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CRIMES AND OFFENSES Offenses Against Public Order and Safety: Provide for Consent to Intercept, Record, or Divulge Message Sent by Telephone, Telegraph, Letter, or Other Means Such as Cellular Phones When Involving a Minor

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CRIMES AND OFFENSES

Offenses Against Public Order and Safety: Provide for Consent to Intercept, Record, or Divulge Message Sent by Telephone, Telegraph, Letter, or Other Means Such as Cellular Phones When Involving a Minor

CODE SECTIONS:	O.C.G.A. § 16-11-66, -69 (amended), -66.1 (new)
BILL NUMBERS:	HB 47, HB 139
ACT NUMBERS:	369, 282
SUMMARY:	HB 47 provides guidelines for courts and law enforcement agencies in the use of wiretapping, eavesdropping and surveillance when a child under the age of eighteen years is a party to the recording. HB 139 provides that it shall be unlawful for any person to maliciously and intentionally intercept communications from a cellular radio telephone without the consent of all parties to the communication.
EFFECTIVE DATE:	July 1, 1993

History

HB 47 was prompted by the case of *Dobbins v. State*.[1] The case involved a thirteen-year-old victim of child molestation.[2] The investigator took the victim to the District Attorney's office.[3] Having previously obtained the consent of the child's father to record a telephone conversation between the child and alleged perpetrator, the investigator asked the child to call the alleged perpetrator and the investigator recorded the conversation.[4] In the course of the conversation, the perpetrator incriminated himself.[5] The tape was introduced at trial and resulted in a conviction.[6] However, the Georgia Supreme Court reversed the conviction because under Georgia consent laws the child lacked the requisite age for consent and the State could not have recorded the conversation without either an investigative warrant or a valid consent according to the prior version of Code section 16-11-64.[7] The supreme court held that the tape constituted evidence

1. *Dobbins v. State*, 415 S.E.2d 168 (Ga. 1992).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.;* 1968 Ga. Laws 1249 (formerly found at O.C.G.A. § 16-11-64 (1992)).

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obtained in violation of title 16 and was therefore inadmissable.[8] This case prompted Senator Poston to introduce a provision for constructive consent when certain guidelines are met.[9]

HB 139 was introduced because even though fourteen states have passed legislation making wiretapping of wireless communication unlawful, Georgia had not.[10] This legislation extended previous landline law to cover cellular, wireless communications since individuals could employ scanners to intentionally detect cellular communications.[11] Many people purchase scanners for the purpose of listening to conversations between parties using cellular phones.[12] Representative Wall introduced HB 139 because of the prevalence of scanners and their impact on the privacy of parties who communicate by cellular phones.[13]

HB 47

The Act amends Code section 16-11-3(1) which relates to wiretapping, eavesdropping, and surveillance by rewriting Code section 16-11-66 which relates to consent to intercept or record messages sent by telephone.[14] Previously, Code section 16-11-66 allowed the "interception, recording, and divulging of a message sent by telephone, telegraph, letter, or any other means of communication where the sender and receiver . . . expressly or impliedly consent . . . or where the message constituted or is transmitted in furtherance of a crime, provided at least one of the parties consents."[15]

The Act addresses situations in which children under the age of eighteen are parties to the communication.[16] In such cases, the Act places the power to consent to the interception of the message in the hands of the court.[17] Additionally, the Act provides that such recordings of messages involving children under the age of eighteen cannot be used in "any prosecution of the consenting child in any delinquency or criminal proceeding."[18]

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8. 1968 Ga. Laws 1249 (formerly found at O.C.G.A. § 16-11-67 (1992)).
9. Telephone Interview with Rep. McCracken "Ken" Poston, Jr., House District No. 3 (Apr. 18, 1993) [hereinafter Poston Interview]. Rep. Poston was the sponsor of HB 47. *Id.*
10. Telephone Interview with Rep. Vinson Wall, House District No. 82 (Apr. 9, 1993) [hereinafter Wall Interview]. Rep. Wall was the sponsor of HB 139. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. O.C.G.A. § 16-11-66 (Supp. 1993).
15. 1968 Ga. Laws 1249 (formerly found at O.C.G.A. § 16-11-66 (1992)).
16. O.C.G.A. § 16-11-66 (Supp. 1993).
17. *Id.* § 16-11-66(b) (Supp. 1993).
18. *Id.*

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The Act provides guidelines which the judge shall use when issuing an order.[19] The guidelines provide that a judge shall issue an order only: "(1) Upon finding probable cause that a crime has been committed; (2) Upon finding that the child understands that the conversation is to be recorded and that such child agrees to participate; and (3) Upon determining that participation is not harmful to such child."[20]

The Act was originally introduced with a provision allowing for guardians, custodial parents, parents or the court to consent for children under the age of fourteen.[21] The Act was amended by the House Judiciary Committee to apply to children under the age of eighteen and to place the decision to grant permission to record in the hands of judges alone as long as certain guidelines are followed.[22]

The Senate Judiciary Committee inserted the language "a true and correct copy of the recording"[23] instead of simply "the recording" in describing the condition of the recording that must be returned to the superior court judge who issued the order granting the permission to make the recording in the first place.[24]

HB 139

The Act creates Code section 16-11-66.1 which makes intentional interception of cellular telephone communications a misdemeanor.[25] The Act also amends Code section 16-11-69, which provides that any violation of Code section 16-11-3(1) is a felony, to allow an exception for the newly created misdemeanor under Code section 16-11-66.1.[26]

The Act as introduced contained fewer provisions but was changed to conform with the landline laws in Georgia.[27] The Georgia General Assembly achieved these changes by adding the term "cellular radio telephone" to the list of transmittal devices.[28] A "cellular radio telephone" is defined as a wireless telephone which the Federal Communications Commission has authorized to operate on the frequency band reserved for cellular telephones.[29]

As introduced, the Act did not apply to any public utility engaged in the business of providing communications services or facilities,

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19. *Id.* § 16-11-66(c) (Supp. 1993).
20. *Id.*
21. HB 47, as introduced, 1993 Ga. Gen. Assem.
22. Poston Interview, *supra* note 9.
23. HB 147 (SCS), 1993 Ga. Gen. Assem.
24. O.C.G.A. § 16-11-66(c) (Supp. 1993).
25. *Id.* § 16-11-66.1 (Supp. 1993).
26. *Id.* § 16-11-69 (Supp. 1993).
27. Wall Interview, *supra* note 10.
28. O.C.G.A. § 16-11-66.1(b) (Supp. 1993).
29. *Id.* § 16-11-66.1(a) (Supp. 1993).

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equipment or services pursuant to the tariffs of the public utility, or telephonic communication systems used exclusively within a state, county, or municipal correctional institution.[30] The House Committee on Special Judiciary offered a substitute to HB 139 which added two exceptions to the applicability of Code section 16-11-66.1.[31] In addition to the three exceptions listed in the bill as introduced, the Committee substitute provided that the Code section would not apply to equipment, facilities or services of users licensed by the Public Service Commission pursuant to Code section 16-11-65, nor to the interception of wire or oral transmissions by law enforcement officers pursuant to Code section 16-11-64.[32] These proposed changes were incorporated into the final bill.[33]

The Senate inserted the word "intentionally" to describe the type of interception that violates the law because it is possible for an individual to accidentally intercept cellular communications.[34] Subsection (d) states that a violation of Code section 16-11-66.1 will be a "misdemeanor of a high and aggravated nature."[35] The Georgia General Assembly struck Code section 16-11-69 in its entirety and inserted new Code section 16-11-69 in its place in order to make it clear that the punishment at the misdemeanor level outlined in subsection (d) which addresses cellular telephone interception violations is an exception to the general rule, since other violations of these Code provisions are felonies punishable either by imprisonment for not less than one nor more than five years or by a fine not to exceed $10,000 or both.[36] Individuals with scanners specifically designed and used to intercept communications by cellular telephone created public concern over the loss of privacy and prompted this legislation.[37]

Daliah Brill

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30. *Id.*
31. HB 139 (HCS), 1993 Ga. Gen. Assem.
32. *Id.*
33. O.C.G.A. § 16-11-66.1 (Supp. 1993).
34. Wall Interview, *supra* note 10.
35. *Id.* § 16-11-66.1(d) (Supp. 1993); *see also* HB 139 (SFA), 1993 Ga. Gen. Assem.
36. O.C.G.A. § 16-11-69 (Supp. 1993).
37. Wall Interview, *supra* note 10.

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