

LEGISLATURE OF NEBRASKA
ONE HUNDREDTH LEGISLATURE
SECOND SESSION
LEGISLATIVE BILL 952

Introduced by Lathrop, 12.

Read first time January 14, 2008

Committee: Judiciary

A BILL

1 FOR AN ACT relating to state administrative departments; to amend
2 section 81-119, Reissue Revised Statutes of Nebraska,
3 and sections 86-2,106, 86-2,107, and 86-2,108, Revised
4 Statutes Cumulative Supplement, 2006; to change and
5 eliminate provisions relating to administrative subpoena
6 powers; to harmonize provisions; and to repeal the
7 original sections.

8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 81-119, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 81-119 Each department created by section 81-101 shall
4 have power through its head, any deputy, assistant, or employee,
5 when authorized by him or her, to make a thorough investigation
6 into all the books, papers, and affairs of any person, firm,
7 or corporation when in the judgment of such department such
8 examination is necessary to the proper performance of its duties
9 and the efficient enforcement of the laws. Such department may
10 subpoena witnesses to attend investigative hearings and have such
11 witnesses bring with them books, accounts, and documents necessary
12 for a thorough investigation. Such witnesses may be examined under
13 oath. These powers shall not be used for criminal investigations.
14 ~~and in so doing to administer oaths and affirmations and to examine~~
15 ~~on oath or affirmation any person, officer, agent or clerk of any~~
16 ~~firm or corporation touching the matters which, in the judgment of~~
17 ~~such department, ought to be inquired into, and to examine and to~~
18 ~~summon, and by attachment compel the attendance of, any person or~~
19 ~~persons in this state to testify under oath before such department~~
20 ~~or its secretary or any deputy, any assistant or employee thereof~~
21 ~~in relation thereto.~~

22 Sec. 2. Section 86-2,106, Revised Statutes Cumulative
23 Supplement, 2006, is amended to read:

24 86-2,106 (1) A governmental entity may require the
25 disclosure by a provider of electronic communication service of

1 the contents of an electronic communication, that is in electronic
2 storage in an electronic communications system for one hundred
3 eighty days or less, only pursuant to a warrant. A governmental
4 entity may require the disclosure by a provider of the contents
5 of an electronic communication that has been in electronic storage
6 in an electronic communications system for more than one hundred
7 eighty days by the means available under subsection (2) of this
8 section.

9 (2) (a) A governmental entity may require a provider of
10 remote computing service to disclose the contents of any electronic
11 communication to which this subsection is made applicable by
12 subdivision (2) (b) of this section (i) without required notice to
13 the subscriber or customer if the governmental entity obtains a
14 warrant or (ii) with prior notice from the governmental entity
15 to the subscriber or customer if the governmental entity ~~(A)~~
16 ~~uses an administrative subpoena or (B)~~ obtains a court order for
17 such disclosure under subsection (4) of this section, except that
18 delayed notice may be given pursuant to section 86-2,108.

19 (b) Subdivision (2) (a) of this section shall apply to any
20 electronic communication that is held or maintained on that service
21 (i) on behalf of, and received by means of electronic transmission
22 from or created by means of computer processing of communications
23 received by means of electronic transmission from, a subscriber to
24 or customer of such remote computing service and (ii) solely for
25 the purpose of providing storage or computer processing services

1 to such subscriber or customer, if the provider is not authorized
2 to access the contents of any such communications for purposes of
3 providing any services other than storage or computer processing.

4 (3) (a) (i) Except as provided in subdivision (3) (a) (ii)
5 of this section, a provider of electronic communication service or
6 remote computing service may disclose a record or other information
7 pertaining to a subscriber to or customer of such service not
8 including the contents of communications covered by subsection (1)
9 or (2) of this section to any person other than a governmental
10 entity.

11 (ii) A provider of electronic communication service
12 or remote computing service shall disclose a record or other
13 information pertaining to a subscriber to or customer of such
14 service not including the contents of communications covered by
15 subsection (1) or (2) of this section to a governmental entity only
16 when the governmental entity (A) uses an administrative subpoena,
17 ~~(B)~~ obtains a warrant, ~~(C)~~ (B) obtains a court order for such
18 disclosure under subsection (4) of this section, or ~~(D)~~ (C) has the
19 consent of the subscriber or customer to such disclosure.

20 (b) A governmental entity receiving records or
21 information under this subsection is not required to provide notice
22 to a subscriber or customer.

23 (4) A court order for disclosure under subsection (2) or
24 (3) of this section shall issue only if the governmental entity
25 shows that there is reason to believe the contents of a wire

1 or electronic communication or the records or other information
2 sought are relevant to a legitimate law enforcement inquiry. A
3 court issuing an order pursuant to this section, on a motion made
4 promptly by the provider, may quash or modify such order if the
5 information or records requested are unusually voluminous in nature
6 or compliance with such order would otherwise cause an undue burden
7 on such provider.

8 (5) No cause of action shall lie in any court against any
9 provider, its officers, employees, or agents, or other specified
10 persons for providing information, facilities, or assistance in
11 accordance with the terms of a court order, or warrant, ~~subpoena,~~
12 ~~or certification~~ under sections 86-2,104 to 86-2,110.

13 Sec. 3. Section 86-2,107, Revised Statutes Cumulative
14 Supplement, 2006, is amended to read:

15 86-2,107 (1)(a) A governmental entity acting under
16 subsection (2) of section 86-2,106 may include in its ~~subpoena or~~
17 court order a requirement that the provider to whom the request is
18 directed create a backup copy of the contents of the electronic
19 communications sought in order to preserve those communications.
20 Without notifying the subscriber or customer of such ~~subpoena or~~
21 court order, such provider shall create such backup copy as soon
22 as practicable consistent with its regular business practices and
23 shall confirm to the governmental entity that such backup copy has
24 been made. Such backup copy shall be created within two business
25 days after receipt by the provider of the ~~subpoena or~~ court order.

1 (b) Notice to the subscriber or customer shall be made
2 by the governmental entity within three days after receipt of such
3 confirmation unless such notice is delayed pursuant to section
4 86-2,108.

5 (c) The provider shall not destroy such backup copy until
6 the later of (i) the delivery of the information or (ii) the
7 resolution of any proceedings including appeals of any proceeding
8 concerning the ~~subpoena~~ ~~or~~ court order.

9 (d) The provider shall release such backup copy to the
10 requesting governmental entity no sooner than fourteen days after
11 the governmental entity's notice to the subscriber or customer if
12 such provider (i) has not received notice from the subscriber
13 or customer that the subscriber or customer has challenged
14 the governmental entity's request and (ii) has not initiated
15 proceedings to challenge the request of the governmental entity.

16 (e) A governmental entity may seek to require the
17 creation of a backup copy under subdivision (a) of this subsection
18 if in its sole discretion such entity determines that there is
19 reason to believe that notification under this section and section
20 86-2,106 of the existence of the ~~subpoena~~ ~~or~~ court order may result
21 in destruction of or tampering with evidence. This determination
22 shall not be subject to challenge by the subscriber, customer, or
23 provider.

24 (2)(a) Within fourteen days after notice by the
25 governmental entity to the subscriber or customer under subdivision

1 (1) (b) of this section, such subscriber or customer may file a
2 motion to ~~quash such subpoena or~~ vacate such court order, with
3 copies served upon the governmental entity and with written notice
4 of such challenge to the provider. A motion to vacate a court order
5 shall be filed in the court which issued such order. ~~A motion to~~
6 ~~quash a subpoena shall be filed in the appropriate court.~~ Such
7 motion ~~or application~~ shall contain an affidavit or sworn statement
8 (i) stating that the applicant is a subscriber to or customer of
9 the service from which the contents of electronic communications
10 maintained for him or her have been sought and (ii) stating the
11 applicant's reasons for believing that the records sought are not
12 relevant to a legitimate law enforcement inquiry or that there has
13 not been substantial compliance with sections 86-2,104 to 86-2,110
14 in some other respect.

15 (b) Service shall be made under this section upon a
16 governmental entity by delivering or mailing by registered or
17 certified mail a copy of the papers to the person, office,
18 or department specified in the notice which the subscriber or
19 customer has received pursuant to sections 86-2,106 to 86-2,108.
20 For purposes of this section, delivery has the same meaning as in
21 section 25-534.

22 (c) If the court finds that the subscriber or customer
23 has complied with subdivisions (a) and (b) of this subsection,
24 the court shall order the governmental entity to file a sworn
25 response, which may be filed in camera if the governmental entity

1 includes in its response the reasons which make in camera review
2 appropriate. If the court is unable to determine the motion or
3 application on the basis of the parties' initial allegations and
4 response, the court may conduct such additional proceedings as it
5 deems appropriate. All such proceedings shall be completed and the
6 motion or application decided as soon as practicable after the
7 filing of the governmental entity's response.

8 (d) If the court finds that the applicant is not the
9 subscriber or customer for whom the communications sought by the
10 governmental entity are maintained or that there is reason to
11 believe that the law enforcement inquiry is legitimate and that
12 the communications sought are relevant to that inquiry, it shall
13 deny the motion ~~or application~~ and order such process enforced. If
14 the court finds that the applicant is the subscriber or customer
15 for whom the communications sought by the governmental entity
16 are maintained and that there is not reason to believe that the
17 communications sought are relevant to a legitimate law enforcement
18 inquiry or that there has not been substantial compliance with
19 sections 86-2,104 to 86-2,110, it shall order the process quashed.

20 (e) A court order denying a motion ~~or application~~ under
21 this section shall not be deemed a final order and no interlocutory
22 appeal may be taken therefrom by the subscriber or customer.

23 Sec. 4. Section 86-2,108, Revised Statutes Cumulative
24 Supplement, 2006, is amended to read:

25 86-2,108 (1)(a) A governmental entity acting under

1 subsection (2) of section 86-2,106 shall ~~(i)~~ when a court order
 2 is sought, include in the application a request, which the court
 3 shall grant, for an order delaying the notification required under
 4 such subsection for a period not to exceed ninety days if the court
 5 determines that there is reason to believe that notification of the
 6 existence of the court order may have an adverse result. ~~or (ii)~~
 7 ~~when an administrative subpoena is obtained,~~ delay the notification
 8 required under such subsection for a period not to exceed ninety
 9 days upon the execution of a written certification of a supervisory
 10 official that there is reason to believe that notification of the
 11 existence of the subpoena may have an adverse result.

12 (b) For purposes of this section ~~(i)~~ Adverse adverse
 13 result means:

14 ~~(A)~~ (i) Endangering the life or physical safety of an
 15 individual;

16 ~~(B)~~ (ii) Flight from prosecution;

17 ~~(C)~~ (iii) Destruction of or tampering with evidence;

18 ~~(D)~~ (iv) Intimidation of potential witnesses; or

19 ~~(E)~~ (v) Otherwise seriously jeopardizing an investigation
 20 or unduly delaying a trial. ~~and~~

21 ~~(ii)~~ Supervisory official means the investigative agent
 22 in charge, the assistant investigative agent in charge, an
 23 equivalent of an investigating agency's headquarters or regional
 24 office, the chief prosecuting attorney, the first assistant
 25 prosecuting attorney, or an equivalent of a prosecuting attorney's

1 ~~headquarters or regional office.~~

2 ~~(c) The governmental entity shall maintain a true copy of~~
3 ~~certification under subdivision (a)(ii) of this subsection.~~

4 ~~(d) (c)~~ Extensions of the delay of notification provided
5 in sections 86-2,106 and 86-2,107 of up to ninety days each may
6 be granted by the court upon application, ~~or by certification by a~~
7 ~~governmental entity,~~ but only in accordance with subsection (2) of
8 this section.

9 ~~(e) (d)~~ Upon expiration of the period of delay of
10 notification under subdivision (a) or ~~(d) (c)~~ of this subsection,
11 the governmental entity shall serve upon or deliver by registered
12 or first-class mail to the customer or subscriber a copy of the
13 process or request together with notice that:

14 (i) States with reasonable specificity the nature of the
15 law enforcement inquiry; and

16 (ii) Informs such customer or subscriber:

17 (A) That information maintained for such customer or
18 subscriber by the provider named in such process or request was
19 supplied to or requested by that governmental entity and the date
20 on which the supplying or request took place;

21 (B) That notification of such customer or subscriber was
22 delayed;

23 (C) What ~~governmental entity or~~ court made the
24 ~~certification or~~ determination pursuant to which that delay was
25 made; and

1 (D) Which provision of sections 86-2,104 to 86-2,109
2 allowed such delay.

3 (2) A governmental entity acting under section 86-2,106,
4 when it is not required to notify the subscriber or customer
5 under subdivision (2)(a) of section 86-2,106 or to the extent
6 that it may delay such notice pursuant to subsection (1) of this
7 section, may apply to a court for an order commanding a provider
8 of electronic communication service or remote computing service to
9 whom a warrant~~, subpoena~~ or court order is directed, for such
10 period as the court deems appropriate, not to notify any other
11 person of the existence of the warrant~~, subpoena~~ or court order.
12 The court shall enter such an order if it determines that there
13 is reason to believe that notification of the existence of the
14 warrant~~, subpoena~~ or court order will result in an adverse result.

15 Sec. 5. Original section 81-119, Reissue Revised Statutes
16 of Nebraska, and sections 86-2,106, 86-2,107, and 86-2,108, Revised
17 Statutes Cumulative Supplement, 2006, are repealed.