

KANSAS ASSOCIATION OF PRIVATE INVESTIGATORS

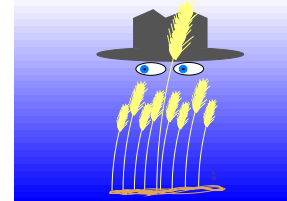
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SERVICEMARK,
KAPI, S.M., KS 1996
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House Committee on Corrections and Juvenile Justice
State Capitol
Topeka, KS 66612

Re: House Bill 2449

The Kansas Association of Private Investigators is a non-profit professional association for private detectives that was formed to establish and perpetuate high ethical and professional standards and excellence of professional service in the private investigative industry. KAPI monitors legislation affecting the industry. KAPI has reviewed the provisions of House Bill 2449 which would amend parts of KSA 21-4001 and KSA 22-4902. Apparently, the proposed amendments to the Eavesdropping statute are intended to restrict use of various monitoring or spying techniques used by sex offenders. *KAPI generally concurs with this apparent intent, but KAPI does not support passage of this bill.* There are some potential problems with the amendments which may have unintended consequences. The specific potential problem areas, issues, and potential solutions are below:

- *Page 1 Lines (18 & 23) which amends KSA 21-4001(a)(2) & (3)* - The addition of the term 'inside' to a private place in paragraph (2) and 'wireless' communication in paragraph (3) creates a practical problem for both the security and communications industry generally. Wireless communication of the type used in electronic broadcasting or security monitoring is typically on frequencies accessible to the public, and a person who receives it is generally entitled to presume that it is intended to be 'readily accessible to the general public' as the term is defined in 18 USC 2510(16) and used in the Federal wiretapping laws. This language would make it illegal to use any equipment which receives wireless transmissions unless the person receiving the transmission has consent to receive it. How would the receiving person have the opportunity to know when there is no consent? There is no way to stop an illegal receipt of a transmission without advance knowledge that it would be illegal to receive it. There is a legitimate question of whether there is implied consent or a reasonable expectation of monitoring in a wireless communication that tends to nullify this amendment to the statute.
 - 18 USC 2510 (16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not -
 - (A) scrambled or encrypted;
 - (B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;
 - (C) carried on a subcarrier or other signal subsidiary to a radio transmission;
 - (D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or
 - (E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;
- *Page 1 Line (36)* - The use of the term 'opening' needs some clarification; this could describe an open window, vent, or door. Only a covered or closed window, vent, or door would give a reasonable expectation of privacy in a private place. How would an 'intent

- to invade privacy' be determined in such circumstances?
- *Page 2 Line (10)* - The amendment here raises questions about when an employer, parent or legal guardian could legally monitor employees, their own kids, etc. on their own property to ensure their security even after informing the employee or kids. Here are two examples of the potential problem:
 - A stockroom is a private place within the meaning of the statute, but it is also a place where an act of employee theft or sexual assault could occur.
 - A nursing home providing care to the elderly could experience attacks against a bed-ridden occupant, but would be unable to install security cameras in the rooms where attacks occur.

In both cases, the offender could potentially file charges against the employer or care provider and the employer or care provider would be prohibited from using its status as a defense against the felony charge, even, apparently, if notification of the possibility of monitoring had been given and the necessary consent from the room occupant been given.

- *Create an 'Aggravated Eavesdropping' felony statute.* The amendment changing this to a felony crime might actually make it easier to escape prosecution for minor incidents since it automatically requires proof of criminal intent which the current misdemeanor offense does not require. Part of the solution may be to create an 'Aggravated Eavesdropping' felony statute which is separate from the current statute and is drafted entirely toward prohibiting the conduct of sex offenders.

Our analysis of this bill is that the changes do not accomplish the apparent purpose without creating more problems than they may be solving. The Kansas Association of Private Investigators recommends against passage of this bill in its current form.

I can be contacted at 816-830-1177 or JohnEllis@pmokspd.com with any questions.



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