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**ENGROSSED SUBSTITUTE HOUSE BILL 1639**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** House Public Safety (originally sponsored by Representatives Taylor, Goodman, Morris, Shea, Walkinshaw, Smith, Ryu, Appleton, Condotta, Moscoso, Kagi, Muri, Young, Scott, Schmick, G. Hunt, and Farrell)

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

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

NEW SECTION. **Sec.**  The legislature finds that Washington is a leader in responsible, effective, innovative government and the industries that help make this possible. The legislature finds that advances in technology have created valuable opportunities for government agencies to carry out their missions more efficiently, cost-effectively, precisely, and comprehensively. However, these technological advances have provided new, unique equipment that may be utilized for surveillance purposes. These technological advances often outpace statutory protections and can lead to inconsistent or contradictory interpretations between jurisdictions. The legislature finds that regardless of application or size, the use of these extraordinary surveillance technologies, without public debate or clear legal authority, creates uncertainty for citizens and agencies throughout Washington state. The legislature finds that extraordinary surveillance technologies do present a substantial privacy risk potentially contrary to the strong privacy protections enshrined in Article I, section 7 of the Washington state Constitution that reads "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The legislature further finds that the lack of clear statutory authority for the use of extraordinary surveillance technologies may increase liability to state and local jurisdictions. It is the intent of the legislature to allow for the performance of legitimate state and local agency functions in accordance with clear standards for the lawful use of extraordinary sensing devices. Nothing in this act is intended to affect the leasehold rights of the residents of Washington state.

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

(1) "Agency" means the state of Washington, its state and local agencies, political subdivisions, and their respective employees and agents, except the Washington national guard in Title 32 U.S.C. status.

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

(3) "Extraordinary sensing device" means a sensing device attached to or used in conjunction with an aircraft that is operated without the possibility of human intervention from within or on such aircraft, together with its associated elements.

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

(5) "Personal information" means any information relating to a particular identified or identifiable individual including, but not limited to: (a) An individual's location; (b) the categories of information identified in RCW 19.255.010(5); (c) the categories of information identified in RCW 42.56.230; and (d) information obtained from a particular vehicle or particular residence, including the curtilage thereof, relating to that individual. Personal information does not include information that an agency does not associate with a particular individual. The information may be in the form of, but is not limited to:

(a) Images obtained from any part of the electromagnetic spectrum including, but not limited to, visible, ultraviolet, and infrared light; X-rays and other radiation; and radio waves;

(b) Sounds of any frequency, including infrasonic, audible, and ultrasonic frequencies; or

(c) Scents of any type, whether or not detectable by the human nose.

(6)(a) "Sensing device" means a device capable of remotely acquiring personal information from its surroundings.

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

NEW SECTION. **Sec.**  (1) No state agency including, but not limited to, the Washington state patrol and the department of natural resources, shall procure an extraordinary sensing device unless moneys are expressly appropriated by the legislature for this specific purpose.

(2) No local agency shall procure an extraordinary sensing device without the explicit approval of the governing body of such locality, given for that specific extraordinary sensing device to be used for a specific purpose.

NEW SECTION. **Sec.**  (1) The governing body for each local agency and elected or appointed official in charge for each state agency must develop and make publicly available, including on the agency web site, written policies and procedures for the use of any extraordinary sensing device procured, and provide notice and opportunity for public comment prior to adoption of the written policies and procedures. Such written policies and procedures must: (a) Describe the purposes for using an extraordinary sensing device and, if applicable, any agency program or study pursuant to which it intends to use the extraordinary sensing device; (b) describe categories of personal information, if applicable, that the agency intends to collect during the operation of such extraordinary sensing device, how the collection of such information furthers the agency's purposes stated pursuant to (a) of this subsection, and how the agency plans to use such information; (c) establish policies and procedures for minimizing the collection of information not specified in (b) of this subsection; (d) establish policies and procedures to prevent unauthorized access to personal information, which may be collected through the agency's use of extraordinary sensing devices, and which policies and procedures may include technical measures such as encryption, hashing, anonymization, and/or deidentification of collected information; (e) identify the unique registration number the agency has affixed, or has previously been affixed, including by another agency, to the extraordinary sensing device it is intending to use; and (f) identify a point of contact for citizen complaints and concerns regarding the agency's use and operation of an extraordinary sensing device.

(2) Within one hundred eighty days of the effective date of this section, the office of the chief information officer shall construct a web site publicly listing every agency's written policies and procedures mandated by this section. The web site shall be easily accessible by the public and a hyperlink to this web site shall appear on http://access.wa.gov, or other similar web site, if this web site is altered or ceases to exist.

(3) The operation of an extraordinary sensing device by an agency is prohibited unless the agency has affixed a unique identifier registration number assigned by the agency.

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

NEW SECTION. **Sec.**  All operations of an extraordinary sensing device, by an agency, or disclosure of personal information about any person acquired through the operation of an extraordinary sensing device, by an agency, must be conducted in such a way as to minimize the collection and disclosure of personal information not authorized under this subchapter. If an agency complies with section 4 of this act and adheres to the minimization policies and procedures it adopts pursuant to section 4 of this act, there is a rebuttable presumption that the agency has complied with the minimization requirement under this section. This presumption can be overcome by clear and convincing evidence to the contrary.

NEW SECTION. **Sec.**  (1) It is lawful under this section for an agency to operate an extraordinary sensing device without obtaining a warrant if the agency reasonably determines that the operation does not intend to collect personal information. Allowable purposes under this subsection include, but are not limited to:

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

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

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

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

(2) No agency may make any effort to identify an individual from the information collected by the operation or to associate any information collected by the operation with a particular individual, nor shall the information be disclosed to a third party unless that party agrees to be bound by the same restrictions. These restrictions shall not apply if there is probable cause that the information is evidence of criminal activity.

NEW SECTION. **Sec.**  (1) It is lawful under this section for any agency to operate an extraordinary sensing device and disclose personal information from the operation without obtaining a warrant if:

(a) The agency reasonably determines that:

(i) An emergency situation exists that involves criminal activity and presents immediate danger of death or serious physical injury to any person, including risk of terrorist activity;

(ii) The emergency situation requires operation of an extraordinary sensing device before a warrant authorizing the use can, with due diligence, be obtained; and

(iii) There are grounds upon which a warrant could be entered to authorize such operation;

(b) The agency reasonably determines that an emergency situation exists that:

(i) Does not involve criminal activity;

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

(iii) Has characteristics such that operation of an extraordinary sensing device may reasonably reduce the danger of death or serious physical injury;

(c) The agency determines that operation is reasonably necessary to locate a missing person;

(d) The operation is limited to use for traffic crash scene photography;

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

(f) The operation is for training, testing, or research purposes by an agency and is not intended to collect personal information without the specific written consent of any individual whose personal information is collected; or

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

(2) Upon completion of the operation of an extraordinary sensing device pursuant to subsection (1)(b) through (g) of this section, any personal information obtained must be treated as information collected on an individual other than a target of a warrant for purposes of section 10 of this act.

NEW SECTION. **Sec.**  (1) An extraordinary sensing device may be operated by an agency and personal information from the operation disclosed, if the operation and collection of personal information is pursuant to a search warrant issued by a court of competent jurisdiction, and the operation, collection, and disclosure are compliant with the provisions of this chapter.

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

(3) Within ten days of the execution of a search warrant, the officer executing the warrant must serve a copy of the warrant upon the target of the warrant, except if notice is delayed pursuant to this section.

(4) An agency acting under this section may, when a warrant is sought, include in the petition a request, which the court shall grant, for an order delaying the notification for a period not to exceed ninety days if the court determines that there is reason to believe that notification of the existence of the warrant may have an adverse result.

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

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

(b) Causing a person to flee from prosecution;

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

(d) Causing the intimidation of potential witnesses; or

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

(6) The agency shall maintain a copy of the warrant.

(7) Extension of the delay of notification of up to ninety days each may be granted by the court upon certification by the agency that there is reason to believe that notification of the extension of the warrant may have an adverse result.

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

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

(b) Informs the target of the warrant: (i) That notification was delayed; (ii) what agency or court made the certification or determination pursuant to which that delay was made; and (iii) the provision of this section allowing the delay.

NEW SECTION. **Sec.**  (1) Personal information collected during the operation of an extraordinary sensing device authorized under sections 7 through 9 of this act may not be used, copied, or disclosed for any purpose after conclusion of the operation for which the extraordinary sensing device was authorized, unless there is probable cause that the personal information is evidence of criminal activity.

(2) Personal information must be deleted, within thirty days if the personal information was collected on a target of a warrant authorizing the operation of the extraordinary sensing device and within ten days for other personal information, after there is no longer probable cause that the personal information is evidence of criminal activity that may be prosecuted. The foregoing shall only apply to the extent the personal information can be destroyed without destroying other evidence relevant to a pending criminal investigation or case. There is a presumption that personal information is not evidence of criminal activity if that personal information is not used in a criminal prosecution within one year of collection.

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

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

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

NEW SECTION. **Sec.**  (1) An agency must maintain records identifying each use of an extraordinary sensing device. The records must include:

(a) Operator name;

(b) Identity of the agency;

(c) Date and time of the flight;

(d) Categories of information collected for each use;

(e) The purpose of using the extraordinary sensing device; and

(f) Whether a warrant was obtained prior to use.

(2) Each state agency having jurisdiction over criminal law or regulatory violation enforcement, for any calendar year in which the agency has used an extraordinary sensing device, must prepare an annual report including, at a minimum in each case, the following:

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

(b) The number of criminal or regulatory investigations aided by the use and how the use was helpful to the investigation;

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

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

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

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

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

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

(3) Each state agency other than that in subsection (2) of this section, for any calendar year in which the agency has used an extraordinary sensing device, must prepare an annual report including, at a minimum in each case, the following:

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

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

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

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

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

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

(4) The annual reports required pursuant to this section must be filed electronically to the office of financial management, who must compile the results and submit them electronically to the relevant committees of the legislature by September 1st of each year, beginning in 2016.

NEW SECTION. **Sec.**  Any use of an extraordinary sensing device by an agency must fully comply with all applicable federal aviation administration regulations.

NEW SECTION. **Sec.**  Nothing in this act abridges, reduces, restricts, or prohibits an officer, employee, or agent of the United States armed forces, or the agent of the United States armed forces to include the national guard in Title 32 U.S.C. from operating an unmanned aerial vehicle.

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

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

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