
ENGROSSED HOUSE BILL 2789

AS AMENDED BY THE SENATE

Passed Legislature - 2014 Regular Session

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 extraordinary

1 surveillance technologies may increase liability to state and local
2 jurisdictions. It is the intent of the legislature to provide clear
3 standards for the lawful use of extraordinary surveillance technologies
4 by state and 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, except the Washington national guard in Title
10 32 U.S.C. status.

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

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

20 (3) "Extraordinary sensing device" means a sensing device attached
21 to an unmanned aircraft system.

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

27 (5) "Personal information" means all information that:

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

30 (i) His or her social security number, driver's license number,
31 agency-issued identification number, student identification number,
32 real or personal property holdings derived from tax returns, and the
33 person's education, financial transactions, medical history, ancestry,
34 religion, political ideology, or criminal or employment record; or

35 (ii) Intellectual property, trade secrets, proprietary information,
36 or operational information;

1 (b) Affords a basis for inferring personal characteristics, such as
2 finger and voice prints, photographs, or things done by or to such
3 person; and the record of the person's presence, registration, or
4 membership in an organization or activity, or admission to an
5 institution; or

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

9 (6)(a) "Sensing device" means a device capable of remotely
10 acquiring personal information from its surroundings, using any
11 frequency of the electromagnetic spectrum, or a sound detecting system.

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

15 (7) "Unmanned aircraft system" means an aircraft that is operated
16 without the possibility of human intervention from within or on the
17 aircraft, together with associated elements, including communication
18 links and components that control the unmanned aircraft that are
19 required for the pilot in command to operate safely and efficiently in
20 the national airspace system.

21 NEW SECTION. **Sec. 3.** Except as otherwise specifically authorized
22 in this subchapter, it is unlawful for an agency to operate an
23 extraordinary sensing device or disclose personal information about any
24 person acquired through the operation of an extraordinary sensing
25 device.

26 NEW SECTION. **Sec. 4.** (1) No state agency or state organization
27 having jurisdiction over criminal law enforcement or regulatory
28 violations including, but not limited to, the Washington state patrol
29 and the department of natural resources, shall purchase an
30 extraordinary sensing device unless moneys are expressly appropriated
31 by the legislature for this specific purpose.

32 (2) No local agency having jurisdiction over criminal law
33 enforcement or regulatory violations shall procure an extraordinary
34 sensing device without the explicit approval of the governing body of
35 such locality, given for that specific extraordinary sensing device to
36 be used for a specific purpose.

1 NEW SECTION. **Sec. 5.** The governing body for each agency must
2 develop and make publicly available, including on the agency web site,
3 written policies and procedures for the use of any extraordinary
4 sensing device procured, and provide notice and opportunity for public
5 comment prior to adoption of the written policies and procedures.

6 NEW SECTION. **Sec. 6.** All operations of an extraordinary sensing
7 device, by an agency, or disclosure of personal information about any
8 person acquired through the operation of an extraordinary sensing
9 device, by an agency, must be conducted in such a way as to minimize
10 the collection and disclosure of personal information not authorized
11 under this subchapter.

12 NEW SECTION. **Sec. 7.** An extraordinary sensing device may be
13 operated and personal information from such operation disclosed, if the
14 operation and collection of personal information is pursuant to a
15 search warrant issued by a court of competent jurisdiction.

16 NEW SECTION. **Sec. 8.** (1) A governmental entity acting under this
17 section may, when a warrant is sought, include in the petition a
18 request, which the court shall grant, for an order delaying the
19 notification for a period not to exceed ninety days if the court
20 determines that there is a reason to believe that notification of the
21 existence of the warrant may have an adverse result.

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

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

24 (b) Causing a person to flee from prosecution;

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

26 (d) Causing the intimidation of potential witnesses; or

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

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

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

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

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

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

7 NEW SECTION. **Sec. 9.** (1) It is lawful for a law enforcement
8 officer, agency employee, or authorized agent to operate an
9 extraordinary sensing device and disclose personal information from
10 such operation if the officer, employee, or agent reasonably determines
11 that an emergency situation exists that:

12 (a) Does not involve criminal activity, unless exigent
13 circumstances exist;

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

16 (c) Has characteristics such that operation of an extraordinary
17 sensing device can reasonably reduce the danger of death or serious
18 physical injury.

19 (2) It is lawful for an officer, employee, or agent to operate an
20 extraordinary sensing device if the officer, employee, or agent does
21 not intend to collect personal information, the operation is unlikely
22 to accidentally collect personal information, and the operation is not
23 for purposes of regulatory enforcement. Allowable uses under this
24 subsection are limited to:

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

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

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

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

33 (3) It is lawful for an officer, employee, or agent to operate an
34 extraordinary sensing device as part of a training exercise conducted
35 on a military base if the extraordinary sensing device does not collect
36 personal information on persons located outside the military base.

1 (4) It is lawful for an officer, employee, or agent to operate an
2 extraordinary sensing device if the operation is for training, testing,
3 or research purposes by an agency and does not collect personal
4 information without the specific written consent of any individual
5 whose personal information is collected.

6 (5) It is lawful for an officer, employee, or agent to operate an
7 extraordinary sensing device if the operation is part of the response
8 to an emergency or disaster for which the governor has proclaimed a
9 state of emergency under RCW 43.06.010(12).

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

14 NEW SECTION. **Sec. 10.** The department of enterprise services shall
15 convene a work group comprised of four legislators and a representative
16 of the governor. The work group will submit a report to the
17 legislature by December 1, 2014, proposing standards for the use of
18 extraordinary sensing devices for regulatory enforcement purposes. No
19 state agency or state organization having jurisdiction over regulatory
20 violations shall operate extraordinary sensing devices for regulatory
21 enforcement purposes until the legislature has approved of standards
22 for this purpose.

23 NEW SECTION. **Sec. 11.** Operation of an extraordinary sensing
24 device by an agency is prohibited unless the agency has affixed a
25 unique identifier registration number assigned by the agency.

26 NEW SECTION. **Sec. 12.** 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. 13.** (1) Personal information collected during
2 the 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 the conclusion of the operation, unless there is
5 probable cause that the personal information is evidence of criminal
6 activity. Nothing in this act is intended to expand or contract the
7 obligations of an agency to disclose public records as provided in
8 chapter 42.56 RCW. The personal information of the person who is the
9 target of a warrant must be destroyed within thirty days after the
10 applicable period of limitations for the criminal activity, as provided
11 in RCW 9A.04.080, if the person has not been charged.

12 (2) The personal information of a person who is not the target of
13 a warrant that is collected incidentally during the operation of an
14 extraordinary sensing device must be destroyed within ten days after it
15 is collected if it can be destroyed without destroying evidence that
16 may be relevant to a pending criminal investigation or case.

17 (3) There is a presumption that personal information is not
18 evidence of criminal activity if that personal information is not used
19 in a criminal prosecution within one year of collection.

20 NEW SECTION. **Sec. 14.** Any person who knowingly violates this
21 subchapter is subject to legal action for damages, to be brought by any
22 other person claiming that a violation of this subchapter has injured
23 his or her business, his or her person, or his or her reputation. A
24 person so injured is entitled to actual damages. In addition, the
25 individual is entitled to reasonable attorneys' fees and other costs of
26 litigation.

27 NEW SECTION. **Sec. 15.** Any use of an extraordinary sensing device
28 must fully comply with all federal aviation administration requirements
29 and guidelines. Compliance with the terms of this subchapter is
30 mandatory and supplemental to compliance with federal aviation
31 administration requirements and guidelines. Nothing in this chapter
32 shall be construed to limit the state's ability to establish and
33 operate a test range for the integration of unmanned aviation vehicles
34 into the national airspace.

1 NEW SECTION. **Sec. 16.** (1) For a state agency having jurisdiction
2 over criminal law enforcement including, but not limited to, the
3 Washington state patrol, the agency must maintain records of each use
4 of an extraordinary sensing device and, for any calendar year in which
5 an agency has used an extraordinary sensing device, prepare an annual
6 report including, at a minimum, the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 (b) The number of investigations aided by the use and how the use
10 was helpful to the investigation;

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

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

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

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

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

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

21 (4) The annual reports required pursuant to subsections (1) and (2)
22 of this section must be filed electronically to the office of financial
23 management, who must compile the results and submit them electronically
24 to the relevant committees of the legislature by September 1st of each
25 year, beginning in 2015.

26 NEW SECTION. **Sec. 17.** Sections 2 through 16 of this act are each
27 added to chapter 9.73 RCW and codified with the subchapter heading of
28 "extraordinary sensing devices."

29 NEW SECTION. **Sec. 18.** If any provision of this act or its
30 application to any person or circumstance is held invalid, the
31 remainder of the act or the application of the provision to other
32 persons or circumstances is not affected.

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