

HOUSE JUDICIARY COMMITTEE  
LAWRENCE KLEMIN, CHAIR  
MARCH 14, 2023

TESTIMONY BY  
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DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION  
OFFICE OF ATTORNEY GENERAL  
IN SUPPORT OF  
SENATE BILL NO. 2043

Chairman Klemin and members of the House Judiciary Committee. I am Parrell Grossman, and it is my privilege to be the Director of the Attorney General's Consumer Protection and Antitrust Division. I appear on behalf of the Attorney General in support of Engrossed Senate Bill 2043.

The administrative search warrant chapter has been in place for many years, and the Consumer Protection Division, as part of a law enforcement entity, has occasion to use this process in its investigations, when appropriate and necessary. In fact, in these times, it is becoming more necessary on occasion in the public interest in order to quickly obtain and preserve evidence of illegal conduct or wrongdoing, including consumer fraud.

This chapter and process does not contemplate and accommodate for electronically stored communications and the time involved to serve and obtain electronically stored communications from the owner or possessor of the records. In other words, neither the Attorney General's Office nor other government agencies can utilize an administrative search warrant to obtain electronically stored communications because the statute currently requires return within twenty-four hours and that requirement typically is impossible.

It is one thing to inspect two filing cabinets on location and return the warrant within 24 hours. It is completely different when the case involves hundreds of thousands of business records and/or electronically stored communications including text messaging, and e-mail for many years, which are becoming the more typical investigations.

**REQUIREMENTS OF N.D.C.C. CH. 29-29.1-03**

N.D.C.C. § 29-29.1-03 currently provides:

**29-29.1-03. Requirements for valid issuance.**

The warrant is validly issued only if it meets the following requirements:

1. It must be signed by the issuing magistrate and must bear the date and hour of its issuance above the magistrate's signature with a notation that the warrant is valid for only twenty-four hours following its issuance;
2. It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or the possessor of the property

can reasonably determine from it what person or property the warrant authorizes an inspection of;

3. It must indicate the conditions, objects, activities, or circumstances which the inspection is intended to check or reveal; and
4. It must be attached to the affidavit required to be made in order to obtain the warrant.

N.D.C.C. § 29-29.1-03 (Copy attached).

#### **REQUIREMENTS OF N.D.C.C. CH. 29-29.1-04**

N.D.C.C. § 29-29.1-04 provides:

##### **29-29.1-04. Warrant valid for twenty-four hours.**

Any warrant issued under this chapter for a search or inspection is valid for only twenty-four hours after its issuance, must be personally served upon an owner or possessor of the property, or upon any person present on the premises if an owner or possessor cannot reasonably be found between the hours of 8:00 a.m. and 8:00 p.m., and must be returned within forty-eight hours.

N.D.C.C. § 29-29.1-04 (see attached).

#### **ATTORNEY GENERAL-CPAT ENFORCEMENT ACTIONS**

As part of enforcement actions brought by the Consumer Protection and Antitrust Division of the Attorney General's Office, our Office regularly issues subpoenas duces tecum to obtain records from individuals suspected to engaged in violation of N.D.C.C. ch. 51-15 and other laws. Communications are significant evidence of wrongdoing as perpetrators regularly communicate with their victims and others by electronic means, including by text messaging and electronic mail. For example:

1. **Photography Business X.** (Involving 500 plus consumer complaints alleging restitution owed in excess of \$1M.) The owner of this business communicated extensively by text messaging and electronic mail with government agencies, financial institutions, and other parties from whom he sought and obtained credit. His communications included false statements, including misrepresenting anticipated credit coming from the government to induce others, including banks and individuals, to give him tens or hundreds of thousands of dollars. He also circulated false or misleading financial documentation as attachments to electronic mail. 15 months after the business has closed the Attorney General is still fighting with the defendants in discovery while the defendants have spoon-fed critical information to the Attorney General, including failing to respond to many questions or provide all the records. The public continues to demand answers for this business's consumer fraud,

including why did this business close its doors keeping my money, or why do we not have our special wedding photos. With this amended statute the Attorney General could have immediately obtained much of the necessary information pursuant to this revised statute.

**2. Deceptive Charity X in Minot.** Defendant purported to raise funds for an registered charitable event when, in actuality, she was spending the donor funds she obtained on herself, including to purchase groceries and fast food. This defendant represents the most egregious example of a perpetrator engaged in fraud who destroyed evidence to frustrate her prosecution. After the Attorney General's Office subpoenaed her records, she and her attorney refused to comply with the subpoena despite multiple court orders. Subsequently, when the Attorney General commenced a consumer fraud action against this defendant, she destroyed electronic evidence of her fraudulent activities, including by altering and deleting multiple websites and fabricating electronic communications with State agencies. Despite court orders compelling her to produce records in discovery, she and her attorney failed to comply. Though the State was victorious through imposition of sanctions after more than two years of litigation, the Attorney General never obtained the substantial evidence of wrongdoing it might otherwise have obtained through an administrative search warrant.

In all our investigations, including the examples and matters I have referenced, it is easy to simply have deleted critical electronic communications in the days or months after initial fraudulent conduct was discovered, or to otherwise claim the electronic information did not exist or is not available. Not surprisingly, just like with potential defendants suspected of engaging in illegal criminal activity, who might possess incriminating information subject to a search warrant, some investigation targets in our civil law enforcement investigations would never voluntarily turn over records or information without a procedure such as an administrative warrant.

There are many businesses that immediately and fully cooperate with a consumer fraud investigation and the standard tools are usually sufficient. The procedures of this chapter have been used very judiciously in past years and the Attorney General will continue to do so with the proposed amendments in Engrossed Senate Bill 2043. Nonetheless, some investigations involving more egregious conduct, and the circumstances relevant to those investigations, will necessitate the procedures of this revised statute. In addition, we want to remind this Committee that any electronic communication information to be searched or inspected must be part of a legally authorized inspection program, or that there is an affidavit of probable cause for believing there is an activity or circumstance justifying a search or inspection of this information, and the warrant must be approved by the Court.

### **RECOMMENDED ACTION**

Ultimately, the Attorney General recommends that sections 29-29.1-03 and 29-29.1-04 extend the time for warrant validity from twenty-four hours to ten days and also recommends extending the time for return to forty-eight hours after service, except as to electronic communications. As one example only, it is likely impossible to serve and obtain return of

electronic communications within twenty-four and forty-eight hours where owners or possessors of electronic communications, e.g., social media sites, are outside the State, or the information is otherwise stored outside the state.

In addition, we recommend that N.D.C.C. ch. 29-29.1 add a section, now designated as 29-29-01.1, that specifically permits the Attorney General to obtain electronic communications and to obtain an extension where the owner or possessor of electronic communications has not produced the requested records.

Then, pursuant to Section 2 of the Engrossed Bill, section 29-29.1-02 will also ensure that this additional authority in this legislation comports with the warrant standards for issuing a warrant that includes a request for electronic communication information, comports with the same existing standard for other property of the possessor.

The Attorney General respectfully recommends that the House Judiciary Committee give Engrossed Senate Bill 2043 a "Do Pass" recommendation.

Thank you for your time and consideration. I would be pleased to try and answer any questions.

Sixty-eighth  
Legislative Assembly  
of North Dakota

## ENGROSSED SENATE BILL NO. 2043

Introduced by

Judiciary Committee

(At the request of the Attorney General)

1 A BILL for an Act to create and enact section 29-29.1-01.1 of the North Dakota Century Code,  
2 relating to a warrant for electronic communication information; to amend and reenact  
3 subsection 1 of section 29-29.1-02, subsection 1 of section 29-29.1-03, and section 29-29.1-04  
4 of the North Dakota Century Code, relating to requirements for valid issuance and to warrant  
5 validity days.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1.** Section 29-29.1-01.1 of the North Dakota Century Code is created and  
8 enacted as follows:

9 **29-29.1-01.1. Warrant for electronic communication information.**

- 10 1. As used in this section, "Electronic communication information" means any information  
11 about an electronic communication or the use of an electronic communication service,  
12 limited to the contents of electronic communications and precise or approximate  
13 location of the target sender or target recipient at any point during the communication.  
14 2. Notwithstanding chapter 29-29, any official or employee of the state or of a unit of  
15 county or local government of the state may, under the conditions specified in this  
16 section, obtain a warrant requiring disclosure of electronic communication information.  
17 3. A warrant issued under this section may authorize the seizure of electronic storage  
18 media or the seizure or copying of electronically stored information. Unless otherwise  
19 specified, the warrant authorizes a later review of the media or information consistent  
20 with the warrant.  
21 4. Under this section, the time for executing the warrant refers to the seizure or onsite  
22 copying of the media or information, and not to any later offsite copying or review.  
23 5. The issuing magistrate may grant an extension of a warrant on the owner or the  
24 possessor of electronic communication information upon an application under oath

1           stating the owner or the possessor has not produced the requested electronic  
2           communication information within ten days and that an extension is necessary to  
3           achieve the purposes for which the search warrant was granted. An extension may not  
4           exceed thirty days.

5           **SECTION 2. AMENDMENT.** Subsection 1 of section 29-29.1-02 of the North Dakota  
6 Century Code is amended and reenacted as follows:

7           1. The one seeking the warrant shall establish under oath or affirmation that the property  
8           or electronic communication information to be searched or inspected is to be searched  
9           or inspected as a part of a legally authorized program of inspection which naturally  
10           includes that property or electronic communication information, or that there is  
11           probable cause for believing that there is a condition, object, activity, or circumstance  
12           which legally justifies such a search or inspection of that property or electronic  
13           communication information;

14           **SECTION 3. AMENDMENT.** Subsection 1 of section 29-29.1-03 of the North Dakota  
15 Century Code is amended and reenacted as follows:

16           1. It must be signed by the issuing magistrate and must bear the date and hour of its  
17           issuance above the magistrate's signature with a notation that the warrant is valid for  
18           only ~~twenty-four hours~~ ten days following its issuance;

19           **SECTION 4. AMENDMENT.** Section 29-29.1-04 of the North Dakota Century Code is  
20 amended and reenacted as follows:

21           **29-29.1-04. Warrant valid for ~~twenty-four hours~~ ten days.**

22           Any warrant issued under this chapter for a search or inspection is valid for only ~~twenty-four~~  
23 ~~hour~~ ten days after its issuance, must be personally served upon an owner or possessor of the  
24 property, or upon any person present on the premises if an owner or possessor cannot  
25 reasonably be found between the hours of 8:00 a.m. and 8:00 p.m., and must be returned within  
26 forty-eight hours of service except as provided in section 29-29.1-01.1.

## **CHAPTER 29-29.1 ADMINISTRATIVE SEARCH WARRANTS**

### **29-29.1-01. Warrants to conduct inspections authorized by law.**

1. Notwithstanding the provisions of chapter 29-29, any official or employee of the state or of a unit of county or local government of North Dakota may, under the conditions specified herein, obtain a warrant authorizing to conduct a search or inspection of property if such a search or inspection is one that is elsewhere authorized by law, either with or without the consent of the person whose privacy would be thereby invaded, and is one for which such a warrant is constitutionally required.
2. The warrant may be issued by any magistrate whose territorial jurisdiction encompasses the property to be inspected.

### **29-29.1-02. Conditions to be met before issuance.**

The issuing magistrate shall issue the warrant when the magistrate is satisfied the following conditions are met:

1. The one seeking the warrant shall establish under oath or affirmation that the property to be searched or inspected is to be searched or inspected as a part of a legally authorized program of inspection which naturally includes that property, or that there is probable cause for believing that there is a condition, object, activity, or circumstance which legally justifies such a search or inspection of that property;
2. An affidavit indicating the basis for the establishment of one of the grounds described in subsection 1 must be signed under oath or affirmation by the affiant; and
3. The issuing magistrate shall examine the affiant under oath or affirmation to verify the accuracy of the matters indicated by the statement in the affidavit.

### **29-29.1-03. Requirements for valid issuance.**

The warrant is validly issued only if it meets the following requirements:

1. It must be signed by the issuing magistrate and must bear the date and hour of its issuance above the magistrate's signature with a notation that the warrant is valid for only twenty-four hours following its issuance;
2. It must describe, either directly or by reference to the affidavit, the property where the search or inspection is to occur and be accurate enough in description so that the executor of the warrant and the owner or the possessor of the property can reasonably determine from it what person or property the warrant authorizes an inspection of;
3. It must indicate the conditions, objects, activities, or circumstances which the inspection is intended to check or reveal; and
4. It must be attached to the affidavit required to be made in order to obtain the warrant.

### **29-29.1-04. Warrant valid for twenty-four hours.**

Any warrant issued under this chapter for a search or inspection is valid for only twenty-four hours after its issuance, must be personally served upon an owner or possessor of the property, or upon any person present on the premises if an owner or possessor cannot reasonably be found between the hours of 8:00 a.m. and 8:00 p.m., and must be returned within forty-eight hours.

### **29-29.1-05. Competency of evidence discovered.**

No facts discovered or evidence obtained in a search or inspection conducted under authority of a warrant issued under this chapter may be competent as evidence in any civil, criminal, or administrative action, nor considered in imposing any civil, criminal, or administrative sanction against any person, nor as a basis for further seeking to obtain any warrant, if the warrant is invalid or if what is discovered or obtained is not a condition, object, activity, or circumstance which it was the legal purpose of the search or inspection to discover; but this does not prevent any such facts or evidence to be so used when the warrant issued is not constitutionally required in those circumstances.

**29-29.1-06. Not criminal search warrants.**

The warrants authorized under this chapter may not be regarded as search warrants for the purpose of application of chapter 29-29.