

State of South Dakota

NINETY-SECOND SESSION
LEGISLATIVE ASSEMBLY, 2017

400Y0289

HOUSE JUDICIARY ENGROSSED NO. **HB 1028** 1/13/2017

Introduced by: The Committee on Judiciary at the request of the Department of Public Safety

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the interception of
2 certain communications.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 23A-35A-1 be amended to read:

5 23A-35A-1. Terms used in this chapter mean:

6 (1) "Aggrieved person," a person who was a party to any intercepted wire, electronic, or
7 oral communication or a person against whom the interception was directed;

8 (2) "Attorney general," the attorney general of the State of South Dakota;

9 (3) "Chapter 119 of the United States Code," Chapter 119 of Part I of Title 18, United
10 States Code, being Public Law 90-351, the Omnibus Crime Control and Safe Streets
11 Act of 1968;

12 (4) "Communications common carrier," the meaning ~~which is~~ given to the term,
13 "common carrier", by section ~~153(h)~~ 153 of Title 47 of the United States Code;

14 (5) "Contents," ~~when used~~ with respect to any wire, electronic, or oral communication,
15 any information concerning the identity of the parties to ~~such~~ the communication or



- 1 the existence, substance, purport, or meaning of that communication;
- 2 (6) "Eavesdropping device," any electronic, mechanical, or other apparatus which is
3 intentionally used to intercept a wire, electronic, or oral communication other than:
- 4 (a) Any telephone ~~or~~, telegraph instrument, or electronic communication device,
5 equipment, or facility, or any component thereof, (i) furnished to the
6 subscriber or user by a communications common carrier in the ordinary course
7 of ~~its~~ business and being used by the subscriber or user in the ordinary course
8 of ~~its~~ business; or (ii) being used by a communications common carrier in the
9 ordinary course of ~~its~~ business, or by an investigative or law enforcement
10 officer in the ordinary course of duty; or
- 11 (b) A hearing aid or similar device being used to correct subnormal hearing to not
12 better than normal;
- 13 (7) "Intercept," the aural acquisition of the contents of any wire, electronic, or oral
14 communication through the use of any eavesdropping device;
- 15 (8) "Investigative or law enforcement officer," any officer of the State of South Dakota
16 or any political subdivision ~~thereof~~ of this state who is empowered by the laws of this
17 state to conduct investigations of or to make arrests for offenses designated and
18 enumerated in this chapter, any law enforcement officer of the United States and any
19 attorney authorized by the laws of this state to prosecute or participate in the
20 prosecution of offenses designated and enumerated in this chapter;
- 21 (9) "Judge," or "judge of competent jurisdiction," the judge of any circuit court of the
22 State of South Dakota;
- 23 (10) "Oral communication," any oral communication uttered by a person exhibiting an
24 expectation that ~~such~~ the communication is not subject to interception under

1 circumstances justifying ~~such~~ the expectation;

2 (11) "Pen register," a device which records or decodes electronic or other impulses which
3 identify the numbers dialed or otherwise transmitted on the ~~telephone line to which~~
4 communication system that the device is attached, ~~but the~~. The term does not include
5 any device used by a provider or customer of a wire communication service for
6 billing, or recording as an incident to billing, for communications services provided
7 by the provider or customer of a wire communication service for cost accounting or
8 other ~~like~~ similar purposes in the ordinary course of ~~its~~ business;

9 (12) "Person," any employee, or agent of the United States or any state or political
10 subdivision thereof, and any individual, partnership, limited liability company,
11 association, joint stock company, trust, or corporation;

12 (13) "State's attorney," the state's attorney of any county of the State of South Dakota;

13 (14) "Trap and trace device," a device ~~which that~~ captures ~~the~~ incoming electronic or other
14 impulses ~~which that~~ identify the originating number of an instrument or device from
15 which a wire or electronic communication was transmitted; ~~and~~

16 (15) "Wire communication," any communication made ~~in whole or in part~~ through the use
17 of facilities for the transmission of communications by the aid of wire, cable, radio,
18 or other ~~like~~ connection between the point of origin and the point of reception
19 furnished or operated by any person engaged as a common carrier in providing or
20 operating ~~such~~ the facilities for the transmission of interstate or foreign
21 communications;

22 (16) "Electronic communication," any transfer of signs, signals, writings, images, sounds,
23 data, or intelligence of any nature transmitted by a wire, radio, electromagnetic,
24 electronic, or optical system.

1 Section 2. That § 23A-35A-2 be amended to read:

2 23A-35A-2. ~~Orders~~ Any order authorizing or approving the interception of wire, electronic,
3 or oral communications may be granted, subject to the provisions of this chapter ~~when,~~ if the
4 interception may provide or has provided evidence of the commission of, or of any conspiracy
5 to commit, the following offenses as otherwise defined by the laws of this state: murder;
6 kidnapping; gambling; robbery; bribery; theft; unlawful use of a computer; unauthorized
7 manufacturing, distribution or counterfeiting of controlled substances or marijuana; and; rape.

8 Section 3. That § 23A-35A-3 be amended to read:

9 23A-35A-3. The attorney general or any state's attorney may apply to any circuit judge for
10 an order ~~authorizing or approving~~ to authorize or approve the interception of wire, electronic,
11 or oral communications by an investigative or law enforcement ~~officers~~ officer having the
12 responsibility ~~for the investigation of~~ of investigating the offense for which the application is
13 made and ~~for the offenses designated and enumerated in~~ any offense pursuant to § 23A-35A-2.
14 The attorney general or the state's attorney applying may designate a deputy or assistant ~~who~~
15 ~~may~~ to make any subsequent applications or presentations ~~which are~~ necessary to implement
16 the order or comply with any of the provisions of this chapter.

17 Section 4. That § 23A-35A-4 be amended to read:

18 23A-35A-4. ~~An~~ The attorney general or state's attorney shall make an application pursuant
19 to § 23A-35A-3 ~~shall be made~~ in writing and upon the oath or affirmation of the applicant. ~~It~~
20 The application shall include:

- 21 (1) The name and title of the applicant;
- 22 (2) A full and complete statement of the facts and circumstances relied upon by the
23 applicant, including the supporting oath or affirmation of the investigating ~~peace~~
24 officer of any police department of the state or any political subdivision thereof, or

1 the investigating sheriff or deputy of any county, to justify ~~his~~ the belief that an order
2 should be issued, including:

3 (a) Details as to the particular crime that has been, is being, or is about to be
4 committed;

5 (b) The identity of the person, if known, believed to be committing the offense
6 and whose communications are to be intercepted;

7 (c) A particular description of the type of communications sought to be
8 intercepted;

9 (d) A particular description of the nature and location of the facilities from which
10 or the place where the communication is to be intercepted; and

11 (e) In the case of a telegraphic, electronic, or telephonic communication,
12 identifying the particular telephone number or telegraph line involved;

13 (3) A full and complete statement as to ~~whether or not~~ if other investigative procedures
14 have been tried and failed ~~or~~, why ~~they~~ other investigative procedures reasonably
15 appear to be unlikely to succeed if tried, or to be too dangerous;

16 (4) A statement of the period of time ~~for which~~ the interception is required to be
17 maintained. If the nature of the investigation is such that authorization to intercept
18 should not automatically terminate when the described type of communication has
19 been first obtained, a particular description of facts establishing probable cause to
20 believe that additional communications of the same type will occur ~~thereafter~~ after
21 the first communication obtained;

22 (5) A full and complete statement of the facts concerning all previous applications
23 known to the ~~individual~~ person authorizing and making the application, made to any
24 judge for authorization to intercept, or for approval of interceptions of, wire,

1 electronic, or oral communications involving any of the same persons, facilities, or
2 places specified in the application, and the action taken by the judge on each such
3 application; and

4 (6) ~~Where~~ If the application is for the extension of an order, a statement setting forth the
5 results thus far obtained from the interception, or a reasonable explanation of the
6 failure to obtain such results.

7 Section 5. That § 23A-35A-5 be amended to read:

8 23A-35A-5. Only a judge of a circuit court of the State of South Dakota ~~is authorized to~~ may
9 grant orders authorizing the interception of wire, electronic, or oral communications.

10 Section 6. That § 23A-35A-6 be amended to read:

11 23A-35A-6. Upon proper application, a judge may enter an ex parte order, as requested or
12 with any appropriate modifications, authorizing wiretapping or eavesdropping if ~~he~~ the judge
13 determines based on the ~~basis of the~~ facts submitted by the applicant that:

14 (1) There is probable cause to believe that ~~an individual~~ a person is committing, has
15 committed, or is about to commit a particular crime ~~included within~~ pursuant to
16 § 23A-35A-2;

17 (2) There is probable cause to believe that particular communications concerning that
18 offense will be obtained through ~~such~~ the interception;

19 (3) Normal investigative procedures have been tried and have failed ~~or,~~ reasonably
20 appear to be unlikely to succeed if tried, or to be too dangerous; and

21 (4) There is probable cause to believe that the facilities from which; or the place where;
22 the wire, electronic, or oral communications are to be used, in connection with the
23 commission of ~~such~~ the offense, or are leased to, listed in the name of or commonly
24 used by ~~such~~ the person.

1 Section 7. That § 23A-35A-7 be amended to read:

2 23A-35A-7. Each order authorizing the interception of any wire, electronic, or oral
3 communication shall specify:

4 (1) The identity of the person, if known, whose communications are to be intercepted;

5 (2) The nature and location of the communications facilities as to which, or the place
6 where authority to intercept is granted;

7 (3) A particular description of the type of communication sought to be intercepted, and
8 a statement of the particular offense to which it relates;

9 (4) The identity of the agency authorized to intercept the communications, and of the
10 person authorizing the application;

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

14 (6) That the authorization for wiretapping or eavesdropping be executed as soon as
15 practicable; that ~~it~~ the wiretapping or eavesdropping be conducted in such a way as
16 to minimize interception of communications not otherwise subject to interception
17 under this section; and that ~~it~~ the wiretapping or eavesdropping shall terminate upon
18 attainment of the authorized objective, or on the date specified, whichever comes
19 first.

20 Section 8. That § 23A-35A-10 be amended to read:

21 23A-35A-10. No order entered under this section may authorize the interception of any wire,
22 electronic, or oral communication for any period longer than is necessary to achieve the
23 objective of the authorization, in any event no longer than thirty days. ~~Extensions~~ Any extension
24 of any order may be granted, but only upon application for an extension made in accordance

1 with § 23A-35A-4 and the ~~court making~~ judge makes the findings required by findings pursuant
2 to § 23A-35A-6. The period of extension ~~shall be no~~ may not be longer than the authorizing
3 judge deems necessary to achieve the purposes for which it the extension was granted and in no
4 event for longer than thirty days.

5 Section 9. That § 23A-35A-13 be amended to read:

6 23A-35A-13. The contents of any wire, electronic, or oral communication intercepted by any
7 means authorized by this statute shall, if possible, be recorded ~~on tape or wire or other~~
8 ~~comparable device~~. The recording of the contents of any wire, electronic, or oral communication
9 under this ~~subsection~~ section shall be done in ~~such~~ a way as ~~will~~ to protect the recording from
10 editing or ~~alterations~~ alteration. Immediately upon the expiration of the period of the order or
11 ~~extensions thereof, such~~ extension, the recordings shall be made available to the judge issuing
12 ~~such the order or extension~~ and sealed under ~~his directions~~ the judge's direction.

13 Section 10. That § 23A-35A-14 be amended to read:

14 23A-35A-14. Within ninety days after an application under § 23A-35A-3 is denied, or the
15 period of an order or ~~extensions thereof~~ extension expires, the issuing or denying judge shall
16 cause the persons named in the order or application and ~~such~~ any other parties to intercepted
17 communications as ~~he~~ the judge may determine the interests of justice require, to be served with
18 an inventory including notice of:

- 19 (1) The fact of the entry of the order or the application;
- 20 (2) The date of the entry and the period of authorized interception, or the denial of the
21 application; and
- 22 (3) The fact that during the period wire, electronic, or oral communications were or were
23 not intercepted.

24 On motion, the judge may ~~in his discretion~~ make available to ~~such~~ the person or ~~his~~ the

1 person's counsel for inspection ~~such~~ the portions of the intercepted communications,
2 applications, and order as ~~he~~ the judge determines to be in the interest of justice. On an ex parte
3 showing of good cause to the judge, the serving of the notice required by this section may be
4 postponed.

5 Section 11. That § 23A-35A-15 be amended to read:

6 23A-35A-15. Any investigative or law enforcement officer who, by any means authorized
7 by this chapter, has obtained knowledge of the contents of any wire, electronic, or oral
8 communication, or evidence derived ~~therefrom~~ from the contents, may disclose ~~such~~ the
9 contents to another investigative or law enforcement officer to the extent that ~~such~~ a disclosure
10 is appropriate to the proper performance of the official duties of the officer making or receiving
11 the disclosure.

12 Section 12. That § 23A-35A-16 be amended to read:

13 23A-35A-16. Any investigative or law enforcement officer who, by any means authorized
14 by this chapter, has obtained knowledge of the contents of any wire, electronic, or oral
15 communication or evidence derived ~~therefrom~~ from the contents may use ~~such~~ the contents to
16 the extent ~~such use is~~ appropriate to the proper performance of ~~his~~ the officer's official duties.

17 Section 13. That § 23A-35A-17 be amended to read:

18 23A-35A-17. Any person, who has received, by any means authorized by this chapter or
19 chapter 119 of the United States Code, or ~~by~~ a like statute of another state, any information
20 concerning the contents of a wire, electronic, or oral communication, or evidence derived
21 ~~therefrom~~ from the contents, intercepted in accordance with the provisions of this chapter may
22 disclose the contents of that communication or ~~such~~ any derivative evidence while giving
23 testimony under oath or affirmation in any proceeding in any court ~~or~~ in this state, before any
24 grand jury in this state, ~~or~~ in any court of the United States or of any other state, or in any federal

1 or state grand jury proceeding.

2 Section 14. That § 23A-35A-18 be amended to read:

3 23A-35A-18. ~~When~~ If an investigative or law enforcement officer, while engaged in
4 intercepting wire, electronic, or oral communications in the manner authorized by this chapter,
5 intercepts wire, electronic, or oral communications relating to offenses ~~other than those~~ not
6 specified in the order of authorization or approval, the contents ~~thereof~~ of the communication,
7 and evidence derived ~~therefrom~~ from the communication, may be disclosed or used as provided
8 in §§ 23A-35A-15 and 23A-35A-16. ~~Such~~ The contents and any evidence derived ~~therefrom~~
9 from the contents may be used under § 23A-35A-17 ~~when~~ if authorized or approved by a circuit
10 court judge where ~~such~~ the judge finds on subsequent application, made as soon as practicable,
11 that the contents were otherwise intercepted in accordance with the provisions of this chapter.

12 Section 15. That § 23A-35A-19 be amended to read:

13 23A-35A-19. No otherwise privileged wire, electronic, or oral communication intercepted
14 in accordance with, or in violation of, the provisions of this chapter ~~shall~~ may lose its privileged
15 character.

16 Section 16. That § 23A-35A-20 be amended to read:

17 23A-35A-20. Except as provided in § 23A-35A-21, a person is guilty of a Class 5 felony
18 who ~~being~~ is not:

19 (1) ~~Not a~~ A sender or receiver of a ~~telephone or telegraph~~ communication; who
20 intentionally and by means of an eavesdropping device overhears or records a
21 ~~telephone or telegraph~~ communication, or aids, authorizes, employs, procures, or
22 permits another to ~~so do~~ overhear or record, without the consent of either a sender or
23 receiver ~~thereof~~ of the communication;

24 (2) ~~Not~~ A person present during a conversation or discussion; who intentionally and by

1 means of an eavesdropping device overhears or records ~~such~~ the conversation or
 2 discussion, or aids, authorizes, employs, procures, or permits another to ~~so do~~
 3 overhear or record, without the consent of a party to ~~such~~ the conversation or
 4 discussion; or

5 (3) ~~Not a~~ A member of a jury; who intentionally records or listens to by means of an
 6 eavesdropping device the deliberations of the jury or aids, authorizes, employs,
 7 procures, or permits another to ~~so do~~ record or listen.

8 Section 17. That § 23A-35A-21 be amended to read:

9 23A-35A-21. The following is exempt from the provisions of this chapter:

10 (1) Wiretapping and eavesdropping pursuant to an ex parte order granted pursuant to
 11 § 23A-35A-6;

12 (2) The normal use of services, equipment, and facilities provided by a common carrier
 13 pursuant to tariffs on file with the Public Utilities Commission of the State of South
 14 Dakota or the ~~Federal Communications Commission~~ federal communications
 15 commission;

16 (3) The normal functions of any operator of a switchboard;

17 (4) Any officer, agent, or employee of a communications common carrier engaged in the
 18 business of providing service, equipment, and facilities for communication who
 19 performs acts otherwise prohibited by this chapter in providing such communication
 20 services, equipment, and facilities or in constructing, maintaining, repairing,
 21 operating, or using same, including the obtaining of billing and accounting
 22 information, the protecting of ~~such~~ the communication services, equipment, and
 23 facilities from illegal use in violation of tariffs on file with the corporation
 24 commission of this state or the federal communications commission and the

1 protecting of the common carrier from the commission of fraud against it;

2 (5) The providing of requested information or other response to a subpoena or other
3 order issued by a court of competent jurisdiction or on demand of other lawful
4 authority; and

5 (6) Any officer, agent, or employee of a communications common carrier, or any
6 common carrier, who provides information, facilities, or technical assistance to an
7 investigative or law enforcement officer ~~who is~~ authorized to ~~wiretap~~ intercept or
8 eavesdrop pursuant to an ex parte order granted pursuant to § 23A-35A-6.

9 Section 18. That § 23A-35A-23 be amended to read:

10 23A-35A-23. The prohibition in § 23A-35A-22 does not apply with respect to the use of a
11 pen register or a trap and trace device by a provider of wire or electronic communication
12 service:

13 (1) Relating to the operation, maintenance, and testing of a wire or electronic
14 communication service or to the protection of the rights or property of the provider,
15 or to the protection of users of that service from abuse of service or unlawful use of
16 service;

17 (2) To record the fact that a wire or electronic communication was initiated or completed
18 in order to protect the provider, another provider furnishing service toward the
19 completion of the wire or electronic communication, or a user of that service, from
20 fraudulent, unlawful, or abusive use of service; or

21 (3) If the consent of the user of that service has been obtained.

22 Section 19. That § 23A-35A-27 be amended to read:

23 23A-35A-27. An order issued under § 23A-35A-26:

24 (1) Shall specify the identity, if known, of the person ~~to whom is leased or in~~ whose

1 name is listed on the telephone line ~~to which~~ or electronic communication device that
2 the pen register or trap and trace device is to be attached; the identity, if known, of
3 the person who is the subject of the criminal investigation; the number and, if known,
4 the physical location of the telephone line to which or electronic communication
5 device that the pen register or trap and trace device is to be attached and, in the case
6 of a trap and trace device, the geographic limits of the trap and trace order; and a
7 statement of the offense ~~to which~~ the information likely to be obtained by the pen
8 register or trap and trace device relates to; and

- 9 (2) Shall direct, upon the request of the applicant, the furnishing of information,
10 facilities, and technical assistance necessary to accomplish the installation of the pen
11 register or trap and trace device under §§ 23A-35A-30 to 23A-35A-33, inclusive.

12 Section 20. That § 23A-35A-31 be amended to read:

13 23A-35A-31. Upon the request of a prosecuting attorney or an officer of a law enforcement
14 agency authorized to receive the results of a trap and trace device under § 23A-35A-1 or
15 §§ 23A-35A-22 to 23A-35A-34, inclusive, a provider of a wire or electronic communication
16 service, landlord, custodian, or other person shall install the device immediately on the
17 appropriate line or electronic device and shall furnish the investigative or law enforcement
18 officer all additional information, facilities, and technical assistance including installation and
19 operation of the device unobtrusively and with ~~a minimum of~~ minimal interference with the
20 services ~~that the person so~~ ordered by the court ~~accords~~ provides the party with respect to ~~whom~~
21 the installation and use is to take place, if the installation and assistance is directed by a court
22 order as provided in § 23A-35A-27. Unless otherwise ordered by the court, the results of the
23 trap and trace device shall be furnished to the officer of a law enforcement agency, designated
24 in the court order, at reasonable intervals during regular business hours for the duration of the

1 order.