



Office of the Attorney General

State of Texas

November 23, 1993

DAN MORALES

ATTORNEY GENERAL

**Ms. Jeannene Fox
Acting Administrator
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127**

Letter Opinion No. 93-103

Re: Whether a call accounting system used by the Texas Alcoholic Beverage Commission is a "pen register" as defined by article 18.21 of the Code of Criminal Procedure and related questions (ID# 22408)

Dear Ms. Fox:

You ask whether a call accounting system used by the Texas Alcoholic Beverage Commission ("TABC") in its Austin and Houston offices is a "pen register" as defined by article 18.21 of the Code of Criminal Procedure. Assuming that the call accounting system is a pen register, you also ask if it would "be legal to utilize it" as a tool for "budgeting and manpower utilization" and for "detection of employee misuse of telephone services" and "misuse (abuse) of time utilization in the work place."

Section 1(9) of article 18.21 of the Code of Criminal Procedure defines a "pen register" as follows:

"Pen register" means a mechanical or electronic device that attaches to a telephone line and is capable of recording outgoing numbers dialed from that line but is not capable of recording the origin of an incoming communication to that line or the content of a communication carried between that line and another line.

Section 16.03 of the Penal Code makes the use a pen register a felony of the third degree except in certain circumstances, providing in pertinent part:

(a) Except as authorized by a court order obtained under Article 18.21, Code of Criminal Procedure, or in an emergency under the circumstances described and permitted under that article, a person commits an offense if he knowingly installs or utilizes a pen register or trap and trace device to record telephone numbers dialed from or to a telephone instrument.

....
(d) It is an exception to the application of Subsection (a) of this section that the installation or utilization of a pen register or trap and trace device was made by an officer, agent, or employee of a lawful enterprise while engaged in an activity that is a necessary incident to the rendition of service or to the protection of property of or services

provided by the enterprise, and was not made for the purpose of gathering information for a law enforcement agency or private investigative agency, other than information related to the theft of communication or information services provided by the enterprise.¹
[Footnote added.]

In Attorney General Opinion JM-983 (1988), this office concluded that a station message detail recording system used by Harris County² to monitor outgoing telephone calls was a "pen register" under article 18.21 of the Code of Criminal Procedure, and that use of such a system was therefore prohibited under article 16.03 of the Penal Code, unless one of that provision's exceptions applied. That opinion was withdrawn by Attorney General Opinion JM-1073 (1989), in which this office concluded that the determination whether a system such as Harris County's constitutes a "pen register" required the resolution of factual issues and was therefore not amenable to the opinion process. Attorney General Opinion JM-1073 at 1. Attorney General Opinion JM-1073 also emphasized that "even if a device is a pen register, its use is permissible if the use 'is a necessary incident to the rendition of service or to the protection of property of or services provided by the enterprise' and is not used for law enforcement or private investigative purposes. Penal Code art. 16.03(d)." *Id.* It also stated that the use of the system at issue was "to help the county 'to identify unauthorized long distance telephone usage and avoid waste of County funds.' We think such a use is clearly a permissible one under article 16.03(d) of the Penal Code." *Id.* It concluded that "the use of the device to protect state property by recording the origin of incoming communications as well as outgoing numbers called in order to prevent the public from paying for private calls is permissible under article 16.03(d) of the Penal Code." *Id.* at 1-2.

Although you have submitted attachments regarding call accounting systems, you have not described the specific features and capabilities of the system employed by the TABC. Even if you had supplied us with more specific information, however, we would not be able to definitively determine whether the call accounting system used by the TABC is a pen register because that determination would require the resolution of factual issues. *See id.* at 1. With respect to your second question, you state that the TABC uses the call accounting system in part to detect employee misuse of telephone services. The use you describe is almost identical to the use found permissible in Attorney General Opinion JM-1073, *i.e.*, the use of a pen register to protect state property by preventing the public

¹Recent legislation amends section 16.03 of the Penal Code effective September 1, 1994. *See* Acts 1993, 73d Leg., ch. 900, §§ 1.01, 1.19. The amendments have little bearing here and are not reflected in the above-quoted language. Under section 16.03(e) as amended, the unlawful use of a pen register will be punishable as a "state jail" felony. *See* Acts 1993, 73d Leg., ch. 900, § 1.01.

²The system was used by Harris County to monitor volume of calls, to switch calls if a telephone switching cabinet became overloaded, to bill and gather administrative data, to identify unauthorized long distance telephone usage, and to avoid waste of county funds. Attorney General Opinion JM-983 (1988) at 1-2.

from paying for private calls. *See id.* at 2. Therefore, on the basis of Attorney General Opinion JM-1073, we conclude that the use of a pen register by a state agency to protect public property by detecting employee misuse of telephone services falls within subsection (d) of section 16.03 and is therefore an exception to the offense set forth in subsection (a) of that section.³

S U M M A R Y

The determination whether a call accounting system used by the Texas Alcoholic Beverage Commission constitutes a "pen register" under article 18.21 of the Code of Criminal Procedure requires the resolution of factual issues and is therefore not amenable to the opinion process. According to Attorney General Opinion JM-1073 (1989), the use of a pen register by a state agency to protect public property by detecting employee misuse of telephone services falls within subsection (d) of section 16.03 of the Penal Code and is therefore an exception to the offense set forth in subsection (a) of that section.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

³We note that article 16.03(d) of the Penal Code has been amended since Attorney General Opinion JM-1073 was issued. *See* Acts 1989, 71st Leg., ch. 958, § 2 at 4034 (eff. Sept. 1, 1989). At that time, article 16.03(d) of the Penal Code began, "It is an affirmative defense to prosecution under this section . . .," instead of "It is an exception to the application of Subsection (a) of this section . . .," as it now reads. *Compare id. with* Acts 1985, 69th Leg., ch. 587, § 6 at 2216 (eff. Aug. 26, 1985). Thus, that provision now sets forth an exception to the offense, rather than an affirmative defense to prosecution. Given that the remainder of the provision has not been substantively altered, however, we look to Attorney General Opinion JM-1073 in construing the exception.