania State Police responsible for conducting the training in the technical aspects of wiretapping and electronic surveillance as required by section 5724 (relating to training) may buy and possess any electronic, mechanical or other device which is to be used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12), 5712, 5713 or 5713.1 for the purpose of training. However, any electronic, mechanical or other device bought or possessed under this provision may be loaned to or used by investigative or law enforcement officers for purposes of interception as authorized under section 5704(2), (5) and (12), 5712, 5713 or 5713.1 only upon written approval by the Attorney General or a deputy attorney general designated in writing by the Attorney General or the district attorney or an assistant district attorney designated in writing by the district attorney of the county wherein the suspected criminal activity has been, is or is about to occur.

(3) With the permission of the Attorney General or a district attorney who has designated any supervising law enforcement officer for purposes of interceptions as authorized under section 5713.1, the law enforcement agency which employs the supervising law enforcement officer may buy, possess, loan or borrow any electronic, mechanical or other device which is to be used by investigative or law enforcement officers at the direction of the supervising law enforcement officer solely for the purpose of interception as authorized under sections 5704(12) and 5713.1.

(4) The Pennsylvania State Police shall annually establish equipment standards for any electronic, mechanical or other device which is to be used by law enforcement officers for purposes of [interception as authorized under section 5704(16).] **r ecording a communication under**

circumstances within paragraph (2) of the definition of "oral communication" in section 5702 (relating to definitions). The equipment standards shall be published annually in the Pennsylvania Bulletin.

(5) The Pennsylvania State Police shall annually establish and publish standards in the Pennsylvania Bulletin for the secure onsite and off-site storage of an audio recording made in accordance with paragraph (4) or any accompanying video recording. The standards shall comply with the Federal Bureau of Investigation's Criminal Justice Information Services (CJIS) Security Policy.

(6) A vendor to law enforcement agencies which stores data related to audio recordings and video recordings shall, at a minimum, comply with the standards set forth by the Pennsylvania State Police under paragraphs (4) and (5). Law enforcement agencies under contract with a vendor for the storage of data before the effective date of this paragraph shall comply with paragraphs (4) and (5) and this paragraph upon expiration or renewal of the contract.

§ 5781. Expiration of chapter.

This chapter expires December 31, [2018] 2023, unless extended by statute.

Section 3. Title 42 is amended by adding a chapter to read:

CHAPTER 67A

RECORDINGS BY LAW ENFORCEMENT OFFICERS

Sec.

67A01. Definitions.

67A02. Scope of chapter.

67A03. Requests for law enforcement audio recordings or video recordings.

67A04. Law enforcement review.

67A05. Procedure.

67A06. Petition for judicial review.

67A07. Audio recording or video recording policies.

67A08. Construction.

67A09. Applicability.

§ 67A01. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Confidential information." Any of the following:

(1) The identity of a confidential source.

(2) The identity of a suspect or witness to whom confidentiality has been assured.

(3) Information made confidential by law or court order.

"Information pertaining to an investigation." An audio recording or video recording which contains any of the following:

(1) Complaints or depictions of criminal conduct, including all actions or statements made before or after the criminal conduct that are part of or relate to the same incident or occurrence.

(2) Upon disclosure, information that would:

(i) reveal the institution, progress or result of a criminal investigation;

(ii) deprive an individual of the right to a fair trial or an impartial adjudication;

(iii) impair the ability of the Attorney General, a district attorney or a law enforcement officer to locate a defendant or codefendant;

(iv) hinder the ability of the Attorney General, a district attorney or a law enforcement officer to secure an arrest, prosecution or conviction; or

(v) endanger the life or physical safety of an individual.

(3) Upon disclosure, information that would:

(i) Reveal the institution, progress or result of an agency investigation.

(ii) Deprive a person of the right to an impartial administrative adjudication.

(iii) Constitute an unwarranted invasion of privacy.

(iv) Hinder an agency's ability to secure an administrative or civil sanction.

(v) Endanger the life or physical safety of an individual.

"Law enforcement agency." The Office of Attorney General, a district attorney's office or an agency that employs a law enforcement officer.

"Law enforcement officer." An officer of the United States, the Commonwealth or a political subdivision thereof, another state or political subdivision thereof or who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter or an equivalent crime in another jurisdiction, a sheriff or deputy sheriff and any attorney authorized by law to prosecute or participate in the prosecution of the offense.

"Victim." An individual who was subjected to an act that was committed by another individual, including a juvenile, which constitutes any of the following:

(1) An offense committed under any of the following:

(i) The act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

(ii) 18 Pa.C.S. (relating to crimes and offenses).

(iii) 30 Pa.C.S. § 5502 (relating to operating watercraft under influence of alcohol or controlled substance).

(iv) 30 Pa.C.S. § 5502.1 (relating to homicide by watercraft while operating under influence).

(v) 75 Pa.C.S. § 3732 (relating to homicide by vehicle).

(vi) 75 Pa.C.S. § 3735 (relating to homicide by vehicle while driving under influence).

(vii) 75 Pa.C.S. § 3735.1 (relating to aggravated assault by vehicle while driving under the influence).

(viii) 75 Pa.C.S. § 3742 (relating to accidents involving death or personal injury).

(ix) 75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs).

(x) Any other Federal or State law.

(2) An offense similar to an offense listed under paragraph (1) committed outside of this Commonwealth.

(3) An offense which would constitute grounds for the issuance of relief under Chapter 62A (relating to protection of victims of sexual violence or intimidation) or 23 Pa.C.S. Ch. 61 (relating to protection from abuse).

(4) An offense against a resident of this Commonwealth which is an act of international terrorism.

"Victim information." Information that would disclose the identity or jeopardize the safety of a victim.

§ 67A02. Scope of chapter.

(a) Exemption.--The provisions of this chapter, and not the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, shall apply to any audio recording or video recording made by a law enforcement agency.

(b) Limitation.--Nothing in this chapter nor the Right-to-Know Law shall establish a right to production of an audio recording or video recording made inside a facility owned or operated by a law enforcement agency or to any communications between or within law enforcement agencies concerning an audio or video recording.

§ 67A03. Requests for law enforcement audio recordings or video recordings.

The following shall apply:

(1) An individual who requests an audio recording or video recording made by a law enforcement agency shall, within 60 days of the date when the audio recording or video recording was made, serve a written request to the individual who is designated as the open-records officer for the law enforcement agency under section 502 of the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law. Service is effective upon receipt of the written request by the open-records officer from personal delivery or certified mail with proof of service.

(2) The request under paragraph (1) shall specify with particularity the incident or event that is the subject of the audio recording or video recording, including the date, time and location of the incident or event.

(3) The request shall include a statement describing the requester's relationship to the incident or event that is the subject of the audio or video recording.

(4) If the incident or event that is the subject of the audio recording or video recording occurred inside a residence, the request shall identify each individual who was present at the time of the audio recording or video recording unless not known and not reasonably ascertainable .

§ 67A04. Law enforcement review.

(a) Determination.--Except as provided in this section, if a law enforcement agency determines that an audio recording or video recording contains potential evidence in a criminal matter, information pertaining to an investigation or a matter in which a criminal charge has been filed, confidential information or victim information and the reasonable redaction of the audio or video recording would not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information, the law enforcement agency shall deny the request in writing. The written denial shall state that reasonable redaction of the audio recording or video recording will not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information.

(b) Agreement.--A law enforcement agency may enter into a memorandum of understanding with the Attorney General or the district attorney with jurisdiction to:

(1) ensure consultation regarding the reviewing of audio recordings or video recordings in order to make a determination; or

(2) require the Attorney General or district attorney with jurisdiction to issue a denial permitted under subsection (a).

§ 67A05. Procedure.

(a) Disclosure.--A law enforcement agency that receives a request under section 67A03 (relating to requests for law enforcement audio recordings or video recordings) for an audio recording or video recording shall provide the audio recording or video recording or identify in writing the basis for denying the request within 30 days of receiving the request, unless the requester and law enforcement agency agree to a longer time period. If an agreement under section 67A04(b) (2) (relating to law enforcement review) is in effect between the law enforcement agency and the Attorney General or district attorney with jurisdiction, then an agreement to a longer time period must be between the requester and the Attorney General or district attorney with jurisdiction.

(b) Denials by operation of law.--The request under section 67A03 shall be deemed denied by operation of law if the law enforcement agency does not provide the audio recording or video recording to the requester or explain why the request is denied within the time period specified or agreed to under subsection (a).

(c) Preservation.--A law enforcement agency that has received a request for an audio recording or video recording shall preserve the unaltered audio recording or video recording that has been requested for no less than the time periods provided in this chapter for service of and responses to written requests for the production of the audio recording or video recording and any period within which a petition for judicial review is allowable or pending.

(d) Fees.--A law enforcement agency may establish reasonable fees relating to the costs incurred to disclose audio recordings or video recordings. The fees shall be paid by the requesting party at the time of disclosure of the audio recording or video recording.

(e) Construction.--Nothing in this section shall be construed to prohibit a law enforcement agency from redacting an audio recording or video recording in order to protect potential evidence in a criminal matter, information pertaining to an investigation, confidential information or victim information.

§ 67A06. Petition for judicial review.

(a) Petition.--

(1) If a request under section 67A03 (relating to requests for law enforcement audio recordings or video recordings) is denied, the requester may file a petition for judicial review in the court of common pleas with jurisdiction within 30 days of the date of denial.

(2) The respondent to a petition filed under this section shall be the entity that denied the request for the audio recording or video recording under section 67A05(a) (relating to procedure) unless the request is denied under section 67A05(b), in which case the law enforcement agency that created the audio recording or video recording shall be the respondent.

(b) Duties of petitioner.--A petitioner under this section shall have the following duties:

(1) The petitioner shall pay a filing fee of \$125.

(2) If the incident or event that is the subject of the request occurred inside a residence, the petitioner shall certify that notice of the petition has been served or that service was attempted on each individual who was present at the time of the audio recording or video recording and on the owner and occupant of the residence. Notice shall not be required under this paragraph if the identity of an

individual present or the location is unknown and not reasonably ascertainable by the petitioner. Service shall be effective upon receipt from personal delivery or certified mail with proof of service .

(3) The petitioner shall include with the petition a copy of the written request under section 67A03 that was served on the law enforcement agency and any written responses to the request that were received.

(4) The petitioner shall serve the petition on the open-records officer of the respondent within five days of the date that the petitioner files the petition with the court of common pleas with jurisdiction, and service shall be effective upon receipt by the open-records officer for personal delivery or certified mail with proof of service.

(c) Intervention as matter of right.--If not a respondent, a prosecuting attorney with jurisdiction may intervene in the action as a matter of right.

(d) Summary dismissal.--It shall be grounds for summary dismissal of a petition filed under this section if:

(1) the request to the law enforcement agency under section 67A03 or the filing of the petition under subsection (a) is untimely;

(2) the request to the law enforcement agency failed to describe with sufficient particularity the incident or event that is the subject of the audio recording or video recording, including the date, time and location of the incident or event; or

(3) the petitioner has not complied with the requirements of subsection (b)(1), (2), (3) and (4).

(e) Approval.--A court of common pleas with jurisdiction may grant a petition under this section, in whole or in part, and order the disclosure of the audio recording or video recording only if the court determines that the petitioner has established all of the following by a preponderance of the evidence:

(1) The request was not denied under section 67A04 (relating to law enforcement review) or the request was denied under section 67A04 and the court of common pleas with jurisdiction determines that the denial was arbitrary and capricious.

(2) The public interest in disclosure of the audio recording or video recording or the interest of the petitioner outweighs the interests of the Commonwealth, the law enforcement agency or an individual's interest in nondisclosure. In making a determination under this paragraph, the court of common pleas may consider the public's interest in understanding how law enforcement officers interact with the public, the interests of crime victims, law enforcement and others with respect to safety and privacy and the resources available to review and disclose the audio recording or video recording.

§ 67A07. Audio recording or video recording policies.

(a) Policies.--A municipal law enforcement agency or sheriff that makes audio recordings or video recordings of communications under circumstances within paragraph (2) of the definition of "oral communication" in 18 Pa.C.S. § 5702 (relating to definitions) shall comply with the guidelines established under 18 Pa.C.S. § 5706(b)(4), (5) and (6) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) and shall establish written policies, which shall be public, for the following:

(1) The training of law enforcement officers authorized to make audio recordings or video recordings.

(2) The time periods when an electronic, mechanical or other device shall be in operation to make audio recordings or video recordings.

(3) The proper use, maintenance and storage of the electronic, mechanical or other device to make audio recordings or video recordings, including equipment inspections and audits and procedures to address malfunctioning equipment.

(4) The information collected from audio recordings or video recordings, including the information's storage, accessibility and retrieval.

(5) Electronic records retention.

(6) The use of facial recognition software or programs.

(7) A statement that a violation of the agency's policy subjects the violator to the agency's disciplinary policy.

(8) Supervisory responsibilities.

(b) Pennsylvania Commission on Crime and Delinquency.--The Pennsylvania Commission on Crime and Delinquency is authorized to condition funding or a grant related to the implementation, use, maintenance or storage of body-worn cameras or recordings from body-worn cameras on the following:

(1) Requiring the grantee to have protocols, guidelines or written policies related to the implementation, use, maintenance or storage of body-worn cameras.

(2) Requiring that such protocols, guidelines or written policies are publicly accessible, including being retrievable on a municipal website.

(3) Ensuring that the protocols, guidelines or written policies substantially comply with applicable recommendations by the commission.

§ 67A08. Construction.

The following shall apply:

(1) Nothing in this chapter shall be construed to alter the responsibilities of parties to any criminal or civil litigation to exchange information in accordance with applicable rules of procedure.

(2) Nothing in this chapter shall be construed to preclude a prosecuting attorney with jurisdiction or a law enforcement agency from disclosing an audio recording or video recording in the absence of a written request or beyond the time periods stated in this chapter.

(3) The prosecuting attorney with jurisdiction must agree in writing to the disclosure by a law enforcement agency if the prosecuting attorney determines that:

(i) the audio recording or video recording contains potential evidence in a criminal matter, information pertaining to an investigation, confidential information or victim information; and

(ii) reasonable redaction of the audio recording or video recording will not safeguard the potential evidence, information pertaining to an investigation, confidential information or victim information.

§ 67A09. Applicability.

Nothing in this chapter shall apply to an audio recording or video recording that is otherwise prohibited or protected from disclosure under any other Federal or State law.

Section 4. This act shall take effect in 60 days.

APPROVED--The 7th day of July, A.D. 2017.

