

SECOND REGULAR SESSION

[PERFECTED]

HOUSE COMMITTEE SUBSTITUTE FOR

HOUSE BILL NO. 2104

99TH GENERAL ASSEMBLY

5873H.02P

D. ADAM CRUMBLISS, Chief Clerk

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 ten new sections relating to the authority to engage in certain investigative practices, with penalty provisions and an emergency clause for a certain section.

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Section A. Sections 542.400, 542.402, 542.406, 542.412, 542.414, 542.416, 542.418, and 542.420, RSMo, are repealed and ten new sections enacted in lieu thereof, to be known as sections 1.500, 542.400, 542.402, 542.405, 542.406, 542.412, 542.414, 542.416, 542.418, and 542.420, to read as follows:

1.500. 1. This section shall be known and may be cited as the "Fourth Amendment Rights Protection Act".

2. As used in this section, the following terms mean:

(1) "Electronic data", information related to an electronic communication or the use of an electronic communication service including, but not limited to, the contents, sender, recipients, or format of an electronic communication; the precise or proximate location of the sender or recipients of an electronic communication at any time during the communication; the time or date the communication was created, sent, or received; and the identity of an individual or device involved in the communication including, but not limited to, an internet protocol address. The term "electronic data" shall not include subscriber information;

(2) "Metadata", information generally not visible when an electronic document is printed describing the history, tracking, or management of an electronic document,

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

14 **including information about data in the electronic document that describes how, when, and**
15 **by whom the data were collected, created, accessed, or modified and how the data are**
16 **formed. The term "metadata" shall not include a spreadsheet formula, a database field,**
17 **an externally or internally linked file, or a reference to an external file or hyperlink.**

18 **3. This state and its agencies, political subdivisions, special districts, or employees**
19 **shall not assist, participate with, or provide material support or resources to a federal**
20 **agency to enable it to collect or facilitate in the collection or use of a person's electronic**
21 **data or metadata unless one or more of the following circumstances apply:**

22 **(1) The person has given informed consent;**

23 **(2) The action is pursuant to a warrant that is based upon probable cause and**
24 **particularly describes the person, place, or thing to be searched or seized; or**

25 **(3) The action is in accordance with a legally recognized exception to the warrant**
26 **requirement.**

27 **4. The attorney general shall enforce the provisions of this section in accordance**
28 **with the Constitution of the United States and the Constitution of Missouri.**

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

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

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

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

12 ~~[(3)]~~ **(4) "Communications device", any device that transmits or receives radio**
13 **waves and is capable of sending or receiving communications, including cell phones,**
14 **aircards, tablets, and laptops;**

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

18 ~~[(4)]~~ **(6) "Court of competent jurisdiction", any circuit court having general criminal**
19 **jurisdiction within the territorial jurisdiction where the communication is to be intercepted**
20 **including any circuit judge specially assigned by the supreme court of Missouri pursuant to**
21 **section 542.404;**

22 ~~[(5)]~~ (7) "Electronic, mechanical, or other device", any device or apparatus which can
23 be used to intercept a wire communication other than:

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

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

32 ~~[(6)]~~ (8) "Intercept", the ~~aural~~ acquisition of the contents of any wire communication
33 through the use of any electronic or mechanical device, including but not limited to interception
34 by one spouse of another spouse;

35 ~~[(7)]~~ (9) "Investigative officer" or "law enforcement officer or agency", any officer or
36 agency of this state or a political subdivision of this state, who is empowered by law to conduct
37 investigations of or to make arrests for offenses enumerated in sections 542.400 to 542.422, and
38 any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

39 ~~[(8)]~~ (10) "Oral communication", any communication uttered by a person exhibiting an
40 expectation that such communication is not subject to interception under circumstances justifying
41 such expectation;

42 ~~[(9)]~~ (11) "Person", any employee, or agent of this state or political subdivision of this
43 state, and any individual, partnership, association, joint stock company, trust, or corporation;

44 ~~[(10)]~~ (12) "Prosecuting attorney", the elected prosecuting attorney of the county or the
45 circuit attorney of any city not contained within a county;

46 ~~[(11)]~~ (13) "State", the state of Missouri and political subdivisions of the state;

47 ~~[(12)]~~ (14) "Wire communication", any communication made in whole or in part
48 through the use of facilities for the transmission of communications by the aid of wire, cable, or
49 other ~~like~~ connection between the point of origin and the point of reception including the use
50 of such connection in a switching station furnished or operated by any person engaged as a
51 common carrier in providing or operating such facilities for the transmission of local, state or
52 interstate communications.

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

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

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

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

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

19 (5) **Knowingly installs or uses a cell-site simulator device in violation of sections**
20 **542.400 to 542.422 to obtain information from a communications device including, but not**
21 **limited to, the location of the communications device, identifying information of the**
22 **subscriber or customer of a communication common carrier, or the contents of any**
23 **communication, data, or metadata sent or received by or stored on the communications**
24 **device.**

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

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

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

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

542.405. 1. An appellate judge or any judge of a court having original jurisdiction
2 **of criminal offenses may issue a warrant for the use of a cell-site simulator device to obtain**

3 **information from a communications device including, but not limited to, the location of the**
4 **device, identifying information of the subscriber or customer of a communication common**
5 **carrier, or the contents of any communication, data, or metadata sent or received by or**
6 **stored on the device. A warrant under this section may be issued in the same territorial**
7 **jurisdiction where the investigation, the communications device for which the warrant is**
8 **sought, or such device's owner is located.**

9 **2. The judge may issue the warrant only on the application of an authorized law**
10 **enforcement officer. An application shall be written and signed and sworn to or affirmed**
11 **before the judge. The affidavit shall specify:**

12 **(1) The identity of the person, if known, to be targeted by the cell-site simulator**
13 **device;**

14 **(2) The telephone number or other unique subscriber account number identifying**
15 **the wire or electronic communications service account used by the communications device**
16 **to be targeted by the cell-site simulator device and the identity of the person, if known, who**
17 **is subscribed to that account;**

18 **(3) The type of communications device and the communications protocols being**
19 **used by the device that is to be attached to or use the cell-site simulator device;**

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

21 **(5) All categories of metadata, data, communications, or other information to be**
22 **collected by the cell-site simulator device from the communications device to be targeted**
23 **including, but not limited to, call records and geolocation information;**

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

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

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

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

33 **(10) The facts and circumstances that provide the applicant with probable cause**
34 **to believe that:**

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

36 **(b) Acquisition of data, metadata, communications, or other information from the**
37 **communications device is likely to produce evidence in a criminal investigation of the**
38 **criminal activity described in paragraph (a) of this subdivision.**

39 **3. No order issued under this section may authorize or approve the use of a cell-site**
40 **simulator device for any period longer than is necessary to achieve the objective of the**
41 **authorization or thirty calendar days, whichever is shorter. The communications device**
42 **shall not be monitored with the cell-site simulator device after the expiration date without**
43 **an extension of the warrant. The period of extension shall be no longer than the court**
44 **deems necessary to achieve the purposes for which it was granted or thirty calendar days,**
45 **whichever is shorter. Every warrant and extension thereof shall contain a provision that**
46 **the authorization to use the cell-site simulator device shall be executed as soon as**
47 **practicable and shall terminate upon attainment of the authorized objective or upon thirty**
48 **calendar days.**

49 **4. An order authorizing the use of a cell-site simulator device shall include a**
50 **provision directing the law enforcement agency to:**

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

53 **(2) Take all steps necessary to delete any data, metadata, communications, or other**
54 **information collected from any party not specified in the applicable warrant immediately**
55 **following such collection and not transmit, use, or retain such information,**
56 **communications, data, or metadata for any purpose whatsoever; and**

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

61 **5. Notwithstanding any provision of this section to the contrary, a law enforcement**
62 **officer may obtain data, metadata, communications, or other information from a**
63 **communications device by operation of a cell-site simulator device without a warrant if:**

64 **(1) The communications device is reported stolen by the owner or owner's agent;**
65 **or**

66 **(2) There exists a hostage, barricade, reasonable evidence of a suicide attempt, or**
67 **other emergency situation in which a person unlawfully and directly threatens another,**
68 **himself, or herself with death or exposes another to a substantial risk of serious physical**
69 **injury and which:**

70 **(a) Is in the territorial jurisdiction of the law enforcement agency that employs the**
71 **officer operating the cell-site simulator device or assisting in the operation of the device;**
72 **and**

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

75 **6. An authorized law enforcement officer shall apply as soon as practicable for a**
76 **warrant to obtain data, metadata, communications, or other information from a**
77 **communications device under a circumstance described under subsection 5 of this section.**
78 **If a judge finds that an emergency situation did not occur and declines to issue the**
79 **warrant, any evidence obtained from the communications device via the unauthorized use**
80 **of a cell-site simulator device is not admissible in a criminal action.**

81 **7. Unless subsection 5 of this section or another exception to the warrant**
82 **requirement provided under state or federal law applies, a law enforcement officer shall**
83 **not procure or use information from a cell-site simulator device to assist with, participate**
84 **in, provide material support or resources for, or enable or facilitate an investigation**
85 **conducted by a law enforcement agency of the federal government or of another state**
86 **without:**

87 **(1) The consent of the owner of the communications device; or**

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

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

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

4 **(2) The contents of any data, metadata, communication, or other information**
5 **obtained from a communications device by a cell-site simulator device**

6

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

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

12 **(1) The contents of any wire or oral communication, or evidence derived therefrom[;]**
13 **; or**

14 **(2) The contents of any data, metadata, communication, or other information from**
15 **a communications device obtained by a cell-site simulator device, or evidence derived**
16 **therefrom**

17

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

20 3. Any person who has received, by any means authorized by sections 542.400 to
21 542.422, any **information obtained with the use of a cell-site simulator device or** information
22 concerning a wire communication[~~; or evidence derived therefrom,~~] intercepted in accordance

23 with the provisions of sections 542.400 to 542.422, **or evidence derived therefrom**, shall
24 disclose the contents of that communication, **information obtained**, or such derivative evidence
25 while giving testimony under oath or affirmation in any criminal proceeding, including
26 deposition in any court or in any grand jury proceeding, subject to the rules of evidence.

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

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

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

542.414. 1. Any aggrieved person in any trial, hearing, or proceeding in or before any
2 court, department, officer, agency, regulatory body, or other authority of the United States, the
3 state, or a political subdivision thereof, may move to suppress the contents of any intercepted
4 wire communication, **or information, data, communication, or metadata obtained from a**
5 **cell-site simulator device**, or evidence derived therefrom, on the grounds that:

- 6 (1) The communication was unlawfully intercepted;
- 7 (2) **The information, data, communication, or metadata was unlawfully obtained**
8 **by a cell-site simulator device;**
- 9 (3) The order of authorization or approval under which ~~the~~ **the communication** was
10 intercepted **or the cell-site simulator device was used** is insufficient on its face;
- 11 ~~(3)~~ (4) The interception **or use of the cell-site simulator device** was not made in
12 conformity with the order of authorization or approval; or

13 ~~[(4)]~~ (5) The communication was intercepted **or the cell-site simulator device was used**
14 in violation of the provisions of the Constitution of the United States or the state of Missouri or
15 in violation of a state statute.

16

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

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

 542.416. 1. Within thirty days after the expiration of an order or each extension thereof
2 entered pursuant to the provisions of **section 542.405** or section 542.408, the issuing court shall
3 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 modified, or was
7 denied;

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

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

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

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

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

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

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

22 (a) The approximate nature and frequency of incriminating communications intercepted
23 **or information obtained from a cell-site simulator device;**

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

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

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

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

32 (4) The number of trials resulting from such interceptions **or cell-site simulator device**
33 **use;**

34 (5) The number of motions to suppress made with respect to such interceptions **or cell-**
35 **site simulator device use**, and the number granted or denied;

36 (6) The number of convictions resulting from such interceptions **or cell-site simulator**
37 **device use** and the offenses for which the convictions were obtained and a general assessment
38 of the importance of the interceptions **or use of the device;** and

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

41 3. In April of each year the state courts administrator shall transmit to the Missouri
42 general assembly a full and complete report concerning the number of applications for orders
43 authorizing or approving the interception of wire communications **and use of cell-site simulator**
44 **devices** and the number of orders and extensions granted or denied during the preceding calendar
45 year. Such report shall include a summary and analysis of the data required to be filed with the
46 state courts administrator by subsections 1 and 2 of this section. The state courts administrator
47 may promulgate rules and regulations dealing with the content and form of the reports required
48 to be filed by 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 simulator device**, or evidence
3 derived therefrom shall not be received in evidence or otherwise disclosed in any civil or
4 administrative proceeding, except in civil actions brought pursuant to this section.

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

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

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

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

14 (b) Punitive damages on a showing of a willful or intentional violation of sections
15 542.400 to 542.422; and

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

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

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

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

Section B. Because immediate action is necessary to protect the privacy of the citizens
2 of this state, section 1.500 of section A of this act is deemed necessary for the immediate
3 preservation of the public health, welfare, peace, and safety, and is hereby declared to be an
4 emergency act within the meaning of the constitution, and section 1.500 of section A of this act
5 shall be in full force and effect upon its passage and approval.

✓