



STATE OF KANSAS

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December 6, 1978

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ATTORNEY GENERAL OPINION NO. 78- 381

The Honorable Paul Burke
State Senator
8229 Cherokee Circle
Shawnee Mission, Kansas 66206

Re: Crimes and Offenses--Electronic Eavesdropping--Consent

Synopsis: An employer whose employees utilize telephones in the course of their employment, such as taking orders, responding to inquiries, debt collection and the like, may monitor telephone conversations in order to assure that such employees deal courteously with the public, provided the consent of each such employee is obtained. Kansas law does not prohibit the employer from requiring its employees to execute such consent as a condition of employment.

* * *

Dear Senator Burke:

You inquire concerning the application of K.S.A. 21-4001 and -4002 to a corporation which does business in your district as a retail establishment. You state that in its general course of business, the retailer communicates on a daily basis with the general public by telephone, for such purposes as taking orders for merchandise, responding to inquiries, and engaging in debt collection activities. The retailer wishes, you indicate, to take every reasonable step to assure that its employees are helpful and courteous in dealing with the public by telephone. In particular, you state, the company is especially concerned that its employees avoid harassment of its customers in the matter of debt collection. Toward this end, it wishes to notify its employees that calls are being monitored on a random basis, and has expressed concern that K.S.A. 21-4001 and -4002 may prevent it from doing so.

The Honorable Paul Burke
Page Two
December 6, 1978

You inquire, first, whether, if an employee of the corporation makes or receives a telephone call on behalf of the employer in the course of his or her employment, the employer is considered the "person in possession or control of the facilities for such wire communication." K.S.A. 21-4001 provides in pertinent part thus:

"(1) Eavesdropping is knowingly and without lawful authority:

* * *

(c) Installing or using any device or equipment for the interception of any telephone, telegraph or other wire communication without the consent of the person in possession or control of the facilities for such wire communication."

The notes of the Judicial Council as published in the Kansas Statutes Annotated indicate that this section is designed to provide criminal sanctions for invasion of a citizen's right to privacy. A provision of the Federal Communications Act of 1934, 47 U.S.C. § 605, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person" is designed likewise to protect the privacy of telephone conversations. Information obtained in violation of this prohibition is inadmissible as evidence in a criminal proceeding. Accordingly, nearly all cases dealing with the term "intercept" have been criminal cases.

For some time, it was disputed whether the words "intercept any communication" applied when one party to a conversation, without the knowledge of the other, allowed a third person to listen to the conversation or record it by a device attached at or near the consenting party's end of the telephone line. The United States Supreme Court resolved the question in *Rathbun v. United States*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957), stating thus:

"The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for

The Honorable Paul Burke
Page Three
December 6, 1978

for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose." 355 U.S. at 110-111.

In *Carnes v. United States*, 295 F.2d 598 (5th Cir. 1962), the court summarized the controlling principles thus:

"First, testimony as to a telephone conversation listened to with the consent of only one of the parties to the conversation is not inadmissible under Section 605. Second, such testimony does not become inadmissible simply because it was recorded by an electrical or mechanical device attached to an extension phone or telephone wiring at the locality of the consenting party."

In short, the term "intercept" in Section 605 of the Federal Communications Act has been construed to include listening to a conversation by a listener who is situated between the caller and sender, and not to include listening by a third party at either end of the conversation, with the consent of either the caller or the receiver.

K.S.A. 21-4002 is the Kansas counterpart of 18 U.S.C. § 2511. *State v. Hruska*, 219 Kan. 233, 547 P.2d 732 (1976). Since *Rathbun, supra*, the federal courts have uniformly held that where one party consents to the overhearing, there is no unlawful "interception." There is no reason to believe other than that Kansas courts will follow this long-standing federal precedent, and uphold the admissibility of evidence obtained by overhearing telephone conversations with the consent of one party thereto, through a device located at one end of the telephone line between the caller and the receiver, holding, thus, that there is no "interception" of a communication under such circumstances. See K.S.A. 21-4002(1)(a).

The Honorable Paul Burke
Page Four
December 6, 1978

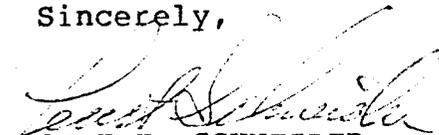
Likewise, where the employer listens in on such conversations with the consent of the employee who is a party to the conversation, there is no "interception," or unlawful eavesdropping under K.S.A. 21-4001.

You ask whether it is the employer or the employee who is the "person in possession or control of the facilities for such wire communication." The statute was enacted and designed for the protection of personal rights to privacy. Certainly, it may be argued that the corporation itself, which owns the premises and provides a telephone system for its employees, is the "person" in legal possession and control of those facilities. It strains the purpose of the statute, however, to argue that if the corporation consents to the overhearing of telephone conversations on its system by its supervisors and others in its employ, that it may eavesdrop thus at will, without the knowledge or consent of the persons actually using the telephone system for communications. The statute was designed to protect *personal* privacy interests. In my judgment, the "person in possession or control of the facilities for such wire communication" is the employee actually using and operating the telephone system and engaging in conversations thereon.

Even if the "person in possession or control of the facilities for such wire communication" were to be deemed the corporation itself, however, K.S.A. 21-4002 would nonetheless prohibit interception of the conversation "without the consent of the sender or receiver" Thus, the consent of the employee as the "sender," would be necessary in order to authorize the monitoring you describe.

You inquire, secondly, whether an employer whose employees engage in telephone conversations with the public on behalf of their employer in the course of their employment may require, as a condition of employment, that such employees consent to the monitoring of such telephone conversations by the employer. I know of no statutory provisions which would prohibit the employer from requiring and obtaining such consents as a condition of employment.

Sincerely,



CURT T. SCHNEIDER
Attorney General

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