

SENATE BILL 5126

State of Washington

52nd Legislature

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By Senators Nelson, Madsen, Patterson, Rasmussen, Thorsness, Hayner, Johnson, A. Smith and Jesernig.

Read first time . Referred to Committee on .

1 AN ACT Relating to pen registers and trap and trace devices;
2 reenacting and amending RCW 9.73.030; adding a new chapter to Title 9
3 RCW; and prescribing penalties.

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

5 NEW SECTION. **Sec. 1.** As used in this chapter:

6 (1) "Aural transfer" means a transfer containing the human voice at
7 any point between and including the point of origin and the point of
8 reception;

9 (2) "Electronic communication" means any transfer of signs,
10 signals, writing, images, sounds, data, or intelligence of any nature
11 transmitted, in whole or in part, by a wire, radio, electromagnetic,
12 photoelectronic, or photooptical system that affects interstate or
13 foreign commerce, but does not include:

14 (a) The radio portion of a cordless telephone communication that is
15 transmitted between the cordless telephone handset and the base unit;

1 (b) A wire or oral communication;

2 (c) A communication made through a tone-only paging device; or

3 (d) A communication from an electronic or mechanical device that
4 permits the tracking of the movement of a person or object.

5 (3) "Electronic communication service" means a service that
6 provides to its users the ability to send or receive wire or electronic
7 communications;

8 (4) "Electronic communications system" means a wire, radio,
9 electromagnetic, photooptical, or photoelectronic facility for the
10 transmission of electronic communications, and computer facilities or
11 related electronic equipment for the electronic storage of such
12 communications;

13 (5) "Electronic storage" means:

14 (a) The temporary, intermediate storage of a wire or electronic
15 communication incidental to the electronic transmission of the
16 communication; and

17 (b) The storage of such communication by an electronic
18 communication service for purposes of backup protection of the
19 communication;

20 (6) "Law enforcement officer" means a general authority Washington
21 peace officer as defined by RCW 10.93.020(3);

22 (7) "Pen register" means a device that records or decodes
23 electronic or other impulses that identifies the numbers dialed or
24 otherwise transmitted on the telephone line to which the device is
25 attached, but the term does not include a device used by a provider or
26 customer of a wire or electronic communication service for billing, or
27 recording as an incident to billing, for communications services
28 provided by the provider or a device used by a provider or customer of
29 a wire communication service for cost accounting or other similar
30 purposes in the ordinary course of its business;

1 (8) "Trap and trace device" means a device that captures the
2 incoming electronic or other impulses that identifies the originating
3 number of an instrument or device from which a wire or electronic
4 communication was transmitted;

5 (9) "User" means a person or entity who:

6 (a) Uses an electronic communication service; and

7 (b) Is duly authorized by the provider of the service to engage in
8 such use; and

9 (10) "Wire communication" means an aural transfer made in whole or
10 in part through the use of facilities for the transmission of
11 communications by the aid of wire, cable, or other like connection
12 between the point of origin and the point of reception, including the
13 use of such a connection in a switching station, furnished or operated
14 by a person engaged in providing or operating such facilities for the
15 transmission of interstate or foreign communications or communications
16 affecting interstate or foreign commerce and includes the electronic
17 storage of the communication, but does not include the radio portion of
18 a cordless telephone communication that is transmitted between the
19 cordless telephone handset and the base unit.

20 NEW SECTION. **Sec. 2.** (1) Except as provided in this section, no
21 person may install or use a pen register or a trap and trace device
22 without first obtaining a court order under section 4 of this act.

23 (2) The prohibition of subsection (1) of this section does not
24 apply to the use of a pen register or a trap and trace device by a
25 provider of electronic or wire communication service:

26 (a) That relates to the operation, maintenance, or testing of a
27 wire or electronic communication service, to the protection of the
28 rights or property of the provider, or to the protection of users of
29 that service from abuse of service or unlawful use of service;

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

6 (c) Where the consent of the user of that service has been
7 obtained.

8 (3) Whoever knowingly violates subsection (1) of this section shall
9 be guilty of a gross misdemeanor.

10 NEW SECTION. **Sec. 3.** A law enforcement officer may make
11 application for an order or an extension of an order under section 4 of
12 this act authorizing or approving the installation and use of a pen
13 register or a trap and trace device under this chapter, in writing
14 under oath or equivalent affirmation, to the superior court. An
15 application shall include:

16 (1) The identity of the law enforcement officer making the
17 application and the identity of the law enforcement agency conducting
18 the investigation; and

19 (2) A certification by the applicant that the information likely to
20 be obtained is relevant to an ongoing criminal investigation being
21 conducted by that agency.

22 NEW SECTION. **Sec. 4.** (1) Upon an application made under section
23 3 of this act the court shall enter an ex parte order authorizing the
24 installation and use of a pen register or a trap and trace device
25 within the jurisdiction of the court if the court finds that the law
26 enforcement officer has certified to the court that the information
27 likely to be obtained by such installation and use is relevant to an
28 ongoing criminal investigation.

1 (2) An order issued under this section shall specify:

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

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

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

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

13 (3) An order issued under this section shall direct, upon the
14 request of the applicant, the furnishing of information, facilities,
15 and technical assistance necessary to accomplish the installation of
16 the pen register or trap and trace device under section 5 of this act.

17 (4) An order issued under this section shall authorize the
18 installation and use of a pen register or a trap and trace device for
19 a period not to exceed sixty days. Extensions of the order may be
20 granted, but only upon an application for an order under section 3 of
21 this act and upon the judicial finding required by subsection (1) of
22 this section. The period of extension may not exceed sixty days.

23 (5) An order authorizing or approving the installation and use of
24 a pen register or a trap and trace device shall direct that:

25 (a) The order be sealed until otherwise ordered by the court; and

26 (b) The person owning or leasing the line to which the pen register
27 or a trap and trace device is attached, or who has been ordered by the
28 court to provide assistance to the applicant, not disclose the
29 existence of the pen register or trap and trace device or the existence

1 of the investigation to the listed subscriber, or to any other person,
2 unless or until otherwise ordered b the court.

3 NEW SECTION. **Sec. 5.** (1) Upon the request of a law enforcement
4 officer authorized to install and use a pen register under this
5 chapter, a provider of wire or electronic communication service,
6 landlord, custodian, or other person shall immediately furnish the law
7 enforcement officer all information, facilities, and technical
8 assistance necessary to accomplish the installation of the pen register
9 unobtrusively and with a minimum of interference with the services that
10 the person ordered by the court accords the party with respect to whom
11 the installation and use is to take place, if the assistance is
12 directed by a court order as provided in section 4 of this act.

13 (2) Upon the request of a law enforcement officer authorized to
14 receive the results of a trap and trace device under this chapter, a
15 provider of a wire or electronic communication service, landlord,
16 custodian, or other person shall install such a device immediately on
17 the appropriate line and shall furnish the law enforcement officer all
18 additional information, facilities, and technical assistance, including
19 installation and operation of the device unobtrusively and with a
20 minimum of interference with the services that the person so ordered by
21 the court accords the party with respect to whom the installation and
22 use is to take place, if the installation and assistance is directed by
23 a court order as provided in section 4 of this act. Unless otherwise
24 ordered by the court, the results of the trap and trace device shall be
25 furnished to an officer of the law enforcement agency designated in the
26 court order at reasonable intervals during regular business hours for
27 the duration of the order.

28 (3) A provider of a wire or electronic communication service,
29 landlord, custodian, or other person who furnishes facilities or

1 technical assistance according to this section shall be reasonably
2 compensated for reasonable expenses incurred in providing the
3 facilities and assistance.

4 (4) No cause of action shall lie in any court against a provider of
5 a wire or electronic communication service, its officers, employees,
6 agents, or other specified persons for providing information,
7 facilities, or assistance in accordance with the terms of a court order
8 under this chapter.

9 (5) A good faith reliance on a court order, a legislative
10 authorization, or a statutory authorization is a complete defense
11 against any civil or criminal action brought under this chapter or any
12 other law.

13 **Sec. 6.** RCW 9.73.030 and 1986 c 38 s 1 & 1985 c 260 s 2 are each
14 reenacted and amended to read as follows:

15 (1) Except as otherwise provided in this chapter or by sections 1
16 through 5 of this act, it shall be unlawful for any individual,
17 partnership, corporation, association, or the state of Washington, its
18 agencies, and political subdivisions to intercept, or record any:

19 (a) Private communication transmitted by telephone, telegraph,
20 radio, or other device between two or more individuals between points
21 within or without the state by any device electronic or otherwise
22 designed to record and/or transmit said communication regardless how
23 such device is powered or actuated, without first obtaining the consent
24 of all the participants in the communication;

25 (b) Private conversation, by any device electronic or otherwise
26 designed to record or transmit such conversation regardless how the
27 device is powered or actuated without first obtaining the consent of
28 all the persons engaged in the conversation.

1 (2) Notwithstanding subsection (1) of this section, wire
2 communications or conversations (a) of an emergency nature, such as the
3 reporting of a fire, medical emergency, crime, or disaster, or (b)
4 which convey threats of extortion, blackmail, bodily harm, or other
5 unlawful requests or demands, or (c) which occur anonymously or
6 repeatedly or at an extremely inconvenient hour, or (d) which relate to
7 communications by a hostage holder or barricaded person as defined in
8 RCW 70.85.100, whether or not conversation ensues, may be recorded with
9 the consent of one party to the conversation.

10 (3) Where consent by all parties is needed pursuant to this
11 chapter, consent shall be considered obtained whenever one party has
12 announced to all other parties engaged in the communication or
13 conversation, in any reasonably effective manner, that such
14 communication or conversation is about to be recorded or transmitted:
15 PROVIDED, That if the conversation is to be recorded that said
16 announcement shall also be recorded.

17 (4) An employee of any regularly published newspaper, magazine,
18 wire service, radio station, or television station acting in the course
19 of bona fide news gathering duties on a full time or contractual or
20 part time basis, shall be deemed to have consent to record and divulge
21 communications or conversations otherwise prohibited by this chapter if
22 the consent is expressly given or if the recording or transmitting
23 device is readily apparent or obvious to the speakers. Withdrawal of
24 the consent after the communication has been made shall not prohibit
25 any such employee of a newspaper, magazine, wire service, or radio or
26 television station from divulging the communication or conversation.

27 NEW SECTION. **Sec. 7.** Sections 1 through 5 of this act shall
28 constitute a new chapter in Title 9 RCW.

1 NEW SECTION. **Sec. 8.** If any provision of this act or its
2 application to any person or circumstance is held invalid, the
3 remainder of the act or the application of the provision to other
4 persons or circumstances is not affected.