

VETO MESSAGE ON HB 2406-S

March 30, 1996

To the Honorable Speaker and Members,

The House of Representatives of the State of Washington
Ladies and Gentlemen:

I am returning herewith, without my approval, Engrossed Substitute House Bill No. 2406 entitled:

"AN ACT Relating to interception, transmission, recording, or disclosure of communications;"

Engrossed Substitute House Bill No. 2406 amends Washington's Privacy Act, RCW 9.73, by authorizing law enforcement to use certain devices to intercept and record telephonic communications. Specifically, this legislation would allow law enforcement to use "pen register" and "trap and trace" devices, attached to telephone lines, to identify outgoing and incoming calls.

Although this bill requires a court order before these devices may be installed, such authorization is granted when law enforcement provides merely a "reason to believe" that using these devices will lead to evidence of crime or to a witness in a criminal investigation. This standard for issuing the court order is lower than the "probable cause" standard generally required for an arrest or search warrant. When issued, the court order authorizes the use of the pen register or trap and trace device for 60 days, with a possible 60-day extension. Law enforcement is not required to inform or to obtain the consent of the person whose telephone line is tapped. Therefore, persons calling out on the telephone line do not know that a pen register is recording every number dialed. Similarly, when a trap and trace device is used, all the originating telephone numbers of incoming calls are recorded; although it operates like the caller ID service, neither the person calling nor the person being called have consented to the use of the device.

Citizens' right to be secure in their private affairs and in their homes is essential to a free society. Washington State is very protective of people's right to privacy against governmental intrusions. The state constitution and Washington's Privacy Act afford greater protections than the federal Constitution and privacy laws particularly in the area of telephone communications.

It might be that citizens have come to expect less and less privacy because of modern advances in surveillance technology. Let us not forget, however, that this legislation involves the relationship between citizens and their government. The boundary between what is acceptable government invasion and what is not is established by the laws we enact and the high standard of our state constitution. I believe this legislation is inconsistent with the historical tradition in this state to fiercely protect citizens' private affairs against government intrusions.

A very detailed dossier of a person's lifestyle can be prepared through the use of these devices over a 60 day or longer period. Although these devices do not record conversations, they do create a list of calls made and received. Moreover, they capture any and all electronic impulses. Bank account and other access code numbers will be recorded by a pen register if the caller uses the phone to conduct bank transactions. These are not

insignificant trespasses into citizens' private affairs by their government.

It also troubles me greatly that the use of these devices is not limited to monitoring criminal suspects. Under this legislation, people who are totally innocent of criminal activity are possible subjects of monitoring if the use of these devices on their lines might lead to information relevant to any criminal investigation. I do not believe the citizens of Washington State favor this method of investigation.

Notably, under current law, courts may authorize law enforcement to use these devices under certain emergency circumstances. While law enforcement must be able to effectively utilize all appropriate investigative tools, I believe we must be ever vigilant against pressures to forfeit our privacy rights for the sake of expediency.

For these reasons, I have vetoed Engrossed Substitute House Bill No. 2406 in its entirety.

Respectfully submitted,
Mike Lowry
Governor