

EHB 2789 - S AMD
By Senator

ADOPTED AND ENGROSSED 3/7/14

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 extraordinary
18 surveillance technologies may increase liability to state and local
19 jurisdictions. It is the intent of the legislature to provide clear
20 standards for the lawful use of extraordinary surveillance technologies
21 by state and 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, except the Washington national guard in Title
27 32 U.S.C. status.

28 (b) "Agency" also includes any entity or individual, whether public
29 or private, with which any of the entities identified in (a) of this

1 subsection has entered into a contractual relationship or any other
2 type of relationship, with or without consideration, for the operation
3 of an extraordinary sensing device that acquires, collects, or indexes
4 personal information to accomplish an agency function.

5 (2) "Court of competent jurisdiction" means any district court of
6 the United States, or a court of general jurisdiction authorized by the
7 state of Washington to issue search warrants.

8 (3) "Extraordinary sensing device" means a sensing device attached
9 to an unmanned aircraft system.

10 (4) "Governing body" means the council, commission, board, or other
11 controlling body of an agency in which legislative powers are vested,
12 except that for a state agency for which there is no governing body
13 other than the state legislature, "governing body" means the chief
14 executive officer responsible for the governance of the agency.

15 (5) "Personal information" means all information that:

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

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

23 (ii) Intellectual property, trade secrets, proprietary information,
24 or operational information;

25 (b) Affords a basis for inferring personal characteristics, such as
26 finger and voice prints, photographs, or things done by or to such
27 person; and the record of the person's presence, registration, or
28 membership in an organization or activity, or admission to an
29 institution; or

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

33 (6)(a) "Sensing device" means a device capable of remotely
34 acquiring personal information from its surroundings, using any
35 frequency of the electromagnetic spectrum, or a sound detecting system.

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

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

7 NEW SECTION. **Sec. 3.** Except as otherwise specifically authorized
8 in this subchapter, it is unlawful for an agency to operate an
9 extraordinary sensing device or disclose personal information about any
10 person acquired through the operation of an extraordinary sensing
11 device.

12 NEW SECTION. **Sec. 4.** (1) No state agency or state organization
13 having jurisdiction over criminal law enforcement or regulatory
14 violations including, but not limited to, the Washington state patrol
15 and the department of natural resources, shall purchase an
16 extraordinary sensing device unless moneys are expressly appropriated
17 by the legislature for this specific purpose.

18 (2) No local agency having jurisdiction over criminal law
19 enforcement or regulatory violations shall procure an extraordinary
20 sensing device without the explicit approval of the governing body of
21 such locality, given for that specific extraordinary sensing device to
22 be used for a specific purpose.

23 NEW SECTION. **Sec. 5.** The governing body for each agency must
24 develop and make publicly available, including on the agency web site,
25 written policies and procedures for the use of any extraordinary
26 sensing device procured, and provide notice and opportunity for public
27 comment prior to adoption of the written policies and procedures.

28 NEW SECTION. **Sec. 6.** All operations of an extraordinary sensing
29 device, by an agency, or disclosure of personal information about any
30 person acquired through the operation of an extraordinary sensing
31 device, by an agency, must be conducted in such a way as to minimize
32 the collection and disclosure of personal information not authorized
33 under this subchapter.

1 NEW SECTION. **Sec. 7.** An extraordinary sensing device may be
2 operated and personal information from such operation disclosed, if the
3 operation and collection of personal information is pursuant to a
4 search warrant issued by a court of competent jurisdiction.

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

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

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

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

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

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

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

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

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

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

25 (a) States with reasonable specificity the nature of the law
26 enforcement inquiry; and

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

31 NEW SECTION. **Sec. 9.** (1) It is lawful for a law enforcement
32 officer, agency employee, or authorized agent to operate an
33 extraordinary sensing device and disclose personal information from
34 such operation if the officer, employee, or agent reasonably determines
35 that an emergency situation exists that:

1 (a) Does not involve criminal activity, unless exigent
2 circumstances exist;

3 (b) Presents immediate danger of death or serious physical injury
4 to any person; and

5 (c) Has characteristics such that operation of an extraordinary
6 sensing device can reasonably reduce the danger of death or serious
7 physical injury.

8 (2) It is lawful for an officer, employee, or agent to operate an
9 extraordinary sensing device if the officer, employee, or agent does
10 not intend to collect personal information, the operation is unlikely
11 to accidentally collect personal information, and the operation is not
12 for purposes of regulatory enforcement. Allowable uses under this
13 subsection are limited to:

14 (a) Monitoring to discover, locate, observe, and prevent forest
15 fires;

16 (b) Monitoring an environmental or weather-related catastrophe or
17 damage from such an event;

18 (c) Surveying for wildlife management, habitat preservation, or
19 environmental damage; and

20 (d) Surveying for the assessment and evaluation of environmental or
21 weather-related damage, erosion, flood, or contamination.

22 (3) It is lawful for an officer, employee, or agent to operate an
23 extraordinary sensing device as part of a training exercise conducted
24 on a military base if the extraordinary sensing device does not collect
25 personal information on persons located outside the military base.

26 (4) It is lawful for an officer, employee, or agent to operate an
27 extraordinary sensing device if the operation is for training, testing,
28 or research purposes by an agency and does not collect personal
29 information without the specific written consent of any individual
30 whose personal information is collected.

31 (5) It is lawful for an officer, employee, or agent to operate an
32 extraordinary sensing device if the operation is part of the response
33 to an emergency or disaster for which the governor has proclaimed a
34 state of emergency under RCW 43.06.010(12).

35 (6) Upon completion of the operation of an extraordinary sensing
36 device pursuant to this section, any personal information obtained must
37 be treated as information collected on an individual other than a
38 target for purposes of section 14 of this act.

1 NEW SECTION. **Sec. 10.** The department of enterprise services shall
2 convene a work group comprised of four legislators and a representative
3 of the governor. The work group will submit a report to the
4 legislature by December 1, 2014, proposing standards for the use of
5 extraordinary sensing devices for regulatory enforcement purposes. No
6 state agency or state organization having jurisdiction over regulatory
7 violations shall operate extraordinary sensing devices for regulatory
8 enforcement purposes until the legislature has approved of standards
9 for this purpose.

10 NEW SECTION. **Sec. 11.** Operation of an extraordinary sensing
11 device by an agency is prohibited unless the agency has affixed a
12 unique identifier registration number assigned by the agency.

13 NEW SECTION. **Sec. 12.** 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. 13.** (1) Personal information collected during
22 the 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 the conclusion of the operation, unless there is
25 probable cause that the personal information is evidence of criminal
26 activity. Nothing in this act is intended to expand or contract the
27 obligations of an agency to disclose public records as provided in
28 chapter 42.56 RCW. The personal information of the person who is the
29 target of a warrant must be destroyed within thirty days after the
30 applicable period of limitations for the criminal activity, as provided
31 in RCW 9A.04.080, if the person has not been charged.

32 (2) The personal information of a person who is not the target of
33 a warrant that is collected incidentally during the operation of an
34 extraordinary sensing device must be destroyed within ten days after it

1 is collected if it can be destroyed without destroying evidence that
2 may be relevant to a pending criminal investigation or case.

3 (3) There is a presumption that personal information is not
4 evidence of criminal activity if that personal information is not used
5 in a criminal prosecution within one year of collection.

6 NEW SECTION. **Sec. 14.** Any person who knowingly violates this
7 subchapter is subject to legal action for damages, to be brought by any
8 other person claiming that a violation of this subchapter has injured
9 his or her business, his or her person, or his or her reputation. A
10 person so injured is entitled to actual damages. In addition, the
11 individual is entitled to reasonable attorneys' fees and other costs of
12 litigation.

13 NEW SECTION. **Sec. 15.** Any use of an extraordinary sensing device
14 must fully comply with all federal aviation administration requirements
15 and guidelines. Compliance with the terms of this subchapter is
16 mandatory and supplemental to compliance with federal aviation
17 administration requirements and guidelines. Nothing in this chapter
18 shall be construed to limit the state's ability to establish and
19 operate a test range for the integration of unmanned aviation vehicles
20 into the national airspace.

21 NEW SECTION. **Sec. 16.** (1) For a state agency having jurisdiction
22 over criminal law enforcement including, but not limited to, the
23 Washington state patrol, the agency must maintain records of each use
24 of an extraordinary sensing device and, for any calendar year in which
25 an agency has used an extraordinary sensing device, prepare an annual
26 report including, at a minimum, 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 crime investigations aided by the use and how the
30 use 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;

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

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

4 (h) Additional information and analysis the governing body deems
5 useful.

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

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

15 (b) Whether deployment of the device was imperceptible to the
16 public;

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

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

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

24 (f) An individual point of contact for citizen complaints and
25 concerns.

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

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

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

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

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

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

1 (f) The dates when personal information and other data was deleted
2 or destroyed in compliance with the act;
3 (g) The number of warrants requested, issued, and extended; and
4 (h) Additional information and analysis the governing body deems
5 useful.
6 (4) The annual reports required pursuant to subsections (1) and (2)
7 of this section must be filed electronically to the office of financial
8 management, who must compile the results and submit them electronically
9 to the relevant committees of the legislature by September 1st of each
10 year, beginning in 2015.

11 NEW SECTION. **Sec. 17.** Sections 2 through 16 of this act are each
12 added to chapter 9.73 RCW and codified with the subchapter heading of
13 "extraordinary sensing devices."

14 NEW SECTION. **Sec. 18.** If any provision of this act or its
15 application to any person or circumstance is held invalid, the
16 remainder of the act or the application of the provision to other
17 persons or circumstances is not affected."

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ADOPTED 3/7/14

18 On page 1, line 1 of the title, after "surveillance;" strike the
19 remainder of the title and insert "adding new sections to chapter 9.73
20 RCW; creating a new section; and prescribing penalties."

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