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HOUSE BILL 2406

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State of Washington                      54th Legislature                      1996 Regular Session

By Representatives Sterk, Chappell, Delvin, Hickel, Smith and Hymes

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1            AN ACT Relating to interception, transmission, recording, or  
2 disclosure of communications; amending RCW 9.73.070 and 9.73.230;  
3 adding a new section to chapter 9.73 RCW; and prescribing penalties.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5            **Sec. 1.** RCW 9.73.070 and 1994 c 49 s 1 are each amended to read as  
6 follows:

7            (1) The provisions of this chapter shall not apply to any activity  
8 in connection with services provided by a common carrier pursuant to  
9 its tariffs on file with the Washington utilities and transportation  
10 commission or the Federal Communication Commission and any activity of  
11 any officer, agent or employee of a common carrier who performs any act  
12 otherwise prohibited by this law in the construction, maintenance,  
13 repair and operations of the common carrier's communications services,  
14 facilities, or equipment or incident to the use of such services,  
15 facilities or equipment, and shall not apply to the use of a pen  
16 register or a trap and trace device by such common carrier:

17            (a) Relating to the operation, maintenance, and testing of a wire  
18 or electronic communication service or to the protection of the rights  
19 or property of such common carrier, or to the protection of users of

1 the common carrier's service from abuse of service or unlawful use of  
2 service;

3 (b) To record the fact that a wire or electronic communication was  
4 initiated or completed in order to protect such common carrier, another  
5 common carrier furnishing service toward the completion of the wire  
6 communication, or a user of that service, from fraudulent, unlawful, or  
7 abusive use of service; or

8 (c) Where the consent of the user of that service has been  
9 obtained.

10 (2) "Common carrier" as used in this section means any person  
11 engaged as a common carrier or public service company for hire in  
12 intrastate, interstate or foreign communication by wire or radio or in  
13 intrastate, interstate or foreign radio transmission of energy.

14 ((+2)) (3) The provisions of this chapter shall not apply to:

15 (a) Any common carrier automatic number, caller, or location  
16 identification service that has been approved by the Washington  
17 utilities and transportation commission; or

18 (b) A 911 or enhanced 911 emergency service as defined in RCW  
19 82.14B.020, for purposes of aiding public health or public safety  
20 agencies to respond to calls placed for emergency assistance.

21 NEW SECTION. Sec. 2. A new section is added to chapter 9.73 RCW  
22 to read as follows:

23 (1) As used in this section:

24 (a) "Wire communication" means any aural transfer made in whole or  
25 in part through the use of facilities for the transmission of  
26 communications by the aid of wire, cable, or other like connection  
27 between the point of origin and the point of reception, including the  
28 use of such connection in a switching station, furnished or operated by  
29 any person engaged in providing or operating such facilities for the  
30 transmission of intrastate, interstate, or foreign communications, and  
31 such term includes any electronic storage of such communication.

32 (b) "Electronic communication" means any transfer of signs,  
33 signals, writing, images, sounds, data, or intelligence of any nature  
34 transmitted in whole or in part by a wire, radio, electromagnetic,  
35 photoelectronic, or photo-optical system, but does not include:

36 (i) Any wire or oral communication;

37 (ii) Any communication made through a tone-only paging device; or

38 (iii) Any communication from a tracking device.

1 (c) "Electronic communication service" means any service that  
2 provides to users thereof the ability to send or receive wire or  
3 electronic communications.

4 (d) "Pen register" means a device that records or decodes  
5 electronic or other impulses that identify the numbers dialed or  
6 otherwise transmitted on the telephone line to which such device is  
7 attached, but such term does not include any device used by a provider  
8 or customer of a wire or electronic communication service for billing,  
9 or recording as an incident to billing, for communications services  
10 provided by such provider or any device used by a provider or customer  
11 of a wire communication service for cost accounting or other like  
12 purposes in the ordinary course of its business.

13 (e) "Trap and trace device" means a device that captures the  
14 incoming electronic or other impulses that identify the originating  
15 number of an instrument or device from which a wire or electronic  
16 communication was transmitted.

17 (2) A law enforcement officer may apply for and the superior court  
18 may issue orders and extensions of orders authorizing the installation  
19 and use of pen registers and trap and trace devices as provided in this  
20 section. The application shall be under oath and shall include the  
21 identity of the officer making the application and the identity of the  
22 law enforcement agency conducting the investigation. The applicant  
23 must certify that the information likely to be obtained is relevant to  
24 an ongoing criminal investigation being conducted by that agency.

25 (3) If the court finds that the information likely to be obtained  
26 by such installation and use is relevant to an ongoing criminal  
27 investigation and finds reason to believe that the pen register or trap  
28 and trace device will lead to obtaining evidence of a crime,  
29 contraband, fruits of crime, things criminally possessed, weapons, or  
30 other things by means of which a crime has been committed or reasonably  
31 appears about to be committed, or will lead to learning the location of  
32 a person who is unlawfully restrained or reasonably believed to be a  
33 witness in a criminal investigation or for whose arrest there is  
34 probable cause, the court shall enter an ex parte order authorizing the  
35 installation and use of a pen register or a trap and trace device. The  
36 order shall specify:

37 (a) The identity, if known, of the person to whom is leased or in  
38 whose name is listed the telephone line to which the pen register or  
39 trap and trace device is to be attached;

1 (b) The identity, if known, of the person who is the subject of the  
2 criminal investigation;

3 (c) The number and, if known, physical location of the telephone  
4 line to which the pen register or trap and trace device is to be  
5 attached and, in the case of a trap and trace device, the geographic  
6 limits of the trap and trace order; and

7 (d) A statement of the offense to which the information likely to  
8 be obtained by the pen register or trap and trace device relates.

9 The order shall direct, if the applicant has requested, the  
10 furnishing of information, facilities, and technical assistance  
11 necessary to accomplish the installation of the pen register or trap  
12 and trace device. An order issued under this section shall authorize  
13 the installation and use of a pen register or a trap and trace device  
14 for a period not to exceed sixty days. Extensions of such an order may  
15 be granted, but only upon a new application for an order under  
16 subsection (2) of this section and upon the judicial findings required  
17 by subsection (3) of this section. The period of extension shall be  
18 for a period not to exceed sixty days.

19 An order authorizing or approving the installation and use of a pen  
20 register or a trap and trace device shall direct that the order be  
21 sealed until otherwise ordered by the court and that the person owning  
22 or leasing the line to which the pen register or trap and trace device  
23 is attached, or who has been ordered by the court to provide assistance  
24 to the applicant, not disclose the existence of the pen register or  
25 trap and trace device or the existence of the investigation to the  
26 listed subscriber or to any other person, unless or until otherwise  
27 ordered by the court.

28 (4) Upon the request of an officer of a law enforcement agency  
29 authorized to install and use a pen register under this chapter, a  
30 provider of wire or electronic communication service, landlord,  
31 custodian, or other person shall furnish such law enforcement officer  
32 forthwith all information, facilities, and technical assistance  
33 necessary to accomplish the installation of the pen register  
34 unobtrusively and with a minimum of interference with the services that  
35 the person so ordered by the court accords the party with respect to  
36 whom the installation and use is to take place, if such assistance is  
37 directed by a court order as provided in subsection (3) of this  
38 section.

1       Upon the request of an officer of a law enforcement agency  
2 authorized to receive the results of a trap and trace device under this  
3 chapter, a provider of a wire or electronic communication service,  
4 landlord, custodian, or other person shall install such device  
5 forthwith on the appropriate line and shall furnish such law  
6 enforcement officer all additional information, facilities, and  
7 technical assistance including installation and operation of the device  
8 unobtrusively and with a minimum of interference with the services that  
9 the person so ordered by the court accords the party with respect to  
10 whom the installation and use is to take place, if such installation  
11 and assistance is directed by a court order as provided in subsection  
12 (3) of this section. Unless otherwise ordered by the court, the  
13 results of the trap and trace device shall be furnished to the officer  
14 of a law enforcement agency, designated in the court order, at  
15 reasonable intervals during regular business hours for the duration of  
16 the order.

17       A provider of a wire or electronic communication service, landlord,  
18 custodian, or other person who furnishes facilities or technical  
19 assistance pursuant to this subsection shall be reasonably compensated  
20 by the law enforcement agency that requests the facilities or  
21 assistance for such reasonable expenses incurred in providing such  
22 facilities and assistance.

23       No cause of action shall lie in any court against any provider of  
24 a wire or electronic communication service, its officers, employees,  
25 agents, or other specified persons for providing information,  
26 facilities, or assistance in accordance with the terms of a court order  
27 under this section. A good faith reliance on a court order under this  
28 section, a request pursuant to this section, a legislative  
29 authorization, or a statutory authorization is a complete defense  
30 against any civil or criminal action brought under this chapter or any  
31 other law.

32       Pursuant to this section, an order may be issued to enforce the  
33 assistance capability and capacity requirements under the federal  
34 communications assistance for law enforcement act.

35       (5) Notwithstanding any other provision of this chapter, a law  
36 enforcement officer specially designated by a prosecuting attorney who  
37 reasonably determines that an emergency situation exists that involves  
38 immediate danger of death or serious bodily injury to any person or  
39 conspiratorial activities characteristic of organized crime that

1 requires the installation and use of a pen register or a trap and trace  
2 device before an order authorizing such installation and use can, with  
3 due diligence, be obtained, and there are grounds upon which an order  
4 could be entered under this chapter to authorize such installation and  
5 use, may have installed and use a pen register or trap and trace device  
6 if, within forty-eight hours after the installation has occurred, or  
7 begins to occur, an order approving the installation or use is issued  
8 in accordance with subsection (3) of this section. In the absence of  
9 an authorizing order, such use shall immediately terminate when the  
10 information sought is obtained, when the application for the order is  
11 denied or when forty-eight hours have lapsed since the installation of  
12 the pen register or trap and trace device, whichever is earlier. If an  
13 order approving the installation or use is not obtained within forty-  
14 eight hours, any information obtained is not admissible as evidence in  
15 any legal proceeding. The knowing installation or use by any law  
16 enforcement officer of a pen register or trap and trace device pursuant  
17 to this subsection without application for the authorizing order within  
18 forty-eight hours of the installation shall constitute a violation of  
19 this chapter and be punishable as a gross misdemeanor. A provider of  
20 a wire or electronic service, landlord, custodian, or other person who  
21 furnished facilities or technical assistance pursuant to this  
22 subsection shall be reasonably compensated by the law enforcement  
23 agency that requests the facilities or assistance for such reasonable  
24 expenses incurred in providing such facilities and assistance.

25       **Sec. 3.** RCW 9.73.230 and 1989 c 271 s 204 are each amended to read  
26 as follows:

27       (1) As part of a bona fide criminal investigation, the chief law  
28 enforcement officer of a law enforcement agency or his or her designee  
29 above the rank of first line supervisor may authorize the interception,  
30 transmission, or recording of a conversation or communication by  
31 officers under the following circumstances:

32       (a) At least one party to the conversation or communication has  
33 consented to the interception, transmission, or recording;

34       (b) Probable cause exists to believe that the conversation or  
35 communication involves the unlawful manufacture, delivery, sale, or  
36 possession with intent to manufacture, deliver, or sell, controlled  
37 substances as defined in chapter 69.50 RCW, or legend drugs as defined

1 in chapter 69.41 RCW, or imitation controlled substances as defined in  
2 chapter 69.52 RCW; and

3 (c) A written report has been completed as required by subsection  
4 (2) of this section.

5 (2) The agency's chief officer or designee authorizing an  
6 interception, transmission, or recording under subsection (1) of this  
7 section, shall prepare and sign a written report at the time of  
8 authorization indicating:

9 (a) The circumstances that meet the requirements of subsection (1)  
10 of this section;

11 (b) The names of the authorizing and consenting parties, except  
12 that in those cases where the consenting party is a confidential  
13 informant, the name of the confidential informant need not be divulged;

14 (c) The names of the officers authorized to intercept, transmit,  
15 and record the conversation or communication;

16 (d) The identity of the particular person or persons, if known, who  
17 may have committed or may commit the offense;

18 (e) The details of the particular offense or offenses that may have  
19 been or may be committed and the expected date, location, and  
20 approximate time of the conversation or communication; and

21 (f) Whether there was an attempt to obtain authorization pursuant  
22 to RCW 9.73.090(2) and, if there was such an attempt, the outcome of  
23 the attempt.

24 (3) An authorization under this section is valid in all  
25 jurisdictions within Washington state and for the interception of  
26 communications from additional persons if the persons are brought into  
27 the conversation or transaction by the nonconsenting party or if the  
28 nonconsenting party or such additional persons cause or invite the  
29 consenting party to enter another jurisdiction.

30 (4) The recording of any conversation or communication under this  
31 section shall be done in such a manner that protects the recording from  
32 editing or other alterations.

33 (5) An authorization made under this section is valid for no more  
34 than twenty-four hours from the time it is signed by the authorizing  
35 officer, and each authorization shall independently meet all of the  
36 requirements of this section. The authorizing officer shall sign the  
37 written report required under subsection (2) of this section,  
38 certifying the exact date and time of his or her signature. An  
39 authorization under this section may be extended not more than twice

1 for an additional consecutive twenty-four hour period based upon the  
2 same probable cause regarding the same suspected transaction. Each  
3 such extension shall be signed by the authorizing officer.

4 (6) Within fifteen days after the signing of an authorization that  
5 results in any interception, transmission, or recording of a  
6 conversation or communication pursuant to this section, the law  
7 enforcement agency which made the interception, transmission, or  
8 recording shall submit a report including the original authorization  
9 under subsection (2) of this section to a judge of a court having  
10 jurisdiction which report shall identify (a) the persons, including the  
11 consenting party, who participated in the conversation, and (b) the  
12 date, location, and approximate time of the conversation.

13 In those cases where the consenting party is a confidential  
14 informant, the name of the confidential informant need not be divulged.

15 A monthly report shall be filed by the law enforcement agency with  
16 the administrator for the courts indicating the number of  
17 authorizations granted, the date and time of each authorization,  
18 interceptions made, arrests resulting from an interception, and  
19 subsequent invalidations.

20 (7)(a) Within two judicial days of receipt of a report under  
21 subsection (6) of this section, the court shall make an ex parte review  
22 of the authorization, but not of the evidence, and shall make a  
23 determination whether the requirements of subsection (1) of this  
24 section were met. If the court determines that any of the requirements  
25 of subsection (1) of this section were not met, the court shall order  
26 that any recording and any copies or transcriptions of the conversation  
27 or communication be destroyed. Destruction of recordings, copies, or  
28 transcriptions shall be stayed pending any appeal of a finding that the  
29 requirements of subsection (1) of this section were not met.

30 (b) Absent a continuation under (c) of this subsection, six months  
31 following a determination under (a) of this subsection that probable  
32 cause did not exist, the court shall cause a notice to be mailed to the  
33 last known address of any nonconsenting party to the conversation or  
34 communication that was the subject of the authorization. The notice  
35 shall indicate the date, time, and place of any interception,  
36 transmission, or recording made pursuant to the authorization. The  
37 notice shall also identify the agency that sought the authorization and  
38 shall indicate that a review under (a) of this subsection resulted in

1 a determination that the authorization was made in violation of this  
2 section.

3 (c) An authorizing agency may obtain six-month extensions to the  
4 notice requirement of (b) of this subsection in cases of active,  
5 ongoing criminal investigations that might be jeopardized by sending  
6 the notice.

7 (8) (~~In any subsequent judicial proceeding,~~) Evidence obtained  
8 through the interception, transmission, or recording of a conversation  
9 or communication pursuant to this section shall be (~~admissible only~~  
10 ~~if~~) inadmissible in any civil or criminal case in all courts of  
11 general or limited jurisdiction in this state unless:

12 (a) The court finds that the requirements of subsection (1) of this  
13 section were met (~~and the evidence is used in prosecuting an offense~~  
14 ~~listed in subsection (1)(b) of this section; or~~);

15 (b) The evidence is admitted with the permission of (~~the~~) any  
16 nonconsenting person whose communication or conversation was  
17 intercepted, transmitted, or recorded; (~~or~~)

18 (c) The evidence is admitted in a prosecution for a "serious  
19 violent offense" as defined in RCW 9.94A.030 in which a party who  
20 consented to the interception, transmission, or recording was a victim  
21 of the offense; or

22 (d) The evidence is admitted in a civil suit for personal injury or  
23 wrongful death arising out of the same incident, in which a party who  
24 consented to the interception, transmission, or recording was a victim  
25 of a serious violent offense as defined in RCW 9.94A.030.

26 Nothing in this subsection bars the admission of testimony of a  
27 party or (~~eyewitness~~) witness to the intercepted, transmitted, or  
28 recorded conversation or communication when that testimony is unaided  
29 by information obtained solely by violation of RCW 9.73.030.

30 (9) Any determination of invalidity of an authorization under this  
31 section shall be reported by the court to the office of the  
32 administrator for the courts.

33 (10) Any person who intentionally intercepts, transmits, or records  
34 or who intentionally authorizes the interception, transmission, or  
35 recording of a conversation or communication in violation of this  
36 section, is guilty of a class C felony punishable according to chapter  
37 9A.20 RCW.

38 (11) An authorizing agency is liable for twenty-five thousand  
39 dollars in exemplary damages, in addition to any other damages

1 authorized by this chapter or by other law, to a person whose  
2 conversation or communication was intercepted, transmitted, or recorded  
3 pursuant to an authorization under this section if:

4 (a) In a review under subsection (7) of this section, or in a  
5 suppression of evidence proceeding, it has been determined that the  
6 authorization was made without the probable cause required by  
7 subsection (1)(b) of this section; and

8 (b) The authorization was also made without a reasonable suspicion  
9 that the conversation or communication would involve the unlawful acts  
10 identified in subsection (1)(b) of this section.

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