

**HB 2789 - H AMD 769**

By Representative Morris

ADOPTED 02/17/2014

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

3 NEW SECTION. **Sec. 1.** The legislature finds that technological  
4 advances have provided new, unique equipment that may be utilized for  
5 surveillance purposes. These technological advances often outpace  
6 statutory protections and can lead to inconsistent or contradictory  
7 interpretations between jurisdictions. The legislature finds that  
8 regardless of application or size, the use of these extraordinary  
9 surveillance technologies, without public debate or clear legal  
10 authority, creates uncertainty for citizens and agencies throughout  
11 Washington state. The legislature finds that extraordinary  
12 surveillance technologies do present a substantial privacy risk  
13 potentially contrary to the strong privacy protections enshrined in  
14 Article I, section 7 of the Washington state Constitution that reads  
15 "No person shall be disturbed in his private affairs, or his home  
16 invaded, without authority of law." The legislature further finds that  
17 the lack of clear statutory authority for the use of surveillance  
18 technologies may increase liability to state and local jurisdictions.  
19 It is the intent of the legislature to provide clear standards for the  
20 lawful use of extraordinary surveillance technologies by state and  
21 local jurisdictions.

22 NEW SECTION. **Sec. 2.** The definitions in this section apply  
23 throughout this subchapter unless the context clearly requires  
24 otherwise.

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

27 (b) "Agency" also includes any entity or individual, whether public  
28 or private, with which any of the entities identified in (a) of this  
29 subsection has entered into a contractual relationship or any other

1 type of relationship, with or without consideration, for the operation  
2 of an extraordinary sensing device that acquires, collects, or indexes  
3 personal information to accomplish an agency function.

4 (2) "Biometric identification system" is a system that collects  
5 unique physical and behavioral characteristics including, but not  
6 limited to, biographical data, facial photographs, fingerprints, and  
7 iris scans to identify individuals.

8 (3) "Court of competent jurisdiction" means any district court of  
9 the United States or any United States court of appeals that has  
10 jurisdiction over the offense being investigated or is located in a  
11 district in which surveillance with the assistance of the extraordinary  
12 sensing device will be conducted, or a court of general jurisdiction  
13 authorized by the state of Washington to issue search warrants.

14 (4) "Extraordinary sensing device" means an unmanned aircraft  
15 system.

16 (5) "Governing body" means the council, commission, board, or other  
17 controlling body of an agency in which legislative powers are vested,  
18 except that for a state agency for which there is no governing body  
19 other than the state legislature, "governing body" means the chief  
20 executive officer responsible for the governance of the agency.

21 (6) "Personal information" means all information that:

22 (a) Describes, locates, or indexes anything about a person  
23 including, but not limited to:

24 (i) His or her social security number, driver's license number,  
25 agency-issued identification number, student identification number,  
26 real or personal property holdings derived from tax returns, and the  
27 person's education, financial transactions, medical history, ancestry,  
28 religion, political ideology, or criminal or employment record; or

29 (ii) Intellectual property, trade secrets, proprietary information,  
30 or operational information;

31 (b) Affords a basis for inferring personal characteristics, such as  
32 finger and voice prints, photographs, or things done by or to such  
33 person; and the record of the person's presence, registration, or  
34 membership in an organization or activity, or admission to an  
35 institution; or

36 (c) Indexes anything about a person including, but not limited to,  
37 his or her activities, behaviors, pursuits, conduct, interests,  
38 movements, occupations, or associations.

1 (7)(a) "Sensing device" means a device capable of remotely  
2 acquiring personal information from its surroundings, using any  
3 frequency of the electromagnetic spectrum.

4 (b) "Sensing device" does not include equipment whose sole function  
5 is to provide information directly necessary for safe air navigation or  
6 operation of a vehicle.

7 (8) "Unmanned aircraft system" means an aircraft that is operated  
8 without the possibility of human intervention from within or on the  
9 aircraft, together with associated elements, including communication  
10 links and components that control the unmanned aircraft that are  
11 required for the pilot in command to operate safely and efficiently in  
12 the national airspace system.

13 NEW SECTION. **Sec. 3.** Except as otherwise specifically authorized  
14 in this subchapter, it is unlawful for an agency to operate an  
15 extraordinary sensing device or disclose personal information about any  
16 person acquired through the operation of an extraordinary sensing  
17 device.

18 NEW SECTION. **Sec. 4.** (1) Agency procurement and use of  
19 extraordinary sensing devices must be conducted in a transparent manner  
20 that is open to public scrutiny, as provided in this section.

21 (2) For a state agency having jurisdiction over criminal law  
22 enforcement including, but not limited to, the Washington state patrol,  
23 the agency may not procure an extraordinary sensing device for criminal  
24 law enforcement without the explicit approval of the legislature, given  
25 for that specific extraordinary sensing device to be used for a  
26 specific purpose.

27 (3) For a local agency having jurisdiction over criminal law  
28 enforcement, the agency may not procure an extraordinary sensing device  
29 without the explicit approval of the governing body of such locality,  
30 given for that specific extraordinary sensing device to be used for a  
31 specific purpose.

32 (4) For a state or local agency seeking to use an extraordinary  
33 sensing device for a purpose described in section 10(1) (b), (c), (d),  
34 or (e) of this act, the agency may not procure an extraordinary sensing  
35 device without first obtaining explicit approval from the agency's  
36 governing body.

1 (5) For an agency other than as described in subsections (2)  
2 through (4) of this section, the agency may not procure an  
3 extraordinary sensing device.

4 NEW SECTION. **Sec. 5.** The governing body for each agency must  
5 develop and make publicly available written policies and procedures for  
6 the use of any extraordinary sensing device procured, and provide  
7 notice and opportunity for public comment prior to adoption of the  
8 written policies and procedures.

9 NEW SECTION. **Sec. 6.** All operations of an extraordinary sensing  
10 device or disclosure of personal information about any person acquired  
11 through the operation of an extraordinary sensing device must be  
12 conducted in such a way as to minimize the collection and disclosure of  
13 personal information not authorized under this subchapter.

14 NEW SECTION. **Sec. 7.** (1) An extraordinary sensing device may be  
15 operated and personal information from such operation disclosed, if the  
16 operation and collection of personal information is pursuant to a  
17 search warrant issued by a court of competent jurisdiction as provided  
18 in this section, and the operation, collection, and disclosure are  
19 compliant with the provisions of this chapter.

20 (2) Each petition for a search warrant from a judicial officer to  
21 permit the use of an extraordinary sensing device and personal  
22 information collected from such operation must be made in writing, upon  
23 oath or affirmation, to a judicial officer in a court of competent  
24 jurisdiction for the geographic area in which an extraordinary sensing  
25 device is to be operated or where there is probable cause to believe  
26 the offense for which the extraordinary sensing device is sought has  
27 been committed, is being committed, or will be committed.

28 (3) The law enforcement officer shall submit an affidavit that  
29 includes:

30 (a) The identity of the applicant and the identity of the agency  
31 conducting the investigation;

32 (b) The identity of the individual and area for which use of the  
33 extraordinary sensing device is being sought;

34 (c) Specific and articulable facts demonstrating probable cause to  
35 believe that there has been, is, or will be criminal activity and that

1 the operation of the extraordinary sensing device will uncover evidence  
2 of such activity or facts to support the finding that there is probable  
3 cause for issuance of a search warrant pursuant to applicable  
4 requirements; and

5 (d) A statement that other methods of data collection have been  
6 investigated and found to be either cost prohibitive or pose an  
7 unacceptable safety risk to a law enforcement officer or to the public.

8 (4) If the judicial officer finds, based on the affidavit  
9 submitted, there is probable cause to believe a crime has been  
10 committed, is being committed, or will be committed and there is  
11 probable cause to believe the personal information likely to be  
12 obtained from the use of the extraordinary sensing device will be  
13 evidence of the commission of such offense, the judicial officer may  
14 issue a search warrant authorizing the use of the extraordinary sensing  
15 device. The search warrant must authorize the collection of personal  
16 information contained in or obtained from the extraordinary sensing  
17 device, but must not authorize the use of a biometric identification  
18 system.

19 (5) Warrants may not be issued for a period greater than ten days.  
20 Extensions may be granted, but no longer than the authorizing judicial  
21 officer deems necessary to achieve the purposes for which it was  
22 granted and in no event for longer than thirty days.

23 (6) Within ten days of the execution of a search warrant, the  
24 officer executing the warrant must serve a copy of the warrant upon the  
25 target of the warrant, except if notice is delayed pursuant to section  
26 8 of this act.

27 NEW SECTION. **Sec. 8.** (1) A governmental entity acting under this  
28 section may, when a warrant is sought, include in the petition a  
29 request, which the court shall grant, for an order delaying the  
30 notification required under section 7(6) of this act for a period not  
31 to exceed ninety days if the court determines that there is a reason to  
32 believe that notification of the existence of the warrant may have an  
33 adverse result.

34 (2) An adverse result for the purposes of this section is:

35 (a) Placing the life or physical safety of an individual in danger;

36 (b) Causing a person to flee from prosecution;

37 (c) Causing the destruction of or tampering with evidence;

1 (d) Causing the intimidation of potential witnesses; or

2 (e) Jeopardizing an investigation or unduly delaying a trial.

3 (3) The governmental entity shall maintain a copy of certification.

4 (4) Extension of the delay of notification of up to ninety days  
5 each may be granted by the court upon application or by certification  
6 by a governmental entity.

7 (5) Upon expiration of the period of delay of notification under  
8 subsection (2) or (4) of this section, the governmental entity shall  
9 serve a copy of the warrant upon, or deliver it by registered or first-  
10 class mail to, the target of the warrant, together with notice that:

11 (a) States with reasonable specificity the nature of the law  
12 enforcement inquiry; and

13 (b) Informs the target of the warrant: (i) That notification was  
14 delayed; (ii) what governmental entity or court made the certification  
15 or determination pursuant to which that delay was made; and (iii) which  
16 provision of this section allowed such delay.

17 NEW SECTION. **Sec. 9.** (1) It is lawful under this section for any  
18 law enforcement officer or other public official to operate an  
19 extraordinary sensing device and disclose personal information from  
20 such operation if such officer reasonably determines that an emergency  
21 situation exists that involves criminal activity and presents immediate  
22 danger of death or serious physical injury to any person and:

23 (a) Requires operation of an extraordinary sensing device before a  
24 warrant authorizing such interception can, with due diligence, be  
25 obtained;

26 (b) There are grounds upon which such a warrant could be entered to  
27 authorize such operation; and

28 (c) An application for a warrant providing such operation is made  
29 within forty-eight hours after the operation has occurred or begins to  
30 occur.

31 (2) In the absence of a warrant, an operation of an extraordinary  
32 sensing device carried out under this section must immediately  
33 terminate when the personal information sought is obtained or when the  
34 application for the warrant is denied, whichever is earlier.

35 (3) In the event such application for approval is denied, the  
36 personal information obtained from the operation of a device must be

1 treated as having been obtained in violation of this subchapter, except  
2 for purposes of section 15 of this act, and an inventory must be served  
3 on the person named in the application.

4 NEW SECTION. **Sec. 10.** (1) It is lawful under this section for a  
5 law enforcement officer, agency employee, or authorized agent to  
6 operate an extraordinary sensing device and disclose personal  
7 information from such operation if:

8 (a) An officer, employee, or agent reasonably determines that an  
9 emergency situation exists that:

10 (i) Does not involve criminal activity;

11 (ii) Presents immediate danger of death or serious physical injury  
12 to any person; and

13 (iii) Requires operation of an extraordinary sensing device to  
14 reduce the danger of death or serious physical injury;

15 (b) An officer, employee, or agent reasonably determines that the  
16 operation does not intend to collect personal information and is  
17 unlikely to accidentally collect personal information, and such  
18 operation is not for purposes of regulatory enforcement. Allowable  
19 purposes under this subsection (1)(b) are limited to:

20 (i) Monitoring to discover, locate, observe, and prevent forest  
21 fires;

22 (ii) Monitoring an environmental or weather-related catastrophe or  
23 damage from such an event;

24 (iii) Surveying for wildlife management, habitat preservation, or  
25 environmental damage; and

26 (iv) Surveying for the assessment and evaluation of environmental  
27 or weather-related damage, erosion, flood, or contamination;

28 (c) The operation is part of a training exercise conducted on a  
29 military base and the extraordinary sensing device does not collect  
30 personal information on persons located outside the military base;

31 (d) The operation is for training and testing purposes by an agency  
32 and does not collect personal information; or

33 (e) The operation is part of the response to an emergency or  
34 disaster for which the governor has proclaimed a state of emergency  
35 under RCW 43.06.010(12).

36 (2) Upon completion of the operation of an extraordinary sensing

1 device pursuant to this section, any personal information obtained must  
2 be treated as information collected on an individual other than a  
3 target for purposes of section 14 of this act.

4 NEW SECTION. **Sec. 11.** An unmanned aircraft system may not be  
5 utilized for the purposes of investigation or enforcement of regulatory  
6 violations or noncompliance until the legislature has adopted  
7 legislation specifically permitting such use.

8 NEW SECTION. **Sec. 12.** Operation of an extraordinary sensing  
9 device by an agency is prohibited unless the agency has affixed a  
10 unique identifier registration number assigned by the agency, and  
11 designed as far as practical to be viewable by the public while the  
12 device is in use.

13 NEW SECTION. **Sec. 13.** Whenever any personal information from an  
14 extraordinary sensing device has been acquired, no part of such  
15 personal information and no evidence derived therefrom may be received  
16 in evidence in any trial, hearing, or other proceeding in or before any  
17 court, grand jury, department, officer, agency, regulatory body,  
18 legislative committee, or other authority of the state or a political  
19 subdivision thereof if the collection or disclosure of that personal  
20 information would be in violation of this subchapter.

21 NEW SECTION. **Sec. 14.** Personal information collected during the  
22 operation of an extraordinary sensing device authorized by and  
23 consistent with this subchapter may not be used, copied, or disclosed  
24 for any purpose after conclusion of the operation, unless there is  
25 probable cause that the personal information is evidence of criminal  
26 activity. Personal information must be deleted as soon as possible  
27 after there is no longer probable cause that the personal information  
28 is evidence of criminal activity; this must be within thirty days if  
29 the personal information was collected on the target of a warrant  
30 authorizing the operation of the extraordinary sensing device, and  
31 within ten days for other personal information collected incidentally  
32 to the operation of an extraordinary sensing device otherwise  
33 authorized by and consistent with this subchapter. There is a



1 presumption that personal information is not evidence of criminal  
2 activity if that personal information is not used in a criminal  
3 prosecution within one year of collection.

4 NEW SECTION. **Sec. 15.** Any person who knowingly violates this  
5 subchapter is subject to legal action for damages, to be brought by any  
6 other person claiming that a violation of this subchapter has injured  
7 his or her business, his or her person, or his or her reputation. A  
8 person so injured is entitled to actual damages or liquidated damages,  
9 computed at the rate of one dollar per day for each day of violation.  
10 In addition, the individual is entitled to reasonable attorneys' fees  
11 and other costs of litigation.

12 NEW SECTION. **Sec. 16.** Any use of an extraordinary sensing device  
13 must fully comply with all federal aviation administration requirements  
14 and guidelines. Compliance with the terms of this subchapter is  
15 mandatory and supplemental to compliance with federal aviation  
16 administration requirements and guidelines.

17 NEW SECTION. **Sec. 17.** (1) For a state agency having jurisdiction  
18 over criminal law enforcement including, but not limited to, the  
19 Washington state patrol, the agency must maintain records of each use  
20 of an extraordinary sensing device and, for any calendar year in which  
21 an agency has used an extraordinary sensing device, prepare an annual  
22 report including, at a minimum, the following:

23 (a) The number of uses of an extraordinary sensing device organized  
24 by types of incidents and types of justification for use;

25 (b) The number of crime investigations aided by the use and how the  
26 use was helpful to the investigation;

27 (c) The number of uses of an extraordinary sensing device for  
28 reasons other than criminal investigations and how the use was helpful;

29 (d) The frequency and type of data collected for individuals or  
30 areas other than targets;

31 (e) The total cost of the extraordinary sensing device;

32 (f) The dates when personal information and other data was deleted  
33 or destroyed in compliance with the act;

34 (g) The number of warrants requested, issued, and extended; and

1 (h) Additional information and analysis the governing body deems  
2 useful.

3 (2) For a state agency other than that in subsection (1) of this  
4 section, the agency must maintain records of each use of an  
5 extraordinary sensing device and, for any calendar year in which an  
6 agency has used an extraordinary sensing device, prepare an annual  
7 report including, at a minimum, the following:

8 (a) The types of extraordinary sensing devices used, the purposes  
9 for which each type of extraordinary sensing device was used, the  
10 circumstances under which use was authorized, and the name of the  
11 officer or official who authorized the use;

12 (b) Whether deployment of the device was imperceptible to the  
13 public;

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

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

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

21 (f) An individual point of contact for citizen complaints and  
22 concerns.

23 (3) For a local agency having jurisdiction over criminal law  
24 enforcement or regulatory violations, the agency must maintain records  
25 of each use of an extraordinary sensing device including, at a minimum,  
26 the following:

27 (a) The number of uses of an extraordinary sensing device organized  
28 by types of incidents and types of justification for use;

29 (b) The number of investigations aided by the use and how the use  
30 was helpful to the investigation;

31 (c) The number of uses of an extraordinary sensing device for  
32 reasons other than criminal investigations and how the use was helpful;

33 (d) The frequency and type of data collected for individuals or  
34 areas other than targets;

35 (e) The total cost of the extraordinary sensing device;

36 (f) The dates when personal information and other data was deleted  
37 or destroyed in compliance with the act;

38 (g) The number of warrants requested, issued, and extended; and

1 (h) Additional information and analysis the governing body deems  
2 useful.

3 (4) The annual reports required pursuant to subsections (1) and (2)  
4 of this section must be filed electronically to the office of financial  
5 management, who must compile the results and submit them electronically  
6 to the relevant committees of the legislature by September 1st of each  
7 year, beginning in 2015.

8 NEW SECTION. **Sec. 18.** Sections 2 through 17 of this act are each  
9 added to chapter 9.73 RCW and codified with the subchapter heading of  
10 "extraordinary sensing devices."

11 NEW SECTION. **Sec. 19.** If any provision of this act or its  
12 application to any person or circumstance is held invalid, the  
13 remainder of the act or the application of the provision to other  
14 persons or circumstances is not affected."

15 Correct the title.

EFFECT: (1) Changes the definitions of "agency" to include  
individuals and "personal information" to include indexes of a person's  
activities, movements, or interests.

(2) Adds a general prohibition on use of an ESD by an agency except  
as specifically authorized.

(3)(a) Changes procurement requirements:

(i) State criminal justice agencies must obtain legislative  
approval before procurement;

(ii) Local criminal justice agencies must obtain approval of their  
governing body before procurement;

(iii) State or local noncriminal justice agencies who seek to use  
an ESD for an enumerated allowable reason, must obtain approval of  
their governing body before procurement.

(b) Otherwise, procurement is prohibited.

(4) Changes reporting requirements:

(a) State agencies must maintain records of each use of an ESD and  
prepare annual reports, which will be compiled by OFM and submitted to  
relevant legislative committees annually;

(b) Local agencies must maintain records of each use of an ESD.

(5) Makes a nonexclusive list of allowable nonregulatory,  
nonexigent uses into an exclusive list.

(6) Requires that an ESD operated by an agency has a unique  
identifier registration number visible to the public, if practicable.

(7) Provides for liquidated damages at the rate of \$1 per day per violation as an alternative to actual damages.

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