

SHB 2179 - H AMD 679

By Representative Smith

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The rapid development of advanced
4 technologies that can monitor and record private behavior beyond the
5 ability of normal human senses has made it necessary for the
6 legislature to establish new technology-neutral standards to protect
7 individual liberty. While all technology is neutral in itself, it is
8 the application by humans that can be both good and bad. Whether
9 surveillance is conducted by the individual, groups, or the government,
10 citizens are not always aware when technology is being used to record
11 and monitor their personal and private behavior. Surveillance
12 conducted remotely and observing activities that were previously not
13 viewable by the naked eye is rapidly increasing. As a consequence,
14 conduct that was formerly considered private may be at risk of losing
15 legal protection from government intrusion--for example, satellites
16 equipped with high resolution cameras can peer into our backyards and
17 our skylights, or read the book we are reading on a park bench. The
18 legislature finds that the right to privacy protects people, not
19 places, and although the expectation of privacy in public spaces may be
20 lower than in private spaces, it is not entirely eliminated. The
21 legislature finds that if legal protections for personal privacy fail
22 to keep up with evolving technology, the delicate balance of power
23 between an individual and the state may be disturbed in a manner
24 destructive to the personal freedom that is essential to our democracy.
25 It is the intent of the legislature to ensure that the gathering of
26 personal information by the state is restricted to that which is
27 reasonably necessary to meet legitimate societal objectives, and to
28 establish an expectation that certain forms of government surveillance,
29 using extraordinary sensing devices from a vantage point not readily

1 accessible to members of the general public, may not occur without the
2 supervision of a court, through a court-ordered warrant.

3 NEW SECTION. **Sec. 2.** The definitions in this section apply
4 throughout this section and sections 3 through 10 of this act unless
5 the context clearly requires otherwise.

6 (1)(a) "Agency" means the state of Washington, its agencies, and
7 political subdivisions.

8 (b) "Agency" also includes any entity or individual, whether public
9 or private, foreign or domestic, with which any of the entities
10 identified in (a) of this subsection has entered into a contractual
11 relationship or any other type of relationship, with or without
12 consideration, for the operation of a sensing device that acquires,
13 collects, or indexes personal information to accomplish an agency
14 function.

15 (2) "Clear and conspicuous notice" means notice that is reasonably
16 easy to find and easily understandable in terms of content and style to
17 the average reader, informing the public of the form of surveillance
18 used and how the information obtained by the surveillance will be
19 stored, used, or disclosed.

20 (3) "Conduct surveillance" means to engage in or induce a third
21 party to engage in the act of collecting personal information.

22 (4) "Court of competent jurisdiction" means any district court of
23 the United States or any United States court of appeals that has
24 jurisdiction over the offense being investigated or is located in a
25 district in which surveillance with the assistance of the extraordinary
26 sensing device will be conducted, or a court of general jurisdiction
27 authorized by the state of Washington to issue search warrants.

28 (5) "Extraordinary sensing device" means a sensing device that is
29 capable of remotely acquiring personal information from its
30 surroundings, using any frequency of the electromagnetic spectrum, but
31 does not include night vision goggles or equipment whose sole function
32 is to provide information directly necessary for safe air navigation or
33 operation of a vehicle.

34 (6) "Extraordinary vantage point" means a vantage point to which an
35 ordinary member of the public does not have ready access.

36 (7) "Imperceptible" means highly unlikely to be perceived by the
37 unassisted senses of a human being of ordinary abilities.

1 (8) "Personal information" means all information that:

2 (a) Describes, locates, or indexes anything about a person
3 including, but not limited to: (i) His or her social security number,
4 driver's license number, agency-issued identification number, student
5 identification number, real or personal property holdings derived from
6 tax returns, and the person's education, financial transactions,
7 medical history, ancestry, religion, political ideology, or criminal or
8 employment record; or (ii) intellectual property, trade secrets,
9 proprietary information, or operational information;

10 (b) Affords a basis for inferring personal characteristics, such as
11 finger and voice prints, photographs, or things done by or to such a
12 person; and the record of the person's presence, registration, or
13 membership in an organization or activity, or admission to an
14 institution; or

15 (c) Describes, locates, or indexes anything about a person
16 including, but not limited to, his or her activities, behaviors,
17 pursuits, conduct, interests, movements, occupations, or associations.

18 NEW SECTION. **Sec. 3.** (1) Except as otherwise specifically
19 authorized in sections 2 through 10 of this act, it is unlawful for the
20 state of Washington, its agencies, and political subdivisions to
21 conduct surveillance with an extraordinary sensing device from an
22 extraordinary vantage point.

23 (2)(a) An agency may operate an extraordinary sensing device from
24 an extraordinary vantage point for the following purposes, which are
25 not deemed "conducting surveillance" under subsection (1) of this
26 section, as long as the operation is not intended to collect personal
27 information and the purpose of the operation is not an investigation of
28 criminal activity or an investigation or enforcement of regulatory
29 violations or noncompliance:

30 (i) Monitoring to discover, locate, observe, and prevent forest
31 fires, but only in such places and at times when there is high fire
32 danger or a fire-related emergency has been declared by the governor or
33 a state or local authority;

34 (ii) Monitoring an environmental or weather-related catastrophe or
35 damage from such an event, but only when a catastrophe has been
36 publicly declared by the governor and then only for a period of thirty
37 days from the date of the public declaration;

1 (iii) Surveying for wildlife management, habitat preservation, or
2 environmental damage, but only on public land and only when written
3 policies and procedures have been adopted to minimize any incidental
4 surveying of private land. No data or images of private land collected
5 under the authority of this subsection may be used in any regulatory or
6 criminal proceeding in any manner, nor may the data or images form the
7 basis of any affidavit or declaration to be admitted in those
8 proceedings; or

9 (iv) Surveying for the assessment and evaluation of environmental
10 or weather-related damage, erosion, flood, or contamination, but only
11 after the head of any agency or its legislative authority has published
12 notice of intent to conduct the survey in the newspaper of record in
13 each county in which the survey is to occur, stating with specificity
14 the time, place, and manner by which the surveying will be done and
15 when it will be completed.

16 (b) If an agency uses an extraordinary sensing device from an
17 extraordinary vantage point for one of the limited purposes outlined in
18 (a) of this subsection, the agency must:

19 (i) Delete or deidentify any personal information that was
20 accidentally or incidentally collected during the operation as soon as
21 practicable, pursuant to a precise and limited retention schedule; and

22 (ii) Comply with the annual reporting and data minimization
23 requirements of section 6 (4) through (6) of this act.

24 (c) Any personal information accidentally or incidentally collected
25 in an operation conducted under this subsection (2) may not be
26 introduced as evidence in any civil or criminal court proceeding,
27 except in a prosecution of a felony.

28 NEW SECTION. **Sec. 4.** (1) The state of Washington, its agencies,
29 and political subdivisions may conduct surveillance otherwise
30 prohibited under section 3 of this act pursuant to a criminal search
31 warrant issued by a court of competent jurisdiction upon a finding of
32 probable cause.

33 (2) Evidence obtained in violation of sections 2 through 7 of this
34 act may not be used to support a finding of probable cause under this
35 section.

36 (3) Except as provided in section 8 of this act, no personal
37 information collected on an individual or area other than the target

1 that justified the issuance of the search warrant may be disclosed or
2 distributed outside of the agency that conducted the surveillance,
3 except:

4 (a) Information about individuals or areas other than the target
5 may be disclosed to the court and counsel as necessary for prosecuting
6 the target or targets that justified the issuance of the search
7 warrant; and

8 (b) Information may be disclosed as necessary for a purpose that is
9 authorized under sections 3 through 10 of this act.

10 NEW SECTION. **Sec. 5.** (1) It is lawful for the state of
11 Washington, its agencies, and political subdivisions to conduct
12 surveillance using an extraordinary sensing device from an
13 extraordinary vantage point and to disclose personal information
14 derived from operation of an extraordinary sensing device under the
15 following emergency circumstances:

16 (a) An agency elected official, appointed official, director, or
17 deputy director reasonably determines that:

18 (i) An emergency situation exists that involves criminal activity
19 and presents immediate danger of death or serious physical injury to
20 any person;

21 (ii) Addressing the danger identified in (a)(i) of this subsection
22 requires operation of the device before a warrant authorizing the
23 operation can, with due diligence, be obtained; and

24 (iii) There are grounds upon which such a warrant could be entered
25 to authorize such an operation.

26 (b) An agency employee or authorized agent reasonably determines
27 that an emergency situation exists and:

28 (i) The emergency presents an immediate danger of death or serious
29 physical injury to any person;

30 (ii) Addressing the emergency situation identified in (b)(i) of
31 this subsection requires operation of an extraordinary sensing device
32 to reduce the danger of death or serious physical injury;

33 (iii) The purpose of the operation is not investigation of criminal
34 activity; and

35 (iv) The operation is not intended to collect personal information.

36 (2)(a) An application for a warrant providing for the operation of

1 the extraordinary sensing device under subsection (1) of this section
2 must be made within forty-eight hours after the operation begins.

3 (b) The surveillance must be immediately terminated when the
4 personal information sought is obtained or when the application for the
5 warrant is denied, whichever is earlier.

6 (c) Any personal information incidentally collected during the
7 operation must be deleted within seventy-two hours of the operation's
8 completion, unless it is not reasonably feasible to delete the personal
9 information without compromising information, the retention of which is
10 still necessary in order to address the emergency situation or
11 prosecute the criminal activity that necessitated the emergency
12 operation under subsection (1)(a) of this section.

13 (d) Within seventy-two hours of authorizing surveillance pursuant
14 to the provisions in subsection (1)(b) of this section, the agency
15 employee or authorized agent must provide written notice to the head of
16 the agency and to the prosecuting authority of any county in which the
17 surveillance has been authorized. The agency must promptly allow the
18 prosecuting authority in the county or counties where such an operation
19 is occurring or has occurred to review any data collected.

20 (3) In the event an application for a warrant under subsection
21 (2)(a) of this section is denied, the personal information obtained
22 from the operation of an extraordinary sensing device must be treated
23 as having been obtained in violation of this chapter for the purpose of
24 the exclusion of evidence under section 4(2) of this act.

25 (4) Any law enforcement or other agency that conducts surveillance
26 using an extraordinary sensing device from an extraordinary vantage
27 point under the authority of this section must issue an annual public
28 audit as required under section 6 of this act.

29 NEW SECTION. **Sec. 6.** Agency procurement and use of extraordinary
30 sensing devices for surveillance purposes must be conducted in a
31 transparent manner that is open to public scrutiny, as provided in this
32 section.

33 (1) For the purposes of this section, "governing body" means the
34 council, commission, board, or other controlling body in which
35 legislative powers are vested, except where no governing body exists
36 other than the state legislature, in which case, "governing body" means

1 the chief executive officer responsible for the governance of the
2 agency.

3 (2) No agency may procure an extraordinary sensing device for
4 surveillance purposes without first obtaining explicit approval from
5 the agency's governing body.

6 (3) The governing body shall develop and make publicly available
7 written policies and procedures for the use of the extraordinary
8 sensing device and provide notice and opportunity for public comment
9 prior to adoption of the written policies and procedures.

10 (4) For any calendar year in which an agency has procured or used
11 an extraordinary sensing device to conduct surveillance from an
12 extraordinary vantage point, the agency must prepare an annual report.
13 The report must be made publicly available and must at a minimum
14 include the following:

15 (a) The types of extraordinary sensing devices used, the purposes
16 for which each type of extraordinary sensing device was used, the
17 circumstances under which use was authorized, and the name of the
18 officer or official who authorized the use;

19 (b) Whether deployment of the device was imperceptible to the
20 public;

21 (c) The specific kinds of personal information that the
22 extraordinary sensing device collected about individuals;

23 (d) The length of time for which any personal information collected
24 by the extraordinary sensing device was retained;

25 (e) The specific steps taken to mitigate the impact on an
26 individual's privacy, including protections against unauthorized use
27 and disclosure and a data minimization protocol; and

28 (f) An individual point of contact for citizen complaints and
29 concerns.

30 (5) The data minimization protocol required under subsection (4)(e)
31 of this section must state the steps taken by the agency to ensure
32 that:

33 (a) Personal information is collected for legitimate, limited, and
34 specifically stated purposes;

35 (b) Collection of personal information is limited to the minimum
36 amount necessary for the specified purposes and appropriate
37 technologies are used to minimize the data collected. For example, the

1 agency uses encryption where practicable to obscure the images of
2 individuals whose identity is not related to the regulatory purpose of
3 the surveillance;

4 (c) Personal information is only used and disclosed for the
5 purposes specified;

6 (d) Personal information is deleted pursuant to precise and
7 appropriately limited retention schedules and in such a manner that
8 prevents the agency or a third party from being able to reconstruct the
9 personal information after deletion; and

10 (e) Only authorized persons have access to information and data
11 obtained through surveillance and authorized persons have received
12 training on their duties and obligations to ensure the confidentiality
13 of the information and data.

14 (6) Each agency, if required to report under subsection (4) of this
15 section, must submit the annual report for the previous calendar year
16 by March 1st, beginning in 2015, as follows:

17 (a) In the case of local government agencies, the annual reports
18 must be submitted to the agency's governing body.

19 (b) In the case of state agencies, the annual reports must be
20 submitted to the joint legislative audit and review committee, who
21 shall compile the results and submit them to the legislature by
22 September 1st of each year, beginning in 2015.

23 NEW SECTION. **Sec. 7.** It is lawful for the state of Washington,
24 its agencies, and political subdivisions to conduct surveillance using
25 an extraordinary sensing device from an extraordinary vantage point
26 without meeting the requirements of sections 3 through 6 of this act if
27 the operation is part of a training exercise conducted on a military
28 base and the extraordinary sensing device does not collect the personal
29 information of persons located outside the military base.

30 NEW SECTION. **Sec. 8.** Any personal information obtained in
31 violation of sections 3 through 7 of this act is inadmissible in any
32 civil or criminal case in all courts of general or limited jurisdiction
33 in this state, except:

34 (1) In an action for damages under section 9 of this act, with the
35 permission of the person whose rights have been violated; or

1 (2) In a criminal action in which the defendant is charged with a
2 crime, the commission of which would jeopardize national security.

3 NEW SECTION. **Sec. 9.** Any person who intentionally violates the
4 provisions of sections 2 through 8 of this act is subject to legal
5 action for damages, to be brought by any other individual claiming that
6 a violation of sections 2 through 8 of this act has injured his or her
7 business, his or her person, or his or her reputation. An individual
8 so injured is entitled to actual damages, including mental pain and
9 suffering endured by the individual on account of the violation, or
10 liquidated damages, computed at the rate of one thousand dollars per
11 day for each day of violation, not to exceed ten thousand dollars. In
12 addition, the individual is entitled to reasonable attorneys' fees and
13 other costs of litigation.

14 NEW SECTION. **Sec. 10.** The attorney general is encouraged to
15 compile and make available to agencies a list of devices that it has
16 determined to be "extraordinary sensing devices." The legislature
17 delegates to the attorney general the authority to make such a
18 determination based on the definition established in section 2 of this
19 act and the stated intent of sections 2 through 9 of this act.

20 NEW SECTION. **Sec. 11.** Sections 2 through 10 of this act are each
21 added to chapter 9.73 RCW and codified with the subchapter heading of
22 "extraordinary sensing devices."

23 NEW SECTION. **Sec. 12.** If any provision of this act or its
24 application to any person or circumstance is held invalid, the
25 remainder of the act or the application of the provision to other
26 persons or circumstances is not affected."

27 Correct the title.

EFFECT: Makes the following changes:
Changes language in the intent section.

Broadens the definition of an "agency" subject to the restrictions on government surveillance to include any entity or individual, whether foreign or domestic, with which any governmental entity has entered into any type of relationship, with or without consideration, for the operation of a sensing device that acquires, collects, or indexes personal information to accomplish an agency function.

Changes the definition of "conduct surveillance" to provide that it means to engage in or induce a third party to engage in the act of collecting personal information.

Makes several changes to the definition of "personal information" including broadening the definition of information that describes, locates, or indexes anything about a person to include intellectual property, trade secrets, proprietary information, and operational information.

Changes the definition of an "extraordinary sensing device" to provide it is a sensing device that is capable of remotely acquiring personal information from its surroundings, using any frequency of the electromagnetic spectrum, but does not include night vision goggles or equipment whose sole function is to provide information directly necessary for safe air navigation or operation of a vehicle.

Narrows exemptions from the definition of "conducting surveillance" for certain kinds of monitoring and surveying; specifies that when an agency accidentally or incidentally collects personal information pursuant to such a monitoring or surveying operation: (1) The agency must delete or deidentify the personal information as soon as practicable, pursuant to a precise and limited retention schedule; (2) the agency must comply with the annual reporting and data minimization requirements of section 6 (4) through (6) of the act; and (3) any personal information accidentally or incidentally collected may not be introduced as evidence in any civil or criminal court proceeding, except in a felony prosecution.

Provides that personal information collected pursuant to a criminal search warrant on an individual who was not the target of the warrant may not be disclosed or distributed outside of the agency that conducted the surveillance, except: (1) To the court and counsel as necessary for prosecuting the target or targets that justified the issuance of the search warrant; and (2) as necessary for a purpose authorized under the bill.

Requires an agency employee or authorized agent who authorizes surveillance in emergency circumstances to provide written notice to the head of the agency and to the prosecuting authority of any county in which such surveillance has been authorized, within seventy-two hours of authorizing the surveillance.

Waives the requirement that personal information incidentally collected in an emergency operation be deleted within seventy-two hours, if such information cannot reasonably feasibly be deleted without compromising information, the retention of which is still necessary in order to address the emergency situation or prosecute the criminal activity that necessitated the emergency operation.

Requires the agency to promptly provide to the prosecuting authority in the county or counties where a surveillance operation is occurring or has occurred the ability to review any data collected, when surveillance is authorized by an agency employee or authorized agent in exigent circumstances.

Eliminates a provision that addressed surveillance for the purpose of regulatory enforcement of a permitted or licensed activity.

Removes the statement of the legislature's intent that a determination by the attorney general, of whether a device is an "extraordinary sensing device," be afforded the utmost deference.
Makes technical changes.

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