
Public Safety Committee

HB 1102

Brief Description: Concerning technology-enhanced government surveillance.

Sponsors: Representatives Taylor, Goodman, Shea, McCaslin, Young, J. Walsh, Condotta, Smith and Buys.

Brief Summary of Bill

- Prohibits state agencies from procuring an extraordinary sensing device (ESD) without an appropriation by the Legislature, and prohibits local agencies from procuring an ESD without explicit approval of their governing bodies.
- Restricts state and local agencies from operating ESDs and disclosing personal information under certain circumstances.
- Excludes all evidence collected by an ESD from all court, legislative, or regulatory proceedings if the collection or disclosure of personal information violates the bill's requirements.

Hearing Date: 1/24/17

Staff: Kelly Leonard (786-7147).

Background:

Unmanned Aircraft Systems. An unmanned aircraft system (UAS) is an unmanned aircraft (UA) and all of the associated support equipment necessary to operate the UA. The UA is the flying portion of the system, flown by a pilot via a ground control system, or autonomously through use of an on-board computer, communication links, and any additional equipment. The Federal Aviation Administration (FAA) first authorized the use of UAs in the National Airspace System (NAS) in 1990.

In 2016 the Federal Aviation Administration passed a new rule to allow small UAS to operate for non-hobby and non-recreational purposes. The following are examples of possible small UAS operations that can be conducted under the rule:

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- crop monitoring and inspection;
- research and development;
- education;
- power-line/pipeline inspection in hilly or mountainous terrain;
- antenna inspection;
- aiding certain rescue operations;
- bridge inspection;
- aerial photography; and
- wildlife nesting area evaluations.

The FAA rule includes weight, speed, and altitude restrictions. Among other requirements, the UAS may only be operated within the operator's visual line-of-sight, and the UAS may not be operated over any persons not directly participating in the operation. Operations in Class G airspace are allowed without the permission of Air Traffic Control. However, operations in Class B, C, D and E airspace require advance permission.

Constitutional Limitations. The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Article 1, section 7 of the Washington State Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." These provisions have been interpreted by courts to prohibit the government or a state actor from conducting certain searches of individuals without a warrant issued by a court of competent jurisdiction. This prohibition is enforced by excluding evidence obtained in violation of the warrant requirement, unless an exception applies. However, many kinds of government surveillance are not considered a search requiring a warrant under the federal or state Constitution. This may include surveillance of activities occurring in open fields or in plain view, and sometimes, the government's acquisition of information from a third-party. Congress and state legislatures may choose to establish stronger regulations on government surveillance than the floor established by either the federal or states constitutions.

Summary of Bill:

Extraordinary Sensing Device. "Extraordinary sensing device" (ESD) 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. A "sensing device" means a device capable of remotely acquiring personal information (PI) from its surroundings. It does not include equipment whose sole function is to provide information directly necessary for safe air navigation or operation of a vehicle.

A state agency may not procure an ESD unless money is expressly appropriated by the Legislature for this purpose, and a local agency may not procure one unless its governing body has given explicit approval. It is unlawful for an agency to operate an extraordinary sensing device (ESD) or use or disclose PI, defined as all information relating to a particular identified or identifiable individual, unless a specific exception in the bill applies.

Agency Uses Without a Warrant. An agency may operate an ESD without obtaining a warrant if it reasonably determines that the operation does not intend to collect PI. Agencies may not attempt to identify an individual from the information collected or associate the information with

an individual or disclose the information to a third-party unless there is probable cause that the information is evidence of criminal activity.

An agency may operate an ESD and disclose PI without obtaining a warrant under the following circumstances:

- an emergency exists that involves criminal activity and presents immediate danger of death or serious physical injury to a person, requires operation of an ESD before a warrant can be obtained, and there are grounds upon which a warrant could be granted;
- an emergency exists that does not involve criminal activity, presents immediate danger of death or serious physical injury to a person, and operation of an ESD can reasonably reduce the danger;
- a training exercise conducted on a military base and the ESD does not collect PI on persons located outside the base;
- for training, testing, or research purposes not intended to collect PI from individuals without their written consent; or
- in response to a state of emergency proclaimed by the Governor.

Agency Uses With a Warrant. An agency may operate an ESD and disclose PI if the agency obtains a search warrant. Search warrants may not be issued for a period greater than 10 days with a possible extension of up to 30 days. A copy of the warrant must be served upon the target within 10 days of its execution. Notice can be delayed if a court finds that it may create an adverse result. An adverse result is: endangering the life or safety of an individual, causing a person to flee from prosecution, destruction of evidence or intimidation of a witness, jeopardizing an investigation, or delaying a trial.

Personal Information. All agency operations of an ESD and disclosure of PI must be conducted in such a way as to minimize unauthorized collection and disclosure of PI. Personal information collected by an agency during operation of an ESD may not be used, copied, or disclosed unless there is probable cause that the PI is evidence of criminal activity. Personal information must be deleted within 30 days if the PI was collected on a target of a warrant or within 10 days for other PI. Deletion is only required to the extent that it can be done without destroying other evidence relevant to a criminal case. Personal information is presumed not to be evidence of criminal activity if the PI is not used in a criminal prosecution within one year of collection.

Enforcement. All PI, and any evidence derived from it, is inadmissible in any proceeding before a court, regulatory body, legislative committee, or other authority, if the PI was obtained in violation of the bill.

Any person who knowingly violates the bill's requirements is subject to a legal action for damages by any person claiming injury of his or her business, person, or reputation. The injured person is entitled to reasonable attorneys' fees and other costs of litigation.

Records Retention and Reporting. Agencies having jurisdiction over criminal law or regulatory enforcement must maintain records for each operation of an ESD and must submit a report to the Office of Financial Management (OFM) with certain information required in the bill. The OFM must compile the results and submit them to the Legislature each year.

Other Requirements and Exceptions. Any use of an ESD must also comply with all applicable FAA regulations. Nothing in the bill restricts or prohibits members or agents of the United States Armed Forces from operating a UAS.

Appropriation: None.

Fiscal Note: Requested on January 20, 2017.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.