
ENGROSSED HOUSE BILL 2789

State of Washington

63rd Legislature

2014 Regular Session

By Representatives Taylor, Goodman, Shea, Morris, Smith, Walkinshaw, Overstreet, Condotta, Moscoso, Ryu, Short, and Scott

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

1 technologies may increase liability to state and local jurisdictions.
2 It is the intent of the legislature to provide clear standards for the
3 lawful use of extraordinary surveillance technologies by state and
4 local jurisdictions.

5 NEW SECTION. **Sec. 2.** The definitions in this section apply
6 throughout this subchapter unless the context clearly requires
7 otherwise.

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

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

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

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

26 (4) "Extraordinary sensing device" means an unmanned aircraft
27 system.

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

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

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

36 (i) His or her social security number, driver's license number,
37 agency-issued identification number, student identification number,

1 real or personal property holdings derived from tax returns, and the
2 person's education, financial transactions, medical history, ancestry,
3 religion, political ideology, or criminal or employment record; or

4 (ii) Intellectual property, trade secrets, proprietary information,
5 or operational information;

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

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

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

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

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

26 NEW SECTION. **Sec. 3.** Except as otherwise specifically authorized
27 in this subchapter, it is unlawful for an agency to operate an
28 extraordinary sensing device or disclose personal information about any
29 person acquired through the operation of an extraordinary sensing
30 device.

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

34 (2) For a state agency having jurisdiction over criminal law
35 enforcement including, but not limited to, the Washington state patrol,
36 the agency may not procure an extraordinary sensing device for criminal

1 law enforcement without the explicit approval of the legislature, given
2 for that specific extraordinary sensing device to be used for a
3 specific purpose.

4 (3) For a local agency having jurisdiction over criminal law
5 enforcement, the agency may not procure an extraordinary sensing device
6 without the explicit approval of the governing body of such locality,
7 given for that specific extraordinary sensing device to be used for a
8 specific purpose.

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

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

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

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

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

33 (2) Each petition for a search warrant from a judicial officer to
34 permit the use of an extraordinary sensing device and personal
35 information collected from such operation must be made in writing, upon

1 oath or affirmation, to a judicial officer in a court of competent
2 jurisdiction for the geographic area in which an extraordinary sensing
3 device is to be operated or where there is probable cause to believe
4 the offense for which the extraordinary sensing device is sought has
5 been committed, is being committed, or will be committed.

6 (3) The law enforcement officer shall submit an affidavit that
7 includes:

8 (a) The identity of the applicant and the identity of the agency
9 conducting the investigation;

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

12 (c) Specific and articulable facts demonstrating probable cause to
13 believe that there has been, is, or will be criminal activity and that
14 the operation of the extraordinary sensing device will uncover evidence
15 of such activity or facts to support the finding that there is probable
16 cause for issuance of a search warrant pursuant to applicable
17 requirements; and

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

21 (4) If the judicial officer finds, based on the affidavit
22 submitted, there is probable cause to believe a crime has been
23 committed, is being committed, or will be committed and there is
24 probable cause to believe the personal information likely to be
25 obtained from the use of the extraordinary sensing device will be
26 evidence of the commission of such offense, the judicial officer may
27 issue a search warrant authorizing the use of the extraordinary sensing
28 device. The search warrant must authorize the collection of personal
29 information contained in or obtained from the extraordinary sensing
30 device, but must not authorize the use of a biometric identification
31 system.

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

36 (6) Within ten days of the execution of a search warrant, the
37 officer executing the warrant must serve a copy of the warrant upon the

1 target of the warrant, except if notice is delayed pursuant to section
2 8 of this act.

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

10 (2) An adverse result for the purposes of this section is:
11 (a) Placing the life or physical safety of an individual in danger;
12 (b) Causing a person to flee from prosecution;
13 (c) Causing the destruction of or tampering with evidence;
14 (d) Causing the intimidation of potential witnesses; or
15 (e) Jeopardizing an investigation or unduly delaying a trial.

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

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

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

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

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

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

1 (a) Requires operation of an extraordinary sensing device before a
2 warrant authorizing such interception can, with due diligence, be
3 obtained;

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

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

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

13 (3) In the event such application for approval is denied, the
14 personal information obtained from the operation of a device must be
15 treated as having been obtained in violation of this subchapter, except
16 for purposes of section 15 of this act, and an inventory must be served
17 on the person named in the application.

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

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

24 (i) Does not involve criminal activity;

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

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

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

34 (i) Monitoring to discover, locate, observe, and prevent forest
35 fires;

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

1 (iii) Surveying for wildlife management, habitat preservation, or
2 environmental damage; and

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

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

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

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

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

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

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

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

1 NEW SECTION. **Sec. 14.** Personal information collected during the
2 operation of an extraordinary sensing device authorized by and
3 consistent with this subchapter may not be used, copied, or disclosed
4 for any purpose after conclusion of the operation, unless there is
5 probable cause that the personal information is evidence of criminal
6 activity. Personal information must be deleted as soon as possible
7 after there is no longer probable cause that the personal information
8 is evidence of criminal activity; this must be within thirty days if
9 the personal information was collected on the target of a warrant
10 authorizing the operation of the extraordinary sensing device, and
11 within ten days for other personal information collected incidentally
12 to the operation of an extraordinary sensing device otherwise
13 authorized by and consistent with this subchapter. There is a
14 presumption that personal information is not evidence of criminal
15 activity if that personal information is not used in a criminal
16 prosecution within one year of collection.

17 NEW SECTION. **Sec. 15.** Any person who knowingly violates this
18 subchapter is subject to legal action for damages, to be brought by any
19 other person claiming that a violation of this subchapter has injured
20 his or her business, his or her person, or his or her reputation. A
21 person so injured is entitled to actual damages or liquidated damages,
22 computed at the rate of one dollar per day for each day of violation.
23 In addition, the individual is entitled to reasonable attorneys' fees
24 and other costs of litigation.

25 NEW SECTION. **Sec. 16.** Any use of an extraordinary sensing device
26 must fully comply with all federal aviation administration requirements
27 and guidelines. Compliance with the terms of this subchapter is
28 mandatory and supplemental to compliance with federal aviation
29 administration requirements and guidelines.

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

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

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

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

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

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

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

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

13 (h) Additional information and analysis the governing body deems
14 useful.

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

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

24 (b) Whether deployment of the device was imperceptible to the
25 public;

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

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

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

33 (f) An individual point of contact for citizen complaints and
34 concerns.

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

- 1 (a) The number of uses of an extraordinary sensing device organized
2 by types of incidents and types of justification for use;
- 3 (b) The number of investigations aided by the use and how the use
4 was helpful to the investigation;
- 5 (c) The number of uses of an extraordinary sensing device for
6 reasons other than criminal investigations and how the use was helpful;
- 7 (d) The frequency and type of data collected for individuals or
8 areas other than targets;
- 9 (e) The total cost of the extraordinary sensing device;
- 10 (f) The dates when personal information and other data was deleted
11 or destroyed in compliance with the act;
- 12 (g) The number of warrants requested, issued, and extended; and
- 13 (h) Additional information and analysis the governing body deems
14 useful.
- 15 (4) The annual reports required pursuant to subsections (1) and (2)
16 of this section must be filed electronically to the office of financial
17 management, who must compile the results and submit them electronically
18 to the relevant committees of the legislature by September 1st of each
19 year, beginning in 2015.

20 NEW SECTION. **Sec. 18.** Sections 2 through 17 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. 19.** 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.

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