

HOUSE BILL REPORT

HB 2173

As Reported by House Committee On:
Health Care & Wellness

Title: An act relating to electronic monitoring in long-term care facilities.

Brief Description: Regarding electronic monitoring in long-term care facilities.

Sponsors: Representatives Schual-Berke and Moeller.

Brief History:

Committee Activity:

Health Care & Wellness: 2/26/07, 2/27/07 [DPS].

Brief Summary of Substitute Bill

- Authorizes residents of long-term care facilities to install and use an electronic monitoring device in their sleeping quarters, at their own expense.
- Requires residents to provide notice to facilities and obtain consent of roommates.
- Requires facilities to post notices and provide reasonable accommodation to residents.

HOUSE COMMITTEE ON HEALTH CARE & WELLNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Cody, Chair; Barlow, Campbell, Curtis, Green, Moeller, Pedersen, Schual-Berke and Seaquist.

Minority Report: Do not pass. Signed by 4 members: Representatives Morrell, Vice Chair; Hinkle, Ranking Minority Member; Alexander, Assistant Ranking Minority Member and Condotta.

Staff: Jasmine Vasavada (786-5793); and Dave Knutson (786-7146).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A resident of a nursing home or other long-term care facility may seek to install video cameras or other means of electronic surveillance in his or her sleeping quarters to help monitor the quality of care the resident is receiving. In Washington, there is no state statute allowing for the audio or video monitoring of a resident's room in a long-term care facility. In most cases, no state or federal privacy law would operate to prohibit such monitoring. However, as a matter of policy, some long-term care facilities may seek to prohibit residents from installing surveillance devices. At least two states, Texas and New Mexico, have enacted statutes explicitly authorizing residents of nursing homes to install electronic monitoring.

Under the Department of Social and Health Services' (DSHS) broad authority to regulate the facilities it licenses, the DSHS has adopted regulations that require boarding homes to ensure that resident-initiated monitoring complies with certain limitations. These regulations require a boarding home resident initiating such monitoring to: (1) obtain written consent of any roommates; (2) comply with state Privacy Act limitations; (3) identify a threat to his or her safety or health, or the safety of his or her possessions; and (4) agree with the facility on a specific duration of time in which the monitoring may take place. As a matter of practice, the DSHS has extended these requirements to nursing homes and adult family homes as well.

Washington law does not directly prohibit overt surveillance conducted by a resident in a long-term care facility. The state Privacy Act generally prohibits the interception or recording of any private communication or conversation without the consent of all parties to the communication or conversation. If both parties have notice that the communication is being recorded or intercepted, the recording or interception would not be considered private and would not be prohibited by the Privacy Act.

The Privacy Act does not regulate the interception or recording of silent video images without an audio or other communication component. However, in certain instances such a recording would be prohibited under the Washington voyeurism law, which establishes felony criminal liability for those who photograph, for the purpose of arousing or gratifying sexual desire, a person in a location where that person has a "reasonable expectation of privacy." The Washington courts have interpreted this to criminalize videotaping of a clothed person, even in a public place, if it is for voyeuristic purposes. Thus, monitoring for voyeuristic purposes would be prohibited anywhere, including in a long-term care facility.

Even where the Privacy Act does not apply, the Washington courts may find certain monitoring is illegal when it invades a person's privacy. The legal test for determining whether an invasion of privacy has occurred is whether the intrusion results in a disclosure of intimate details of a person's life that are of the kind one normally keeps entirely private or at most reveals only to family and close personal friends, and the person reasonably expected the information to remain private. Thus, secretly videotaping a person's intimate activities inside his or her own home may give rise to a legal claim for invasion of privacy. A Washington court, discussing a voyeurism case, has found that a nursing home serves as a home to its residents, who may reasonably expect to be safe from casual or hostile intrusion in their homes.

Although in any given case a court will consider the specific circumstances, many activities occurring in common areas or semi-private areas of an institution would fail the test for an invasion of privacy, because they occur in plain view of acquaintances or strangers. Similarly, where a person has been notified that a specific location is being monitored, the person would normally no longer have a reasonable expectation of privacy in that location.

Summary of Substitute Bill:

"Electronic monitoring" is defined as the recording or transmission of a series of photographs, a motion picture film, a videotape, a series of digital images, or any other recording or transmission of images, whether or not it includes an audio component, but does not include images captured by a still camera.

Residents of nursing homes, boarding homes, and adult family homes are authorized to install and conduct electronic monitoring, subject to certain conditions. A resident seeking to conduct authorized electronic monitoring must comply with any rules adopted by the DSHS. The resident must provide written notice to the facility, and pay for all maintenance and installation costs of the monitoring. The resident must also obtain consent in writing from any roommate who shares the same sleeping quarters and must limit monitoring to any conditions made by a roommate. If the roommate objects, the resident requesting monitoring may be moved to a different room. If a resident is incompetent, the resident's attorney in fact, guardian, or other legal representative may authorize electronic monitoring on behalf of the resident.

Long-term care facilities must permit a resident to install electronic monitoring and provide reasonable physical accommodation to facilitate the installation and use of the electronic monitoring device. Facilities must inform new residents and current residents of their right to conduct electronic monitoring with a form developed by the DSHS. A facility may not discriminate against residents who seek to install monitoring by refusing to admit them into residency or removing them from residency in retaliation for a request to install or the actual implementation of monitoring. Facilities must post notices at both the main entrance and outside individual rooms where monitoring is being conducted to inform visitors of electronic monitoring. The DSHS may exercise its broad authority to regulate the facilities it licenses to enforce against any violation of these provisions.

A tape or other recording created in compliance with these provisions is admissible as evidence in a civil or criminal court action or administrative proceeding. Electronic monitoring that is inconsistent with or violates the Privacy Act is not authorized.

Substitute Bill Compared to Original Bill:

The substitute bill: (1) removes the exemption from Privacy Act requirements and adds a statement that nothing in this section authorizes monitoring in violation of the Privacy Act; (2) removes a specific reference to administrative penalties, instead allowing the DSHS to exercise its broad enforcement powers, which may include but are not limited to

administrative penalties; (3) requires a resident seeking to install or use electronic monitoring to comply with any other rules adopted by the DSHS; and (4) makes a technical change to avoid duplication of language in the code applying this act to adult family homes.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Electronic monitoring such as a video camera in a room can be important to the family of a loved one with dementia who is alleging abuse. In such a situation, a family may be unable to determine whether allegations of abuse are justified without being able to monitor the situation from their homes. It could work like a traffic camera. The state has prevented a family home where wiring was already installed from installing a camera, stating privacy concerns.

(Neutral) We believe current practices within the DSHS that apply to boarding homes is adequate and provides a good balance between privacy issues and safety issues. We would support rulemaking that extends this to family homes and nursing homes. This bill does not limit monitoring to circumstances where a specific problem has been identified, and does not limit it to a specific duration of time. This bill does not disallow audio monitoring, which is questionable for us because it is more invasive of privacy than video monitoring.

(Opposed) Residents are not asking for this, although occasionally family members may request this. A regulatory solution is coming. The requirement that a form is presented when a resident is admitted to a facility adds more complexity to an already overwhelming experience. Signs posted outside of rooms and the main entrance take away from a home-like environment.

Persons Testifying: (In support) John Chromy.

(Neutral) Julie Peterson, Washington Association of Housing and Services for the Aging.

(Opposed) Louise Ryan, Washington State Long-Term Care Ombudsman Program.

Persons Signed In To Testify But Not Testifying: None.