
HOUSE BILL 2179

State of Washington

63rd Legislature

2014 Regular Session

By Representatives Morris and Morrell

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1 AN ACT Relating to technology-enhanced government surveillance;
2 adding new sections to chapter 9.73 RCW; creating a new section; and
3 prescribing penalties.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The rapid development of advanced
6 technologies that can monitor and record private behavior beyond the
7 ability of normal human senses has made it necessary for the
8 legislature to establish new technology-neutral standards to protect
9 individual liberty. While all technology is neutral in itself, it is
10 the application by humans that can be both good and bad. Whether
11 surveillance is conducted by the individual, groups, or the government,
12 citizens are not always aware when technology is being used to record
13 and monitor their personal and private behavior. Surveillance
14 conducted remotely and observing activities that were previously not
15 viewable by the naked eye is rapidly increasing. As a consequence,
16 conduct that was formerly considered private may be at risk of losing
17 legal protection from government intrusion--for example, satellites
18 equipped with high resolution cameras can peer into our backyards and
19 our skylights, or read the book we are reading on a park bench. The

1 legislature finds that, while constitutional protections against
2 government invasions into private affairs are strongest inside one's
3 home with the windows shuttered, the scope of legal protections drops
4 precipitously for the private affairs of an individual who leaves his
5 or her home, and for those private affairs of an individual conducted
6 inside the home but from a public vantage point. The legislature finds
7 that the right to privacy protects people, not places, and although the
8 expectation of privacy in public spaces may be lower than in private
9 spaces, it is not entirely eliminated. The legislature finds that when
10 legal protections for personal privacy fail to keep up with evolving
11 technology, the delicate balance of power between an individual and the
12 state may be disturbed in a manner destructive to the personal freedom
13 that is essential to our democracy. It is the intent of the
14 legislature to restore this delicate balance, by ensuring that the
15 gathering of personal information by the state is restricted to that
16 which is reasonably necessary to meet legitimate societal objectives,
17 and by establishing an expectation that certain forms of government
18 surveillance using extraordinary sensing devices may not be conducted,
19 from any vantage point, without the supervision of a court, through a
20 court-ordered warrant.

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

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

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

31 (3) "Conduct surveillance" means to engage in or induce a third
32 party to engage in the act of collecting personal information using an
33 extraordinary sensing device.

34 (4) "Court of competent jurisdiction" includes any district court
35 of the United States or any United States court of appeals that has
36 jurisdiction over the offense being investigated or is located in a

1 district in which surveillance with the assistance of the extraordinary
2 sensing device will be conducted, or a court of general jurisdiction
3 authorized by the state of Washington to issue search warrants.

4 (5) "Extraordinary sensing device" means a sensing device that is
5 uncommon to society, under a community-based standard. A sensing
6 device is uncommon if its use and existence has not become integrated
7 into the ordinary societal experience of the community as of January 1,
8 2014. In making a determination about whether a device is uncommon and
9 has not been socially integrated into the experience of a community,
10 the court shall consider all relevant factors including, but not
11 limited to:

12 (a) The level of technology and sophistication of the device;

13 (b) The extent to which the device, as of January 1, 2014, was
14 commercially available to individual members of the community at retail
15 stores located in that community;

16 (c) The extent of the use of the device in a nongovernmental
17 context within the community and public awareness in the community of
18 such use; and

19 (d) The extent to which the device makes conduct visible from an
20 extraordinary vantage point.

21 (6) "Extraordinary vantage point" means a vantage point to which an
22 ordinary member of the public would not have ready access.

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

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

26 (a) Describes, locates, or indexes anything about a person
27 including, but not limited to, his or her social security number,
28 driver's license number, agency-issued identification number, student
29 identification number, real or personal property holdings derived from
30 tax returns, and the person's education, financial transactions,
31 medical history, ancestry, religion, political ideology, or criminal or
32 employment record;

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

1 (c) Describes, locates, or indexes anything about a person
2 including, but not limited to, intellectual property, trade secrets,
3 proprietary information, or operational information.

4 (9) "Sensing device" means a device capable of remotely acquiring
5 personal information from its surroundings, using any frequency of the
6 electromagnetic spectrum. "Sensing device" does not include equipment
7 whose sole function is to provide information directly necessary for
8 safe air navigation or operation of a vehicle.

9 NEW SECTION. **Sec. 3.** Except as otherwise specifically authorized
10 in this section and sections 4 through 6 of this act, it is unlawful
11 for the state of Washington, its agencies, and political subdivisions
12 to conduct surveillance with an extraordinary sensing device from an
13 extraordinary vantage point, when the persons or activities being
14 observed are located within the boundaries of an individual's private
15 residential property, including the privately owned lands surrounding
16 the home, and the surveillance is conducted without the consent of the
17 individual or individuals entitled to privacy in that place.

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

23 (2) Evidence obtained in violation of sections 2 through 9 of this
24 act may not be used to support a finding of probable cause under this
25 section.

26 (3) Except as provided in section 8 of this act, no personal
27 information collected on an individual or area other than the target
28 that justified the issuance of the search warrant may be used, copied,
29 or disclosed for any purpose. This personal information must be
30 deleted as soon as possible, and in no event later than ten days after
31 collection.

32 NEW SECTION. **Sec. 5.** (1) It is lawful for the state of
33 Washington, its agencies, and political subdivisions to conduct
34 surveillance and disclose personal information derived from operation

1 of an extraordinary sensing device under the following exigent
2 circumstances:

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

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

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

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

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

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

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

20 (iii) The purpose of the operation is not investigation of criminal
21 activity; and

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

23 (2)(a) An application for a warrant providing for the operation of
24 the extraordinary sensing device under subsection (1) of this section
25 must be made within forty-eight hours after the operation has occurred
26 or begins to occur.

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

30 (c) Any personal information incidentally collected during the
31 operation must be deleted within seventy-two hours of the operation's
32 completion.

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

1 (4) Any law enforcement or other agency that conducts surveillance
2 under the authority of this section must issue an annual public audit
3 as required under section 6 of this act.

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

8 (1) No agency may procure an extraordinary sensing device for
9 surveillance purposes without first obtaining explicit approval from
10 the agency's governing body.

11 (2) The governing body shall develop and make publicly available
12 written policies and procedures for the use of the extraordinary
13 sensing device and provide notice and opportunity for public comment
14 prior to adoption of the written policies and procedures.

15 (3) The governing body shall conduct an annual comprehensive audit
16 on each agency that conducts surveillance in any location using an
17 extraordinary sensing device. The audit must be made publicly
18 available and must at a minimum include the following:

19 (a) The types of extraordinary sensing devices used, the purposes
20 for which each type of extraordinary sensing device was used, the
21 circumstances under which use was authorized, and the name of the
22 officer or official who authorized the use;

23 (b) Whether deployment of the device was perceptible to the public;

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

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

28 (e) The specific steps taken to mitigate the impact on an
29 individual's privacy, including protections against unauthorized use
30 and disclosure; and

31 (f) An individual point of contact for citizen complaints and
32 concerns.

33 (4) Beginning September 1, 2015, and each year thereafter, state
34 agencies shall submit the annual audit conducted under this section to
35 the state patrol, who shall compile the results and submit them to the
36 legislature by November 1, 2015, and November 1st of each year
37 thereafter.

1 (5) For the purposes of this section, "governing body" means the
2 legislature, council, commission, board, or other controlling body in
3 which legislative powers are vested.

4 NEW SECTION. **Sec. 7.** It is lawful for the state of Washington,
5 its agencies, and political subdivisions to conduct surveillance using
6 an extraordinary sensing device if the operation is part of a training
7 exercise conducted on a military base and the extraordinary sensing
8 device does not collect the personal information of persons located
9 outside the military base.

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

14 (1) In an action for damages under section 10 of this act, with the
15 permission of the person whose rights have been violated; or

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

18 NEW SECTION. **Sec. 9.** (1) Except as specifically authorized in
19 this section, the state of Washington, its agencies, and political
20 subdivisions are prohibited from using an extraordinary sensing device
21 to conduct surveillance for the purpose of regulatory enforcement of a
22 permitted or licensed activity.

23 (2) An agency must comply with each of the following requirements:

24 (a) The agency must give the permittee or licensee clear and
25 conspicuous notice at the time that the permit or license is granted or
26 renewed that the permitted or licensed activity is subject to such
27 surveillance;

28 (b) Prior to conducting surveillance under the authority of this
29 section, the agency must have adopted and published a data minimization
30 protocol establishing reasonable measures to ensure that the
31 surveillance is unlikely to accidentally collect and retain personal
32 information of individuals or activities not related to the permitted
33 or licensed activity, as provided in subsection (3) of this section;
34 and

1 (c) The agency must provide an annual report to the legislature and
2 the public, as described in subsection (4) of this section.

3 (3) The data minimization protocol required under subsection (2) of
4 this section must state the steps taken by the agency to ensure that:

5 (a) Personal information is collected for legitimate, limited, and
6 specific-stated purposes;

7 (b) Collection of personal information is limited to the minimum
8 amount necessary for the specified purposes and appropriate
9 technologies are used to minimize the data collected. For example, the
10 agency uses encryption where practicable to obscure the images of
11 individuals whose identity is not related to the regulatory purpose of
12 the surveillance;

13 (c) Personal information is only used and disclosed for the
14 purposes specified;

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

19 (e) Only authorized persons have access to information and data
20 obtained through the surveillance and authorized persons have received
21 training on their duties and obligations to ensure the confidentiality
22 of the information and data.

23 (4) The annual report required under subsection (2)(c) of this
24 section must detail the agency's use of extraordinary sensing devices
25 for regulatory enforcement. The report must include:

26 (a) The specific surveillance purposes for which the agency
27 authorized the use of an extraordinary sensing device and the name of
28 the senior official who authorized the use;

29 (b) The specific kinds of personal information that the device is
30 intended to collect or may incidentally collect;

31 (c) The amount of time that personal information was retained;

32 (d) The steps taken by the agency to ensure that collection of
33 personal information was limited to the minimum amount necessary for
34 the regulatory purpose, including a description of privacy-enhancing
35 technologies embedded into the surveillance equipment and operation;
36 and

37 (e) An individual point of contact for complaints and concerns by
38 the regulated entity and by members of the public.

1 (5) Evidence obtained in violation of this section may not be used
2 in a regulatory enforcement action taken by the agency.

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

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

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

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