

HOUSE BILL No. 2217

By Representative Sloan

2-8

1 AN ACT concerning authorized interception of wire, oral or electronic
2 communications; issuance of order; amending K.S.A. 2010 Supp. 22-
3 2502 and 22-2516 and repealing the existing sections.
4

5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2010 Supp. 22-2502 is hereby amended to read as
7 follows: 22-2502. (a) A search warrant shall be issued only upon the oral
8 or written statement, including those conveyed or received by electronic
9 communication, of any person under oath or affirmation which states
10 facts sufficient to show probable cause that a crime has been or is being
11 committed and which particularly describes a person, place or means of
12 conveyance to be searched and things to be seized. Any statement which
13 is made orally shall be either taken down by a certified shorthand
14 reporter, sworn to under oath and made part of the application for a
15 search warrant, or recorded before the magistrate from whom the search
16 warrant is requested and sworn to under oath. Any statement orally made
17 shall be reduced to writing as soon thereafter as possible. If the magistrate
18 is satisfied that grounds for the application exist or that there is probable
19 cause to believe that they exist, the magistrate may issue a search warrant
20 for the seizure of the following:

21 (1) Any things which have been used in the commission of a crime,
22 or any contraband or any property which constitutes or may be
23 considered a part of the evidence, fruits or instrumentalities of a crime
24 under the laws of this state, any other state or of the United States. The
25 term "fruits" as used in this act shall be interpreted to include any
26 property into which the thing or things unlawfully taken or possessed
27 may have been converted.

28 (2) Any person who has been kidnapped in violation of the laws of
29 this state or who has been kidnapped in another jurisdiction and is now
30 concealed within this state.

31 (3) Any human fetus or human corpse.

32 (4) Any person for whom a valid felony arrest warrant has been
33 issued in this state or in another jurisdiction.

34 (5) (A) *Any information concerning the user of an electronic*
35 *communication service; any information concerning the location of*
36 *electronic communications systems, including, but not limited to, towers*

1 *transmitting cellular signals involved in any wire communication; and*
2 *any other information made through an electronic communications*
3 *system.*

4 *(B) The jurisdiction granted in this paragraph shall extend to*
5 *information held by entities primarily located outside the state of Kansas*
6 *if the jurisdiction in which the entity is primarily located recognizes the*
7 *authority of the magistrate to issue the search warrant.*

8 (b) Before ruling on a request for a search warrant, the magistrate
9 may require the affiant to appear personally and may examine under oath
10 the affiant and any witnesses that the affiant may produce. Such
11 proceeding shall be taken down by a certified shorthand reporter or
12 recording equipment and made part of the application for a search
13 warrant.

14 (c) Affidavits or sworn testimony in support of the probable cause
15 requirement of this section shall not be made available for examination
16 without a written order of the court, except that such affidavits or
17 testimony when requested shall be made available to the defendant or the
18 defendant's counsel for such disposition as either may desire.

19 (d) As used in this section; (1) "Electronic communication"
20 means the use of electronic equipment to send or transfer a copy of an
21 original document; and

22 (2) "electronic communication service" and "electronic
23 communication system" have the meaning as defined in K.S.A. 22-2514,
24 and amendments thereto.

25 Sec. 2. K.S.A. 2010 Supp. 22-2516 is hereby amended to read as
26 follows: 22-2516. (1) Each application for an order authorizing the
27 interception of a wire, oral or electronic communication shall be made in
28 writing, upon oath or affirmation, to a judge of competent jurisdiction,
29 and shall state the applicant's authority to make such application. Each
30 application shall include the following information:

31 (a) The identity of the prosecuting attorney making the application,
32 and the identity of the investigative or law enforcement officer requesting
33 such application to be made;

34 (b) A full and complete statement of the facts and circumstances
35 relied upon by the applicant to justify such applicant's belief that an order
36 should be issued, including (i) details as to the particular offense that has
37 been, is being or is about to be committed, (ii) except as provided in
38 subsection (10), a particular description of the nature and location of the
39 facilities from which or the place where the communication is to be
40 intercepted, (iii) a particular description of the type of communications
41 sought to be intercepted, and (iv) the identity of the person, if known,
42 committing the offense and whose communications are to be intercepted;

43 (c) A full and complete statement as to whether or not other

1 investigative procedures have been tried and failed or why they
2 reasonably appear to be unlikely to succeed if tried or to be too
3 dangerous;

4 (d) A statement of the period of time for which the interception is
5 required to be maintained and, if the nature of the investigation is such
6 that the authorization for interception should not automatically terminate
7 when the described type of communication first has been obtained, a
8 particular description of facts establishing probable cause to believe that
9 additional communications of the same type will occur thereafter;

10 (e) A full and complete statement of the facts known to the applicant
11 concerning all previous applications made to any judge for authorization
12 to intercept wire, oral or electronic communications involving any of the
13 same persons, facilities or places specified in the application, and the
14 action taken by the judge on each such application; and

15 (f) Where the application is for the extension of an order, a statement
16 setting forth the results thus far obtained from the interception, or a
17 reasonable explanation of the failure to obtain such results.

18 (2) The judge may require the applicant to furnish additional
19 testimony or documentary evidence in support of the application. Oral
20 testimony shall be under oath or affirmation, and a record of such
21 testimony shall be made by a certified shorthand reporter and reduced to
22 writing.

23 (3) Upon such application the judge may enter an *ex parte* order, as
24 requested or as modified, authorizing the interception of wire, oral or
25 electronic communications within the territorial jurisdiction of such
26 judge, if the judge determines on the basis of the facts submitted by the
27 applicant that:

28 (a) There is probable cause for belief that a person is committing,
29 has committed or is about to commit a particular offense enumerated in
30 subsection (1) of K.S.A. 22-2515, and amendments thereto;

31 (b) there is probable cause for belief that particular communications
32 concerning the offense will be obtained through such interception;

33 (c) normal investigative procedures have been tried and have failed,
34 or reasonably appear to be unlikely to succeed if tried, or to be too
35 dangerous; and

36 (d) except as provided in subsection (10), there is probable cause for
37 belief that the facilities from which, or the place where, the wire, oral or
38 electronic communications are to be intercepted are being used, or are
39 about to be used, in connection with the commission of such offense, or
40 are leased to, listed in the name of or commonly used by such person.

41 (4) Each order authorizing the interception of any wire, oral or
42 electronic communication shall:

43 (a) Specify the identity of the person, if known, whose

1 communications are to be intercepted;

2 (b) specify the nature and location of the communications facilities
3 as to which, or the place where, authority to intercept is granted;

4 (c) specify with particularity a description of the type of
5 communication sought to be intercepted, and a statement of the particular
6 offense to which it relates;

7 (d) specify the identity of each agency authorized to intercept the
8 communications, and of the person authorizing the application;

9 (e) specify the period of time during which such interception is
10 authorized, including a statement as to whether or not the interception
11 shall automatically terminate when the described communication has
12 been first obtained; and

13 (f) upon request of the applicant, direct that a provider of wire
14 *communication*, ~~or~~ electronic communication service, *regardless of the*
15 *location or principle place of business of such provider of electronic*
16 *communication service*, or public utility, landlord, custodian or other
17 person shall furnish the applicant forthwith all information, facilities and
18 technical assistance necessary to accomplish the interception
19 unobtrusively and with a minimum of interference with the services that
20 such service provider, utility, landlord, custodian or person is according
21 the person whose communications are to be intercepted. Any provider of
22 wire or electronic communication service or public utility, landlord,
23 custodian or other person furnishing such facilities or technical assistance
24 shall be compensated therefor by the applicant for reasonable expenses
25 incurred in providing such facilities or technical assistance.

26 (5) No order entered under this section may authorize the
27 interception of any wire, oral or electronic communication for any period
28 longer than is necessary to achieve the objective of the authorization, nor
29 in any event longer than 30 days. Such thirty-day period begins on the
30 earlier of the day on which the investigative or law enforcement officer
31 first begins to conduct an interception under the order or 10 days after the
32 order is entered. Extensions of an order may be granted, but only upon
33 application for an extension made in accordance with subsection (1) of
34 this section and the court making the findings required by subsection (3)
35 of this section. The period of any such extension shall be no longer than
36 the authorizing judge deems necessary to achieve the purposes for which
37 it was granted and in no event for longer than 30 days. Every order and
38 extension thereof shall contain a provision that the authorization to
39 intercept shall be executed as soon as practicable, shall be conducted in
40 such a way as to minimize the interception of communications not
41 otherwise subject to interception under this act, and must terminate upon
42 attainment of the authorized objective, or in any event in 30 days. In the
43 event the intercepted communication is in a code or foreign language, and

1 an expert in that foreign language or code is not reasonably available
2 during the interception period, minimization may be accomplished as
3 soon as practicable after such interception. An interception under this
4 chapter may be conducted in whole or in part by government personnel,
5 or by an individual operating under a contract with the government,
6 acting under the supervision of an investigative or law enforcement
7 officer authorized to conduct the interception.

8 (6) Whenever an order authorizing the interception of wire or oral
9 communications is entered pursuant to this act, the order may require
10 reports to be made to the judge who issued the order showing what
11 progress has been made toward achievement of the authorized objective
12 and the need for continued interception. Such reports shall be made at
13 such intervals as the judge may require.

14 (7) (a) The contents of any wire, oral or electronic communication
15 intercepted by any means authorized by this act shall be recorded, if
16 possible, on tape or wire or other comparable device. The recording of
17 the contents of any wire, oral or electronic communication under this
18 subsection shall be done in a manner which will protect the recording
19 from editing or other alterations. Immediately upon the expiration of the
20 period of the order, or extensions thereof, such recordings shall be made
21 available to the judge issuing such order and sealed under such judge's
22 directions. Custody of the recordings shall be wherever the judge orders,
23 and the recordings shall not be destroyed except upon order of the issuing
24 or denying judge and, in any event, shall be kept for not less than 10
25 years. Duplicate recordings may be made for use or disclosure pursuant
26 to the provisions of subsections (b) and (c) of K.S.A. 22-2515, and
27 amendments thereto, for investigations. The presence of the seal
28 provided for by this subsection, or a satisfactory explanation for the
29 absence thereof, shall be a prerequisite for the use or disclosure of the
30 contents of any wire, oral or electronic communication or evidence
31 derived therefrom under subsection (d) of K.S.A. 22-2515, and
32 amendments thereto.

33 (b) Applications made and orders granted under this act shall be
34 sealed by the judge. Custody of the applications and orders shall be
35 wherever the judge directs. Such applications and orders shall be
36 disclosed only upon a showing of good cause before a judge of competent
37 jurisdiction and shall not be destroyed except on order of the issuing or
38 denying judge, and in any event shall be kept for not less than 10 years.

39 (c) Any violation of the provisions of paragraph (a) or (b) of this
40 subsection may be punished as contempt of the issuing or denying judge.

41 (d) Within a reasonable time but not later than 90 days after the
42 termination of the period of an order or extensions thereof the issuing or
43 denying judge shall cause to be served on the persons named in the order

1 or the application and, in the interest of justice, such other parties to
2 intercepted communications as the judge may determine, an inventory
3 which shall include notice of:

4 (i) the fact of the entry of the order or the application;

5 (ii) the date of the entry and the period of authorized, approved or
6 disapproved interception, or the denial of the application; and

7 (iii) the fact that during the period wire, oral or electronic
8 communications were or were not intercepted.

9 The judge, upon the filing of a motion in such judge's discretion, may
10 make available to such person or such person's counsel for inspection,
11 such portions of the intercepted communications, applications and orders
12 as the judge determines to be in the interest of justice. On an *ex parte*
13 showing of good cause to a judge of competent jurisdiction the serving of
14 the inventory required by this subsection may be postponed.

15 (8) The contents of any intercepted wire, oral or electronic
16 communication or evidence derived therefrom shall not be received in
17 evidence or otherwise disclosed in any trial, hearing or other proceeding
18 in any federal court or court of this state, unless each party, not less than
19 10 days before the trial, hearing or proceeding, has been furnished with a
20 copy of the court order, and accompanying application, under which the
21 interception was authorized. Such ten-day period may be waived by the
22 judge, if the judge finds that it was not possible to furnish the party with
23 the above information 10 days before the trial, hearing or proceeding, and
24 that the party will not be prejudiced by the delay in receiving such
25 information.

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

31 (i) The communication was unlawfully intercepted;

32 (ii) The order of authorization under which it was intercepted is
33 insufficient on its face; or

34 (iii) The interception was not made in conformity with the order of
35 authorization.

36 Such motion shall be made before the trial, hearing or proceeding,
37 unless there was no opportunity to make such motion or the person was
38 not aware of the grounds of the motion. If the motion is granted, the
39 contents of the intercepted wire or oral communication, or evidence
40 derived therefrom, shall be treated as having been obtained in violation of
41 this act. Upon the filing of such motion by the aggrieved person, the
42 judge in such judge's discretion may make available to the aggrieved
43 person or such person's counsel for inspection such portions of the

1 intercepted communication or evidence derived therefrom as the judge
2 determines to be in the interest of justice.

3 (b) In addition to any other right to appeal, the state shall have the
4 right to appeal:

5 (i) From an order granting a motion to suppress made under
6 paragraph (a) of this subsection. Such appeal shall be taken within 14
7 days after the order of suppression was entered and shall be diligently
8 prosecuted as in the case of other interlocutory appeals or under such
9 rules as the supreme court may adopt;

10 (ii) From an order denying an application for an order authorizing
11 the interception of wire or oral communications, and any such appeal
12 shall be *ex parte* and shall be in camera in preference to all other pending
13 appeals in accordance with rules promulgated by the supreme court.

14 (10) The requirements of subsections (1)(b)(ii) and (3)(d) of this
15 section relating to the specification of the facilities from which, or the
16 place where, the communication is to be intercepted do not apply if:

17 (a) In the case of an application with respect to the interception of an
18 oral communication:

19 (i) The application is by a law enforcement officer and is approved
20 by the attorney general and the county or district attorney where the
21 application is sought;

22 (ii) the application contains a full and complete statement as to why
23 such specification is not practical and identifies the person committing
24 the offense and whose communications are to be intercepted; and

25 (iii) the judge finds that such specification is not practical; and

26 (b) in the case of an application with respect to a wire or electronic
27 communication:

28 (i) the application is by a law enforcement officer and is approved
29 by the attorney general and the county or district attorney where the
30 application is sought;

31 (ii) the application identifies the person believed to be committing
32 the offense and whose communications are to be intercepted and the
33 applicant makes a showing of a purpose, on the part of that person, to
34 thwart interception by changing facilities; and

35 (iii) the judge finds that such purpose has been adequately shown.

36 (11) An interception of a communication under an order with respect
37 to which the requirements of subsections (1)(b)(ii) and (3)(d) of this
38 section do not apply by reason of subsection (10) shall not begin until the
39 facilities from which, or the place where, the communication is to be
40 intercepted is ascertained by the person implementing the interception
41 order. A provider of wire or electronic communications service that has
42 received an order as provided for in subsection (10)(b) may move the
43 court to modify or quash the order on the ground that its assistance with

1 respect to the interception cannot be performed in a timely or reasonable
2 fashion. The court, upon notice to the government, shall decide such a
3 motion expeditiously.

4 ~~(e)-(12)~~(12) The remedies and sanctions described in this chapter
5 with respect to the interception of electronic communications are the only
6 judicial remedies and sanctions for nonconstitutional violations of this act
7 involving such communications.

8 Sec. 3. K.S.A. 2010 Supp. 22-2502 and 22-2516 are hereby
9 repealed.

10 Sec. 4. This act shall take effect and be in force from and after its
11 publication in the statute book.

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