

FIRST REGULAR SESSION
[P E R F E C T E D]
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 84
99TH GENERAL ASSEMBLY

Reported from the Committee on the Judiciary and Civil and Criminal Jurisprudence, February 16, 2017, with recommendation that the Senate Committee Substitute do pass.

Senate Committee Substitute for Senate Bill No. 84, adopted April 3, 2017.

Taken up for Perfection April 3, 2017. Bill declared Perfected and Ordered Printed.

ADRIANE D. CROUSE, Secretary.

0052S.02P

AN ACT

To repeal sections 542.400, 542.402, 542.406, 542.412, 542.414, 542.416, 542.418, and 542.420, RSMo, and to enact in lieu thereof nine new sections relating to the authority to engage in certain investigative practices, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 542.400, 542.402, 542.406, 542.412, 542.414, 542.416, 542.418, and 542.420, RSMo, are repealed and nine new sections enacted in lieu thereof, to be known as sections 542.400, 542.402, 542.405, 542.406, 542.412, 542.414, 542.416, 542.418, and 542.420, to read as follows:

542.400. As used in sections 542.400 to 542.422, the following words and phrases mean:

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

(2) "Cell site simulator device", an international mobile subscriber identity catcher or other device that mimics a cell phone tower and sends out signals to cause communications devices in the area to transmit their locations, identifying information of the subscriber or customer of a communication common carrier, or the contents of any communication, data, or metadata sent or received by or stored on a communications device;

(3) "Communication common carrier", an individual or corporation undertaking to transport messages for compensation;

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

14 [(3)] (4) **"Communications device", any device that transmits or**
15 **receives radio waves, and is capable of sending or receiving**
16 **communications, including cell phones, aircards, tablets, and laptops;**

17 (5) "Contents", when used with respect to any wire communication,
18 includes any information concerning the identity of the parties, the substance,
19 purport, or meaning of that communication;

20 [(4)] (6) "Court of competent jurisdiction", any circuit court having
21 general criminal jurisdiction within the territorial jurisdiction where the
22 communication is to be intercepted including any circuit judge specially assigned
23 by the supreme court of Missouri pursuant to section 542.404;

24 [(5)] (7) "Electronic, mechanical, or other device", any device or
25 apparatus which can be used to intercept a wire communication other than:

26 (a) Any telephone or telegraph instrument, equipment or facility, or any
27 component thereof, owned by the user or furnished to the subscriber or user by
28 a communications common carrier in the ordinary course of its business and being
29 used by the subscriber or user in the ordinary course of its business or being used
30 by a communications common carrier in the ordinary course of its business or by
31 an investigative office or law enforcement officer in the ordinary course of his
32 duties; or

33 (b) A hearing aid or similar device being used to correct subnormal
34 hearing to not better than normal;

35 [(6)] (8) "Intercept", the aural acquisition of the contents of any wire
36 communication through the use of any electronic or mechanical device, including
37 but not limited to interception by one spouse of another spouse;

38 [(7)] (9) "Investigative officer" or "law enforcement officer or agency", any
39 officer or agency of this state or a political subdivision of this state, who is
40 empowered by law to conduct investigations of or to make arrests for offenses
41 enumerated in sections 542.400 to 542.422, and any attorney authorized by law
42 to prosecute or participate in the prosecution of such offenses;

43 [(8)] (10) "Oral communication", any communication uttered by a person
44 exhibiting an expectation that such communication is not subject to interception
45 under circumstances justifying such expectation;

46 [(9)] (11) "Person", any employee, or agent of this state or political
47 subdivision of this state, and any individual, partnership, association, joint stock
48 company, trust, or corporation;

49 [(10)] (12) "Prosecuting attorney", the elected prosecuting attorney of the

50 county or the circuit attorney of any city not contained within a county;

51 [(11)] **(13)** "State", the state of Missouri and political subdivisions of the
52 state;

53 [(12)] **(14)** "Wire communication", any communication made in whole or
54 in part through the use of facilities for the transmission of communications by the
55 aid of wire, cable, or other like connection between the point of origin and the
56 point of reception including the use of such connection in a switching station
57 furnished or operated by any person engaged as a common carrier in providing
58 or operating such facilities for the transmission of local, state or interstate
59 communications.

542.402. 1. Except as otherwise specifically provided in sections 542.400
2 to 542.422, a person is guilty of a class E felony and upon conviction shall be
3 punished as provided by law, if such person:

4 (1) Knowingly intercepts, endeavors to intercept, or procures any other
5 person to intercept or endeavor to intercept, any wire communication;

6 (2) Knowingly uses, endeavors to use, or procures any other person to use
7 or endeavor to use any electronic, mechanical, or other device to intercept any
8 oral communication when such device transmits communications by radio or
9 interferes with the transmission of such communication; provided, however, that
10 nothing in sections 542.400 to 542.422 shall be construed to prohibit the use by
11 law enforcement officers of body microphones and transmitters in undercover
12 investigations for the acquisition of evidence and the protection of law
13 enforcement officers and others working under their direction in such
14 investigations;

15 (3) Knowingly discloses, or endeavors to disclose, to any other person the
16 contents of any wire communication, when he knows or has reason to know that
17 the information was obtained through the interception of a wire communication
18 in violation of this subsection; [or]

19 (4) Knowingly uses, or endeavors to use, the contents of any wire
20 communication, when he knows or has reason to know that the information was
21 obtained through the interception of a wire communication in violation of this
22 subsection; **or**

23 **(5) Knowingly installs or uses a cell site simulator device in**
24 **violation of sections 542.400 to 542.422 to obtain information from a**
25 **communications device, including the location of the communications**
26 **device, identifying information of the subscriber or customer of a**

27 **communication common carrier, or the contents of any communication,**
28 **data, or metadata sent or received by or stored on the communications**
29 **device.**

30 2. It is not unlawful under the provisions of sections 542.400 to 542.422:

31 (1) For an operator of a switchboard, or an officer, employee, or agent of
32 any communication common carrier, whose facilities are used in the transmission
33 of a wire communication, to intercept, disclose, or use that communication in the
34 normal course of his employment while engaged in any activity which is a
35 necessary incident to the rendition of his service or to the protection of the rights
36 or property of the carrier of such communication, however, communication
37 common carriers shall not utilize service observing or random monitoring except
38 for mechanical or service quality control checks;

39 (2) For a person acting under law to intercept a wire or oral
40 communication, where such person is a party to the communication or where one
41 of the parties to the communication has given prior consent to such interception;

42 (3) For a person not acting under law to intercept a wire communication
43 where such person is a party to the communication or where one of the parties
44 to the communication has given prior consent to such interception unless such
45 communication is intercepted for the purpose of committing any criminal or
46 tortious act.

542.405. 1. An appellate judge or any judge of a court having
2 original jurisdiction of criminal offenses may issue a warrant for the
3 use of a cell site simulator device to obtain information from a
4 communications device, including the location of the device, identifying
5 information of the subscriber or customer of a communication common
6 carrier, or the contents of any communication, data, or metadata sent
7 or received by or stored on the device. A warrant under this section
8 may be issued in the same territorial jurisdiction where the
9 investigation or the communications device, or the person who owns or
10 possesses the communications device, with respect to which the
11 warrant is sought, is located.

12 2. The order may authorize the acquisition of information
13 obtained from a communications device that, at the time the
14 information is acquired, is located outside the court's jurisdiction but
15 within the state if the applicant for the warrant reasonably believes the
16 device to be located within the jurisdiction at the time the warrant is

17 issued.

18 **3. The judge may issue the warrant only on the application of an**
19 **authorized law enforcement officer. An application must be written**
20 **and signed and sworn to or affirmed before the judge. The affidavit**
21 **shall specify:**

22 **(1) The identity of the person, if known, who possesses the**
23 **communications device to be targeted by the cell site simulator device;**

24 **(2) The telephone number or other unique subscriber account**
25 **number identifying the wire or electronic communications service**
26 **account used by the communications device to be targeted by the cell**
27 **site simulator device and the identity of the person, if known, who is**
28 **subscribed to that account;**

29 **(3) The type of communications device, and the communications**
30 **protocols being used by the device, to which the cell site simulator**
31 **device is to be attached or used;**

32 **(4) The geographic area that will be covered by the cell site**
33 **simulator device;**

34 **(5) All categories of metadata, data, communications, or other**
35 **information to be collected by the cell site simulator device from the**
36 **communications device to be targeted including, call records and**
37 **geolocation information;**

38 **(6) Whether the cell site simulator device will incidentally collect**
39 **metadata, data, communications, or other information from any parties**
40 **or communications devices not specified in the warrant, and if so, what**
41 **categories of information, data, or metadata will be collected;**

42 **(7) Any disruptions to access or use of a communications or**
43 **internet access network that may be created by use of the cell site**
44 **simulator device;**

45 **(8) The name, department, agency, and address of the applicant;**

46 **(9) The type of information sought from the communications**
47 **device and how it relates to the criminal offense being investigated;**

48 **(10) The judicial circuit in which the communications device is**
49 **reasonably expected to be located;**

50 **(11) The facts and circumstances that provide the applicant with**
51 **probable cause to believe that:**

52 **(a) Criminal activity has been, is being, or will be committed;**

53 **and**

54 (b) Acquisition of data, metadata, communications, or other
55 information from the communications device is likely to produce
56 evidence in a criminal investigation of the criminal activity described
57 in paragraph (a) of this subdivision.

58 4. No order issued under this section may authorize or approve
59 the use of a cell site simulator device for any period longer than is
60 necessary to achieve the objective of the authorization, nor in any
61 event longer than thirty calendar days. The communications device
62 may not be monitored with the cell site simulator device after the
63 expiration date without an extension of the warrant. The period of
64 extension shall be no longer than the court deems necessary to achieve
65 the purposes for which it was granted and in no event longer than
66 thirty calendar days. Every warrant and extension thereof shall
67 contain a provision that the authorization to use the cell site simulator
68 device shall be executed as soon as practicable and shall terminate
69 upon attainment of the authorized objective, or in any event in thirty
70 calendar days.

71 5. An order authorizing the use of a cell site simulator device
72 shall include a provision directing that the law enforcement agency:

73 (1) Take all steps necessary to limit the collection of any data,
74 metadata, communications, or other information to the target specified
75 in the warrant;

76 (2) Take all steps necessary to delete any data, metadata,
77 communications, or other information collected from any party not
78 specified in the applicable warrant immediately following such
79 collection and shall not transmit, use, or retain such information,
80 communications, data, or metadata for any purpose whatsoever; and

81 (3) Delete any data, metadata, communications, or other
82 information collected from the target specified in the warrant within
83 thirty calendar days if there is no longer probable cause to support the
84 belief that such data, metadata, communications, or information is
85 evidence of a crime.

86 6. Notwithstanding any provision of this section to the contrary,
87 a law enforcement officer may obtain data, metadata, communications,
88 or other information from a communications device by operation of a
89 cell site simulator device without a warrant if:

90 (1) The communications device is reported stolen by the owner

91 or possessor; or

92 (2) There exists a hostage, barricade, reasonable evidence of a
93 suicide attempt, or other emergency situation in which a person
94 unlawfully and directly threatens another with death or exposes
95 another to a substantial risk of serious physical injury and which:

96 (a) Is in the territorial jurisdiction of the law enforcement
97 agency that employs the officer operating the cell site simulator device
98 or assisting in the operation of the device; and

99 (b) To prevent death or serious physical injury, necessitates the
100 use of the cell site simulator device before a warrant may be obtained
101 under this section.

102 7. An authorized law enforcement officer shall apply as soon as
103 practicable for a warrant to obtain data, metadata, communications, or
104 other information from a communications device under a circumstance
105 described by subsection 6 of this section. If the judge finds that an
106 emergency situation did not occur and declines to issue the warrant,
107 any evidence obtained from the communications device via the
108 unauthorized use of a cell site simulator device is not admissible in a
109 criminal action.

110 8. No later than the seventh calendar day after the date of the
111 expiration of a warrant under this section, the law enforcement officer
112 who requested the warrant shall deliver a copy of the warrant to the
113 owner or possessor of the communications device that was subject to
114 the order unless the court has granted a delay in notice to the owner
115 or possessor under the following circumstances:

116 (1) With respect to the issuance of any warrant or court order
117 under this section, for which any notice is required, or that may be
118 required, to be given, such notice may be delayed if the court finds
119 reasonable cause to believe that providing notification of the execution
120 of the warrant may have an adverse result by endangering the life or
121 physical safety of an individual, flight from prosecution, destruction of
122 or tampering with evidence, intimidation of potential witnesses, or
123 otherwise seriously jeopardizing an investigation or unduly delaying
124 trial;

125 (2) The court may delay the initial notice by ninety days for good
126 cause shown, and a subsequent request for extension for good cause
127 shown may also be granted, subject to the condition that extensions

128 **should only be granted upon an updated showing of the need for**
129 **further delay and that each additional delay should be limited to**
130 **periods of ninety days or less, unless the facts of the case justify a**
131 **longer period of delay.**

132 **9. Unless subsection 6 of this section or another exception to the**
133 **warrant requirement provided under state or federal law applies, a law**
134 **enforcement officer may not obtain or use information from a cell site**
135 **simulator device to assist with, participate in, provide material support**
136 **or resources for, or enable or facilitate an investigation conducted by**
137 **a law enforcement agency of the federal government or of another state**
138 **without:**

139 **(1) The consent of the owner or possessor of the communications**
140 **device; or**

141 **(2) A warrant obtained under this section.**

542.406. 1. Any investigative officer or law enforcement officer who, by
2 any means authorized by sections 542.400 to 542.422, has lawfully obtained
3 knowledge of:

4 **(1) The contents of any wire communication, or evidence derived**
5 **therefrom[.]; or**

6 **(2) The contents of any data, metadata, communication, or other**
7 **information obtained from a communications device by a cell site**
8 **simulator device;**

9 may disclose such contents to another investigative officer or law enforcement
10 officer to the extent that such disclosure is necessary to the proper performance
11 of the official duties of the officer making or receiving the disclosure for
12 investigative purposes only.

13 2. Any investigative officer or law enforcement officer who, by any means
14 authorized by sections 542.400 to 542.422, has lawfully obtained knowledge of:

15 **(1) The contents of any wire or oral communication, or evidence derived**
16 **therefrom[.]; or**

17 **(2) The contents of any data, metadata, communication, or other**
18 **information from a communications device obtained by a cell site**
19 **simulator device, or evidence derived therefrom;**

20 may use such contents to the extent such use is necessary to the proper
21 performance of his **or her** official duties.

22 3. Any person who has received, by any means authorized by sections

23 542.400 to 542.422, any **information obtained with the use of a cell site**
24 **simulator device or** information concerning a wire communication[, or evidence
25 derived therefrom,] intercepted in accordance with the provisions of sections
26 542.400 to 542.422, **or evidence derived therefrom**, shall disclose the contents
27 of that communication, **information obtained**, or such derivative evidence
28 while giving testimony under oath or affirmation in any criminal proceeding,
29 including deposition in any court or in any grand jury proceeding, subject to the
30 rules of evidence.

31 4. No otherwise privileged wire communication intercepted **or**
32 **information obtained** in accordance with, or in violation of, the provisions of
33 sections 542.400 to 542.422 shall lose its privileged character and shall be
34 suppressed upon motion.

542.412. 1. The contents of any intercepted wire communications **or**
2 **data, metadata, communication, or other information obtained from a**
3 **cell site simulator device**, or evidence derived therefrom shall not be received
4 in evidence or otherwise disclosed in any trial, hearing, or other proceeding in
5 federal or state court nor in any administrative proceeding unless each party, in
6 compliance with supreme court rules relating to discovery in criminal cases,
7 hearings and proceedings, has been furnished with a copy of the court order and
8 accompanying application under which the interception **or use of the cell site**
9 **simulator device** was authorized or approved and a transcript of any
10 intercepted wire communication, **or a copy of any data, metadata,**
11 **communication, or other information obtained from a cell site**
12 **simulator device**, or evidence derived therefrom.

13 2. If the defense in its request designates material or information not in
14 the possession or control of the state, but which is, in fact, in the possession or
15 control of other governmental personnel, the state shall use diligence and make
16 good faith efforts to cause such materials to be made available to the defendant's
17 counsel, and if the state's efforts are unsuccessful and such material or other
18 governmental personnel are subject to the jurisdiction of the court, the court,
19 upon request, shall issue suitable subpoenas or orders to cause such material or
20 information to be made available to the state for disclosure to the defense.

542.414. 1. Any aggrieved person in any trial, hearing, or proceeding in
2 or before any court, department, officer, agency, regulatory body, or other
3 authority of the United States, the state, or a political subdivision thereof, may
4 move to suppress the contents of any intercepted wire communication, **or**

5 **information, data, communication, or metadata obtained from a cell site**
6 **simulator device**, or evidence derived therefrom, on the grounds that:

7 (1) The communication was unlawfully intercepted;

8 (2) **The information, data, communication, or metadata was**
9 **unlawfully obtained by a cell site simulator device;**

10 (3) The order of authorization or approval under which [it] **the**
11 **communication** was intercepted **or the cell site simulator device was used**
12 is insufficient on its face;

13 [(3)] (4) The interception **or use of the cell site simulator device** was
14 not made in conformity with the order of authorization or approval; or

15 [(4)] (5) The communication was intercepted **or the cell site simulator**
16 **device was used** in violation of the provisions of the Constitution of the United
17 States or the state of Missouri or in violation of a state statute.

18 Such motion shall be made before the trial, hearing, or proceeding unless there
19 was no reasonable opportunity to make such motion or the person was not aware
20 of the existence of grounds for the motion. If the motion is granted, the contents
21 of the intercepted wire communication, **or information, data, communication,**
22 **or metadata obtained from the cell site simulator device**, or evidence
23 derived therefrom, or the contents of any communication intercepted **or**
24 **information, data, communication, or metadata obtained** as a result of
25 any extension of the original order authorizing or approving the interception of
26 wire communication **or use of a cell site simulator device**, and any evidence
27 derived therefrom, shall be treated as having been obtained in violation of
28 sections 542.400 to 542.422.

29 2. In addition to any other right to appeal, the state shall have the right
30 to appeal from an order granting a motion to suppress made under subsection 1
31 of this section if the prosecuting attorney shall certify to the court or other official
32 granting such motion that the appeal be taken within thirty days after the date
33 the order was entered and shall be diligently prosecuted.

542.416. 1. Within thirty days after the expiration of an order or each
2 extension thereof entered pursuant to the provisions of **section 542.405 or**
3 **section 542.408**, the issuing court shall report to the state courts administrator:

4 (1) The fact that an order or extension was applied for;

5 (2) The kind of order or extension applied for;

6 (3) The fact that the order or extension was granted as applied for, was
7 modified, or was denied;

8 (4) The period of interceptions **or use of a cell site simulator device**
9 authorized by the order, and the number and duration of any extensions of the
10 order;

11 (5) The offense specified in the order or application, or extension of an
12 order;

13 (6) The identity of the applying investigative officer or law enforcement
14 officer and agency making the application and the person authorizing the
15 application; and

16 (7) The nature of the facilities from which or the place where
17 communications were to be intercepted **or the cell site simulator device was**
18 **to be used.**

19 2. In January of each year, the principal prosecuting attorney for any
20 political subdivision of the state shall report to the state courts administrator:

21 (1) The information required by subdivisions (1) through (7) of subsection
22 1 of this section with respect to each application for an order or extension made
23 during the preceding calendar year;

24 (2) A general description of the interceptions made, **or information**
25 **collected from a cell site simulator device**, under such order or extension,
26 including:

27 (a) The approximate nature and frequency of incriminating
28 communications intercepted **or information obtained from a cell site**
29 **simulator device**;

30 (b) The approximate nature and frequency of other communications
31 intercepted **or information obtained from a cell site simulator device**;

32 (c) The approximate number of persons whose communications were
33 intercepted **or whose information was obtained from a cell site simulator**
34 **device**; and

35 (d) The approximate nature, amount, and cost of the manpower and other
36 resources used in the interceptions **or use of a cell site simulator device**;

37 (3) The number of arrests resulting from interceptions made **or use of a**
38 **cell site simulator device** under such order or extension, and the offenses for
39 which arrests were made;

40 (4) The number of trials resulting from such interceptions **or cell site**
41 **simulator device use**;

42 (5) The number of motions to suppress made with respect to such
43 interceptions **or cell site simulator device use**, and the number granted or

44 denied;

45 (6) The number of convictions resulting from such interceptions **or cell**
46 **site simulator device use** and the offenses for which the convictions were
47 obtained and a general assessment of the importance of the interceptions **or use**
48 **of the device**; and

49 (7) The information required by subdivisions (2) through (6) of this
50 subsection with respect to orders or extensions obtained in the preceding calendar
51 year.

52 3. In April of each year the state courts administrator shall transmit to
53 the Missouri general assembly a full and complete report concerning the number
54 of applications for orders authorizing or approving the interception of wire
55 communications **and use of cell site simulator devices** and the number of
56 orders and extensions granted or denied during the preceding calendar
57 year. Such report shall include a summary and analysis of the data required to
58 be filed with the state courts administrator by subsections 1 and 2 of this
59 section. The state courts administrator may promulgate rules and regulations
60 dealing with the content and form of the reports required to be filed by
61 subsections 1 and 2 of this section.

542.418. 1. The contents of any wire communication, **or data, metadata,**
2 **communication, or other information obtained from a cell site**
3 **simulator device**, or evidence derived therefrom shall not be received in
4 evidence or otherwise disclosed in any civil or administrative proceeding, except
5 in civil actions brought pursuant to this section.

6 2. Any person whose wire communication is intercepted, disclosed, or used
7 in violation of sections 542.400 to 542.422 **or whose data, metadata,**
8 **communication, or other information is obtained from a cell site**
9 **simulator device, disclosed, or used in violation of such sections** shall:

10 (1) Have a civil cause of action against any person who intercepts,
11 **obtains**, discloses, or uses, or procures any other person to intercept, **obtain**,
12 disclose, or use such communications, **information, data, or metadata**; and

13 (2) Be entitled to recover from any such person:

14 (a) Actual damages, but not less than liquidated damages computed at the
15 rate of one hundred dollars a day for each day of violation or ten thousand dollars
16 whichever is greater;

17 (b) Punitive damages on a showing of a willful or intentional violation of
18 sections 542.400 to 542.422; and

19 (c) A reasonable attorney's fee and other litigation costs reasonably
20 incurred.

21 3. A good faith reliance on a court order or on the provisions of **section**
22 **542.405** or section 542.408 shall constitute a prima facie defense to any civil or
23 criminal action brought under sections 542.400 to 542.422.

24 4. Nothing contained in this section shall limit any cause of action
25 available prior to August 28, 1989.

542.420. Whenever any wire communication has been intercepted **or cell**
2 **site simulator device has been used**, no part of the contents of such
3 communication, **or the contents of data, metadata, communications, or**
4 **information obtained from the cell site simulator device**, and no evidence
5 derived therefrom may be received in evidence in any trial, hearing, or other
6 proceeding in or before any court, grand jury, department, officer, agency,
7 regulatory body, legislative committee, or other authority of the United States,
8 a state, or a political subdivision thereof if the disclosure of that information
9 would be in violation of sections 542.400 to 542.422.

Bill ✓

Copy