

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 1440

64th Legislature
2015 Regular Session

Passed by the House April 16, 2015
Yeas 96 Nays 0

Speaker of the House of Representatives

Passed by the Senate April 14, 2015
Yeas 47 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 1440** as passed by House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 1440

AS AMENDED BY THE SENATE

Passed Legislature - 2015 Regular Session

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

By House Public Safety (originally sponsored by Representatives Taylor, Goodman, Pollet, Scott, Condotta, Shea, G. Hunt, Young, Moscoso, Smith, Ryu, Jenkins, Magendanz, Farrell, and McCaslin)

READ FIRST TIME 02/17/15.

1 AN ACT Relating to prohibiting the use of a cell site simulator
2 device without a warrant; amending RCW 9.73.260; adding a new section
3 to chapter 9.73 RCW; and declaring an emergency.

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

5 NEW SECTION. **Sec. 1.** A new section is added to chapter 9.73 RCW
6 to read as follows:

7 The state and its political subdivisions shall not, by means of a
8 cell site simulator device, collect or use a person's electronic data
9 or metadata without (1) that person's informed consent, (2) a
10 warrant, based upon probable cause, that describes with particularity
11 the person, place, or thing to be searched or seized, or (3) acting
12 in accordance with a legally recognized exception to the warrant
13 requirements.

14 **Sec. 2.** RCW 9.73.260 and 1998 c 217 s 1 are each amended to read
15 as follows:

16 (1) As used in this section:

17 (a) "Wire communication" means any aural transfer made in whole
18 or in part through the use of facilities for the transmission of
19 communications by the aid of wire, cable, or other like connection
20 between the point of origin and the point of reception, including the

1 use of such connection in a switching station, furnished or operated
2 by any person engaged in providing or operating such facilities for
3 the transmission of intrastate, interstate, or foreign
4 communications, and such term includes any electronic storage of such
5 communication.

6 (b) "Electronic communication" means any transfer of signs,
7 signals, writing, images, sounds, data, or intelligence of any nature
8 transmitted in whole or in part by a wire, radio, electromagnetic,
9 photoelectronic, or photo-optical system, but does not include:

10 (i) Any wire or oral communication;

11 (ii) Any communication made through a tone-only paging device; or

12 (iii) Any communication from a tracking device, but solely to the
13 extent the tracking device is owned by the applicable law enforcement
14 agency.

15 (c) "Electronic communication service" means any service that
16 provides to users thereof the ability to send or receive wire or
17 electronic communications.

18 (d) "Pen register" means a device that records or decodes
19 electronic or other impulses that identify the numbers dialed or
20 otherwise transmitted on the telephone line to which such device is
21 attached, but such term does not include any device used by a
22 provider or customer of a wire or electronic communication service
23 for billing, or recording as an incident to billing, for
24 communications services provided by such provider or any device used
25 by a provider or customer of a wire communication service for cost
26 accounting or other like purposes in the ordinary course of its
27 business.

28 (e) "Trap and trace device" means a device that captures the
29 incoming electronic or other impulses that identify the originating
30 number of an instrument or device from which a wire or electronic
31 communication was transmitted.

32 (f) "Cell site simulator device" means a device that transmits or
33 receives radio waves for the purpose of conducting one or more of the
34 following operations: (i) Identifying, locating, or tracking the
35 movements of a communications device; (ii) intercepting, obtaining,
36 accessing, or forwarding the communications, stored data, or metadata
37 of a communications device; (iii) affecting the hardware or software
38 operations or functions of a communications device; (iv) forcing
39 transmissions from or connections to a communications device; (v)
40 denying a communications device access to other communications

1 devices, communications protocols, or services; or (vi) spoofing or
2 simulating a communications device, cell tower, cell site, or
3 service, including, but not limited to, an international mobile
4 subscriber identity catcher or other invasive cell phone or telephone
5 surveillance or eavesdropping device that mimics a cell phone tower
6 and sends out signals to cause cell phones in the area to transmit
7 their locations, identifying information, and communications content,
8 or a passive interception device or digital analyzer that does not
9 send signals to a communications device under surveillance. A cell
10 site simulator device does not include any device used or installed
11 by an electric utility, as defined in RCW 19.280.020, solely to the
12 extent such device is used by that utility to measure electrical
13 usage, to provide services to customers, or to operate the electric
14 grid.

15 (2) No person may install or use a pen register (~~((or))~~), trap and
16 trace device, or cell site simulator device without a prior court
17 order issued under this section except as provided under subsection
18 (6) of this section or RCW 9.73.070.

19 (3) A law enforcement officer may apply for and the superior
20 court may issue orders and extensions of orders authorizing the
21 installation and use of pen registers (~~(and)~~), trap and trace
22 devices, and cell site simulator devices as provided in this section.
23 The application shall be under oath and shall include the identity of
24 the officer making the application and the identity of the law
25 enforcement agency conducting the investigation. The applicant must
26 certify that the information likely to be obtained is relevant to an
27 ongoing criminal investigation being conducted by that agency.

28 (4) If the court finds that the information likely to be obtained
29 by such installation and use is relevant to an ongoing criminal
30 investigation and finds that there is probable cause to believe that
31 the pen register (~~((or))~~), trap and trace device, or cell site
32 simulator device will lead to obtaining evidence of a crime,
33 contraband, fruits of crime, things criminally possessed, weapons, or
34 other things by means of which a crime has been committed or
35 reasonably appears about to be committed, or will lead to learning
36 the location of a person who is unlawfully restrained or reasonably
37 believed to be a witness in a criminal investigation or for whose
38 arrest there is probable cause, the court shall enter an ex parte
39 order authorizing the installation and use of a pen register (~~((or))~~)

1 a)) trap and trace device, or cell site simulator device. The order
2 shall specify:

3 (a)(i) In the case of a pen register or trap and trace device,
4 the identity, if known, of the person to whom is leased or in whose
5 name is listed the telephone line to which the pen register or trap
6 and trace device is to be attached; or

7 (ii) In the case of a cell site simulator device, the identity,
8 if known, of (A) the person to whom is subscribed or in whose name is
9 subscribed the electronic communications service utilized by the
10 device to which the cell site simulator device is to be used and (B)
11 the person who possesses the device to which the cell site simulator
12 device is to be used;

13 (b) The identity, if known, of the person who is the subject of
14 the criminal investigation;

15 (c)(i) In the case of a pen register or trap and trace device,
16 the number and, if known, physical location of the telephone line to
17 which the pen register or trap and trace device is to be attached
18 and, in the case of a trap and trace device, the geographic limits of
19 the trap and trace order; or

20 (ii) In the case of a cell site simulator device: (A) The
21 telephone number or other unique subscriber account number
22 identifying the wire or electronic communications service account
23 used by the device to which the cell site simulator device is to be
24 attached or used; (B) if known, the physical location of the device
25 to which the cell site simulator device is to be attached or used;
26 (C) the type of device, and the communications protocols being used
27 by the device, to which the cell site simulator device is to be
28 attached or used; (D) the geographic area that will be covered by the
29 cell site simulator device; (E) all categories of metadata, data, or
30 information to be collected by the cell site simulator device from
31 the targeted device including, but not limited to, call records and
32 geolocation information; (F) whether or not the cell site simulator
33 device will incidentally collect metadata, data, or information from
34 any parties or devices not specified in the court order, and if so,
35 what categories of information or metadata will be collected; and (G)
36 any disruptions to access or use of a communications or internet
37 access network that may be created by use of the device; and

38 (d) A statement of the offense to which the information likely to
39 be obtained by the pen register (~~(a))~~ trap and trace device, or
40 cell site simulator device relates.

1 The order shall direct, if the applicant has requested, the
2 furnishing of information, facilities, and technical assistance
3 necessary to accomplish the installation of the pen register ((~~or~~))
4 trap and trace device, or cell site simulator device. An order issued
5 under this section shall authorize the installation and use of a: (i)
6 Pen register or a trap and trace device for a period not to exceed
7 sixty days; and (ii) a cell site simulator device for sixty days. An
8 extension of the original order may only be granted upon: A new
9 application for an order under subsection (3) of this section; and a
10 showing that there is a probability that the information or items
11 sought under this subsection are more likely to be obtained under the
12 extension than under the original order. No extension beyond the
13 first extension shall be granted unless: There is a showing that
14 there is a high probability that the information or items sought
15 under this subsection are much more likely to be obtained under the
16 second or subsequent extension than under the original order; and
17 there are extraordinary circumstances such as a direct and immediate
18 danger of death or serious bodily injury to a law enforcement
19 officer. The period of extension shall be for a period not to exceed
20 sixty days.

21 An order authorizing or approving the installation and use of a
22 pen register ((~~or a~~))
23 trap and trace device, or cell site simulator
24 device shall direct that the order be sealed until otherwise ordered
25 by the court and that the person owning or leasing the line to which
26 the pen register ((~~or~~))
27 trap and trace device, and cell site
28 simulator devices is attached or used, or who has been ordered by the
29 court to provide assistance to the applicant, not disclose the
30 existence of the pen register ((~~or~~))
31 trap and trace device, or cell
32 site simulator device or the existence of the investigation to the
33 listed subscriber or to any other person, unless or until otherwise
34 ordered by the court.

35 (5) Upon the presentation of an order, entered under subsection
36 (4) of this section, by an officer of a law enforcement agency
37 authorized to install and use a pen register under this chapter, a
38 provider of wire or electronic communication service, landlord,
39 custodian, or other person shall furnish such law enforcement officer
40 forthwith all information, facilities, and technical assistance
41 necessary to accomplish the installation of the pen register
42 unobtrusively and with a minimum of interference with the services
43 that the person so ordered by the court accords the party with

1 respect to whom the installation and use is to take place, if such
2 assistance is directed by a court order as provided in subsection (4)
3 of this section.

4 Upon the request of an officer of a law enforcement agency
5 authorized to receive the results of a trap and trace device under
6 this chapter, a provider of a wire or electronic communication
7 service, landlord, custodian, or other person shall install such
8 device forthwith on the appropriate line and shall furnish such law
9 enforcement officer all additional information, facilities, and
10 technical assistance including installation and operation of the
11 device unobtrusively and with a minimum of interference with the
12 services that the person so ordered by the court accords the party
13 with respect to whom the installation and use is to take place, if
14 such installation and assistance is directed by a court order as
15 provided in subsection (4) of this section. Unless otherwise ordered
16 by the court, the results of the trap and trace device shall be
17 furnished to the officer of a law enforcement agency, designated in
18 the court order, at reasonable intervals during regular business
19 hours for the duration of the order.

20 A provider of a wire or electronic communication service,
21 landlord, custodian, or other person who furnishes facilities or
22 technical assistance pursuant to this subsection shall be reasonably
23 compensated by the law enforcement agency that requests the
24 facilities or assistance for such reasonable expenses incurred in
25 providing such facilities and assistance.

26 No cause of action shall lie in any court against any provider of
27 a wire or electronic communication service, its officers, employees,
28 agents, or other specified persons for providing information,
29 facilities, or assistance in accordance with the terms of a court
30 order under this section. A good faith reliance on a court order
31 under this section, a request pursuant to this section, a legislative
32 authorization, or a statutory authorization is a complete defense
33 against any civil or criminal action brought under this chapter or
34 any other law.

35 (6)(a) Notwithstanding any other provision of this chapter, a law
36 enforcement officer and a prosecuting attorney or deputy prosecuting
37 attorney who jointly and reasonably determine that there is probable
38 cause to believe that an emergency situation exists that involves
39 immediate danger of death or serious bodily injury to any person that
40 requires the installation and use of a pen register (~~(or a)~~) trap

1 and trace device, or cell site simulator device before an order
2 authorizing such installation and use can, with due diligence, be
3 obtained, and there are grounds upon which an order could be entered
4 under this chapter to authorize such installation and use, may have
5 installed and use a pen register ((~~or~~)), trap and trace device, or
6 cell site simulator device if, within forty-eight hours after the
7 installation has occurred, or begins to occur, an order approving the
8 installation or use is issued in accordance with subsection (4) of
9 this section. In the absence of an authorizing order, such use shall
10 immediately terminate when the information sought is obtained, when
11 the application for the order is denied or when forty-eight hours
12 have lapsed since the installation of the pen register ((~~or~~)), trap
13 and trace device, or cell site simulator device, whichever is
14 earlier. If an order approving the installation or use is not
15 obtained within forty-eight hours, any information obtained is not
16 admissible as evidence in any legal proceeding. The knowing
17 installation or use by any law enforcement officer of a pen register
18 ((~~or~~)), trap and trace device, or cell site simulator device pursuant
19 to this subsection without application for the authorizing order
20 within forty-eight hours of the installation shall constitute a
21 violation of this chapter and be punishable as a gross misdemeanor. A
22 provider of a wire or electronic service, landlord, custodian, or
23 other person who furnished facilities or technical assistance
24 pursuant to this subsection shall be reasonably compensated by the
25 law enforcement agency that requests the facilities or assistance for
26 such reasonable expenses incurred in providing such facilities and
27 assistance.

28 (b) A law enforcement agency that authorizes the installation of
29 a pen register ((~~or~~)), trap and trace device, or cell site simulator
30 device under this subsection (6) shall file a monthly report with the
31 administrator for the courts. The report shall indicate the number of
32 authorizations made, the date and time of each authorization, whether
33 a court authorization was sought within forty-eight hours, and
34 whether a subsequent court authorization was granted.

35 (c) A law enforcement agency authorized to use a cell site
36 simulator device in accordance with this section must: (i) Take all
37 steps necessary to limit the collection of any information or
38 metadata to the target specified in the applicable court order; (ii)
39 take all steps necessary to permanently delete any information or
40 metadata collected from any party not specified in the applicable

1 court order immediately following such collection and must not
2 transmit, use, or retain such information or metadata for any purpose
3 whatsoever; and (iii) must delete any information or metadata
4 collected from the target specified in the court order within thirty
5 days if there is no longer probable cause to support the belief that
6 such information or metadata is evidence of a crime.

7 NEW SECTION. **Sec. 3.** If any provision of this act or its
8 application to any person or circumstance is held invalid, the
9 remainder of the act or the application of the provision to other
10 persons or circumstances is not affected.

11 NEW SECTION. **Sec. 4.** This act is necessary for the immediate
12 preservation of the public peace, health, or safety, or support of
13 the state government and its existing public institutions, and takes
14 effect immediately.

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