
HOUSE BILL 1108

State of Washington 65th Legislature 2017 Regular Session

By Representative Klippert

Read first time 01/11/17. Referred to Committee on Judiciary.

1 AN ACT Relating to controlled substances trafficking
2 investigations pursuant to the privacy act; amending RCW 9.73.240;
3 adding new sections to chapter 9.73 RCW; and creating a new section.

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

5 NEW SECTION. **Sec. 1.** It is the intent of the legislature to
6 prevent drug trafficking activities, and thereby protect Washington
7 residents, by providing appropriate investigative tools that
8 facilitate and promote cooperation between local, state, and federal
9 law enforcement agencies that remove barriers to cooperation in drug
10 trafficking investigations, and that continue to protect the privacy
11 rights of residents of the state.

12 NEW SECTION. **Sec. 2.** A new section is added to chapter 9.73 RCW
13 to read as follows:

14 The attorney general or any deputy or assistant attorney general
15 specifically designated by the attorney general, or a prosecuting
16 attorney or any deputy or assistant prosecuting attorney specifically
17 designated by a prosecuting attorney, may authorize an application to
18 a superior court for, and the court may grant, in conformity with
19 section 3 of this act, an order authorizing the interception, by a
20 law enforcement agency having responsibility for the investigation of

1 the offense as to which the application is made, of wire, oral, or
2 electronic communications if the interception may provide evidence of
3 an act of trafficking in controlled substances.

4 NEW SECTION. **Sec. 3.** A new section is added to chapter 9.73 RCW
5 to read as follows:

6 (1) Each application pursuant to section 2 of this act for an
7 order authorizing the interception of a wire, oral, or electronic
8 communication shall be made in writing upon oath or affirmation to a
9 superior court and shall state the applicant's authority to make the
10 application. Each application shall include the following
11 information:

12 (a) The identity of the investigative or law enforcement officer
13 making the application, and the officer authorizing the application;

14 (b) A full and complete statement of the facts and circumstances
15 relied upon by the applicant to justify his or her belief that an
16 order should be issued, including (i) details as to the particular
17 act of trafficking in controlled substances that has been, is being,
18 or is about to be committed, (ii) except as provided in subsection
19 (11) of this section, a particular description of the nature and
20 location of the facilities from which or the place where the
21 communication is to be intercepted, (iii) a particular description of
22 the type of communications sought to be intercepted, and (iv) the
23 identity of the person, if known, committing the offense and whose
24 communications are to be intercepted;

25 (c) A full and complete statement as to whether or not other
26 investigative procedures have been tried and failed or why they
27 reasonably appear to be unlikely to succeed if tried or to be too
28 dangerous;

29 (d) A statement of the period of time for which the interception
30 is required to be maintained. If the nature of the investigation is
31 such that the authorization of interceptions should not automatically
32 terminate when the described type of communication has been first
33 obtained, a particular description of facts establishing probable
34 cause to believe that additional communications of the same type will
35 occur thereafter;

36 (e) A full and complete statement of the facts concerning all
37 previous applications known to the individual authorizing and making
38 the application, made to any court for authorization to intercept
39 wire, oral, or electronic communications involving any of the same

1 persons, facilities, or places specified in the application, and the
2 action taken by the court on each application; and

3 (f) Where the application is for the extension of an order, a
4 statement setting forth the results thus far obtained from the
5 interception, or a reasonable explanation of the failure to obtain
6 results.

7 (2) The court may require the applicant to furnish additional
8 testimony or documentary evidence in support of the application.

9 (3) Upon receiving the application, the court may enter an ex
10 parte order, as requested or as modified, authorizing interception of
11 wire, oral, or electronic communications, if the court determines on
12 the basis of the facts submitted by the applicant that:

13 (a) There is probable cause for belief that a person is
14 committing, has committed, or is about to commit an act of
15 trafficking in controlled substances;

16 (b) There is probable cause for belief that particular
17 communications concerning the offense will be obtained through the
18 interception;

19 (c) Normal investigative procedures have been tried and have
20 failed or reasonably appear to be unlikely to succeed if tried or to
21 be too dangerous;

22 (d) Except as provided in subsection (11) of this section, there
23 is probable cause for belief that the facilities from which, or the
24 place where, the wire, oral, or electronic communications are to be
25 intercepted are being used, or are about to be used, in connection
26 with the commission of the offense, or are leased to, listed in the
27 name of, or commonly used by such person.

28 (4) Each order authorizing the interception of any wire, oral, or
29 electronic communication under this section shall specify:

30 (a) The identity of the person, if known, whose communications
31 are to be intercepted;

32 (b) The nature and location of the communications facilities as
33 to which, or the place where, authority to intercept is to be
34 granted;

35 (c) A particular description of the type of communication sought
36 to be intercepted, and a statement of the particular offense to which
37 it relates;

38 (d) The identity of the agency authorized to intercept the
39 communications, and of the person authorizing the application; and

1 (e) The period of time during which the interception is
2 authorized, including a statement as to whether or not the
3 interception shall automatically terminate when the described
4 communication has been first obtained.

5 (5) An order authorizing the interception of a wire, oral, or
6 electronic communication under this section shall, upon request of
7 the applicant, direct that a provider of wire or electronic
8 communication service, landlord, custodian, or other person shall
9 furnish the applicant forthwith all information, facilities, and
10 technical assistance necessary to accomplish the interception
11 unobtrusively and with a minimum of interference with the services
12 that the service provider, landlord, custodian, or other person is
13 according the person whose communications are to be intercepted. Any
14 service provider, landlord, custodian, or other person furnishing
15 facilities or technical assistance shall be compensated by the
16 applicant for reasonable expenses incurred in providing the
17 facilities or assistance.

18 (6) No order entered under this section may authorize the
19 interception of any wire, oral, or electronic communication for any
20 period longer than is necessary to achieve the objective of the
21 authorization, nor in any event longer than thirty days. The
22 thirty-day period begins on the earlier of the day on which the
23 investigative or law enforcement officer first begins to conduct an
24 interception under the order or ten days after the order is entered.
25 Extensions of an order may be granted, but only upon application for
26 an extension made in accordance with subsection (1) of this section
27 and the court making the findings required by subsection (3) of this
28 section. The period of extension shall be no longer than the
29 authorizing court deems necessary to achieve the purposes for which
30 it is granted and in no event for longer than thirty days. Every
31 order and extension shall contain a provision that the authorization
32 to intercept shall be executed as soon as practicable, shall be
33 conducted in such a way as to minimize the interception of
34 communications not otherwise subject to interception under this
35 section, and must terminate upon attainment of the authorized
36 objective, or in any event in thirty days. In the event the
37 intercepted communication is in a code or foreign language, and an
38 expert in that code or foreign language is not reasonably available
39 during the interception period, minimization may be accomplished as
40 soon as practicable after the interception. An interception under

1 this section may be conducted in whole or in part by employees of the
2 state or a political subdivision of the state, or by an individual
3 operating under a contract with the state or a political subdivision
4 of the state, when acting under the supervision of an investigative
5 or law enforcement officer authorized to conduct the interception.

6 (7) Whenever an order authorizing interception is entered
7 pursuant to this section, the order may require reports to be made to
8 the court that issued the order showing what progress has been made
9 toward achievement of the authorized objective and the need for
10 continued interception. The reports shall be made at such intervals
11 as the court may require.

12 (8)(a) The contents of any wire, oral, or electronic
13 communication intercepted by any means authorized by this section
14 shall, if possible, be recorded on tape or wire or other comparable
15 device. The recording of the contents of any wire, oral, or
16 electronic communication under this subsection shall be done in such
17 a way as will protect the recording from editing or other
18 alterations. Immediately upon the expiration of the period of the
19 order, or extensions thereof, the recordings shall be made available
20 to the court issuing the order and shall be sealed under the court's
21 directions. Custody of the recordings shall be with a law enforcement
22 agency at the court's direction. The recordings shall not be
23 destroyed except upon an order of the issuing court and in any event
24 shall be kept for at least ten years. Duplicate recordings may be
25 made for use, or for disclosure pursuant to the provisions of section
26 4 (1) and (2) of this act, for investigations. The presence of the
27 seal provided for by this subsection, or a satisfactory explanation
28 for the absence thereof, shall be a prerequisite for the use or
29 disclosure of the contents of any wire, oral, or electronic
30 communication or derivative evidence under section 4(3) of this act.

31 (b) Applications made and orders granted under this section shall
32 be sealed by the court. Custody of the applications and orders shall
33 be wherever the court directs. The applications and orders shall be
34 disclosed only upon a showing of good cause before a superior court
35 and shall not be destroyed except on order of the issuing or denying
36 court, and in any event shall be kept for at least ten years.

37 (c) Any violation of this subsection (8) may be punished as
38 contempt of the issuing or denying court.

39 (d) Within a reasonable time but not later than ninety days after
40 the termination of the period of an order or extensions thereof, the

1 issuing court shall cause to be served, on the persons named in the
2 order, and other parties to intercepted communications as the court
3 may determine is in the interest of justice, an inventory which shall
4 include notice of (i) the fact of the entry of the order, (ii) the
5 date of the entry and the period of authorized interception, and
6 (iii) whether during that period wire, oral, or electronic
7 communications were or were not intercepted.

8 The court, upon the filing of a motion, may make available to any
9 such person or party or his or her counsel for inspection the
10 portions of the intercepted communications and orders as the court
11 determines to be in the interest of justice. On an ex parte showing
12 of good cause to the court, the serving of the inventory required by
13 this subsection may be postponed.

14 (9) The contents of any wire, oral, or electronic communication
15 intercepted pursuant to this section or evidence derived from the
16 contents shall not be received in evidence or otherwise disclosed in
17 any trial, hearing, or other proceeding in a court of this state
18 unless each party, not less than ten days before the trial, hearing,
19 or proceeding, has been furnished with a copy of the court order, and
20 accompanying application, under which the interception was
21 authorized. This ten-day period may be waived by the court upon a
22 finding that it was not possible to furnish the party with the order
23 and application ten days before the trial, hearing, or proceeding and
24 that the party will not be prejudiced by the delay in receiving such
25 information.

26 (10)(a) An aggrieved person in any trial, hearing, or other
27 proceeding in or before any court, administrative law judge, hearing
28 officer or examiner, department, officer, agency, board, regulatory
29 body, legislative committee, or other similar authority of this state
30 or any political subdivision of this state may move to suppress the
31 contents of any wire, oral, or electronic communication intercepted
32 pursuant to this section, or evidence derived from the contents, on
33 the grounds that (i) the communication was unlawfully intercepted;
34 (ii) the order of authorization under which it was intercepted is
35 insufficient on its face; or (iii) the interception was not made in
36 conformity with the order of authorization.

37 The motion shall be made before the trial, hearing, or proceeding
38 unless there was no opportunity to make the motion or the person was
39 not aware of the grounds of the motion. If the motion is granted, the
40 contents of the intercepted wire, oral, or electronic communication,

1 or evidence derived from such contents, shall be treated as having
2 been obtained in violation of this section. The court or person
3 presiding, upon the filing of a motion by the aggrieved person, may
4 make available to the aggrieved person or his or her counsel for
5 inspection the portions of the intercepted communication or
6 derivative evidence as the court or person presiding determines to be
7 in the interest of justice.

8 (b) In addition to any other right to appeal, the state or other
9 proponent of evidence that is suppressed has the right to appeal from
10 an order granting a motion to suppress made under (a) of this
11 subsection, if the attorney for the state or other proponent
12 certifies to the court or other official granting the motion that the
13 appeal is not taken for purposes of delay. An appeal shall be taken
14 within thirty days after the date the order was entered and shall be
15 diligently prosecuted.

16 (11) The requirements of subsections (1)(b)(ii) and (3)(d) of
17 this section relating to the specification of the facilities from
18 which, or the place where, a communication is to be intercepted do
19 not apply if:

20 (a) In the case of an application with respect to the
21 interception of an oral communication:

22 (i) The application is by an investigative or law enforcement
23 officer and is approved by the attorney general, a prosecuting
24 attorney, or other attorney authorized to provide the approval under
25 section 2 of this act;

26 (ii) The application contains a full and complete statement as to
27 why the specification is not practical and identifies the person
28 believed to be committing the offense and whose communications are to
29 be intercepted; and

30 (iii) The court finds that the specification is not practical;
31 and

32 (b) In the case of an application with respect to a wire or
33 electronic communication:

34 (i) The application is by an investigative or law enforcement
35 officer and is approved by the attorney general, a prosecuting
36 attorney, or other attorney authorized to provide the approval under
37 section 2 of this act;

38 (ii) The application identifies the person believed to be
39 committing the offense and whose communications are to be intercepted
40 and the applicant makes a showing that there is probable cause to

1 believe that the person's actions could have the effect of thwarting
2 interception from a specified facility;

3 (iii) The court finds that the showing has been adequately made;
4 and

5 (iv) The order authorizing the interception is limited to
6 interception only for such time as it is reasonable to presume that
7 the person identified in the application is reasonably proximate to
8 the instrument through which the communication will be transmitted.

9 (12) An interception of a communication under an order with
10 respect to which the requirements of subsections (1)(b)(ii) and
11 (3)(d) of this section do not apply by reason of subsection (11)(a)
12 of this section shall not begin until the facilities from which, or
13 the place where, the communication is to be intercepted is
14 ascertained by the person implementing the interception order. A
15 provider of wire or electronic communication service that has
16 received an order as provided for in subsection (11)(b) of this
17 section may move the court to modify or quash the order on the
18 grounds that its assistance with respect to the interception cannot
19 be performed in a timely or reasonable fashion. The court, upon
20 notice to the government, shall decide the motion expeditiously.

21 NEW SECTION. **Sec. 4.** A new section is added to chapter 9.73 RCW
22 to read as follows:

23 (1) Any investigative or law enforcement officer who, by any
24 means authorized by this section or section 3 of this act has
25 obtained knowledge of the contents of any wire, oral, or electronic
26 communication, or evidence derived from the contents, may disclose
27 the contents or derivative evidence to another investigative or law
28 enforcement officer, including an investigative or law enforcement
29 officer of another state, to the extent that the disclosure is
30 appropriate to the proper performance of the official duties of the
31 officer making or receiving the disclosure.

32 (2) Any investigative or law enforcement officer who, by any
33 means authorized by this section or section 3 of this act, has
34 obtained knowledge of the contents of any wire, oral, or electronic
35 communication, or evidence derived from the contents, may use the
36 contents or derivative evidence to the extent the use is appropriate
37 to the proper performance of his or her official duties.

38 (3) Any person who, by any means authorized by this section or
39 section 3 of this act, has received any information concerning the

1 contents of a wire, oral, or electronic communication, or evidence
2 derived from the contents, intercepted in accordance with this
3 section or section 3 of this act, may disclose the contents or
4 derivative evidence while giving testimony under oath or affirmation
5 in any proceeding held under the authority of this state or any
6 political subdivision of this state.

7 (4) When an investigative or law enforcement officer, while
8 engaged in intercepting wire, oral, or electronic communications in
9 the manner authorized in section 3 of this act, intercepts wire,
10 oral, or electronic communications relating to an offense other than
11 an offense specified in the order of authorization, the contents of
12 the communications, and evidence derived from the contents, may be
13 disclosed or used as provided in subsections (1) and (2) of this
14 section. The contents and derivative evidence may be used under
15 subsection (3) of this section when authorized by a superior court
16 where the court finds on subsequent application that the contents
17 were otherwise intercepted in accordance with the provisions of
18 section 3 of this act. The application shall be made as soon as
19 practicable.

20 (5) Any investigative or law enforcement officer, or attorney for
21 the state or any political subdivision of the state, who by any means
22 authorized by this section or section 3 of this act has obtained
23 knowledge of the contents of any wire, oral, or electronic
24 communication, or evidence derived from the contents, may also
25 disclose the contents or derivative evidence to any federal
26 intelligence, protective, immigration, national defense, or national
27 security official to the extent that such contents or derivative
28 evidence includes foreign intelligence or counterintelligence, as
29 defined in the national security act of 1947, 50 U.S.C. Sec. 3003, or
30 foreign intelligence information, as defined in 18 U.S.C. Sec.
31 2510(19), to assist the official who is to receive that information
32 in the performance of his or her official duties. Any federal
33 official who receives information pursuant to this provision may use
34 that information only as necessary in the conduct of that person's
35 official duties subject to any limitations on the unauthorized
36 disclosure of the information.

37 (6) Any federal investigative or law enforcement officer who
38 obtains information regarding an act of trafficking in controlled
39 substances from the contents of a wire, oral, or electronic
40 communication, or obtains any evidence derived from the information,

1 may disclose the information or derivative evidence while giving
2 testimony under oath or affirmation in any proceeding held under the
3 authority of this state or any political subdivision of this state,
4 if the information or derivative evidence was obtained in compliance
5 with federal law, and in a case in which no party to a communication
6 has consented to an interception, if the information or derivative
7 evidence was obtained through an interception that was also done with
8 prior judicial authorization whether or not the prior authorization
9 was required by federal law.

10 (7) No otherwise privileged wire, oral, or electronic
11 communication intercepted in accordance with, or in violation of, the
12 provisions of this act shall lose its privileged character.

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

15 For the purposes of sections 2 through 4 of this act, the
16 following definitions apply:

17 (1) "Aggrieved person" means a person who was a party to any
18 intercepted wire, oral, or electronic communication or a person
19 against whom the interception was directed.

20 (2) "Computer" means an electronic, magnetic, optical,
21 electrochemical, or other high speed data processing device
22 performing logical, arithmetic, or storage functions, and includes
23 any data storage facility or communications facility directly related
24 to or operating in conjunction with the device, but does not include
25 an automated typewriter or typesetter, a portable handheld
26 calculator, or other similar device.

27 (3) "Contents," when used with respect to any wire, oral, or
28 electronic communication, includes any information concerning the
29 substance, purport, or meaning of that communication.

30 (4) "Electronic communication" means any transfer of signs,
31 signals, writing, images, sounds, data, or intelligence of any nature
32 transmitted in whole or in part by a wire, radio, electromagnetic,
33 photoelectronic, or photooptical system, but does not include:

34 (a) Any wire or oral communication;

35 (b) Any communication made through a tone only paging device;

36 (c) Any communication from a tracking device;

37 (d) Electronic funds transfer information stored by a financial
38 institution in an electronic communication system used for the
39 electronic storage and transfer of funds.

1 (5) "Electronic communication service" means any service that
2 provides users the ability to send or receive wire or electronic
3 communications.

4 (6) "Electronic communication system" means any wire, radio,
5 electromagnetic, photooptical, or photoelectronic facilities for the
6 transmission of wire or electronic communications, and any computer
7 facilities or related electronic equipment for the electronic storage
8 of the communications.

9 (7) "Electronic storage" means (a) any temporary, intermediate
10 storage of a wire or electronic communication incidental to the
11 electronic transmission thereof; and (b) any storage of communication
12 by an electronic communication service for purposes of backup
13 protection of the communication.

14 (8) "Investigative or law enforcement officer" means any officer
15 of the United States or of this state or a political subdivision of
16 this state, who is empowered by law to conduct investigations of or
17 make arrest for criminal offenses enumerated in the United States
18 Code or laws of this state, and any attorney authorized by law to
19 prosecute or participate in the prosecution of the offenses.

20 (9) "Oral communication" means any oral communication uttered by
21 a person exhibiting an expectation that the communication is not
22 subject to interception under circumstances justifying the
23 expectation, but does not include any electronic communication.

24 (10) "Trafficking in controlled substances" means unlawful
25 manufacture, delivery, sale, or possession with intent to
26 manufacture, deliver, or sell, controlled substances as defined in
27 chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW,
28 or imitation controlled substances as defined in chapter 69.52 RCW,
29 or conspiracy to commit any of these offenses, when the offense
30 involves the collaboration of two or more persons and the volume of
31 controlled substances, legend drugs, or imitation controlled
32 substances at issue exceeds one pound.

33 (11) "User" means any person or entity who (a) uses an electronic
34 communication service; and (b) is duly authorized by the provider of
35 the service to engage in the use.

36 (12) "Wire communication" means any transfer of the human voice
37 made in whole or in part through the use of facilities for the
38 transmission of communications by the aid of wire, cable, or other
39 like connection between the point of origin and the point of
40 reception, including the use of a connection in a switching station,

1 furnished or operated by any person engaged in providing or operating
2 facilities for the transmission of intrastate, interstate, or foreign
3 communications.

4 **Sec. 6.** RCW 9.73.240 and 1989 c 271 s 206 are each amended to
5 read as follows:

6 (1) The attorney general shall have concurrent authority and
7 power with the prosecuting attorneys to investigate violations of RCW
8 9.73.200 through 9.73.230 (~~or RCW~~), 9.73.090, or sections 2 through
9 4 of this act and initiate and conduct prosecutions of any violations
10 upon request of any of the following:

11 (a) The person who was the nonconsenting party to the
12 intercepted, transmitted, or recorded conversation or communication;
13 or

14 (b) The county prosecuting attorney of the jurisdiction in which
15 the offense has occurred.

16 (2) The request shall be communicated in writing to the attorney
17 general.

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