

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1072

55th Legislature
1998 Regular Session

Passed by the House March 9, 1998
Yea 96 Nays 0

**Speaker of the
House of Representatives**

Passed by the Senate March 5, 1998
Yea 48 Nays 0

President of the Senate

Approved

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1072** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Governor of the State of Washington

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1072

AS AMENDED BY THE SENATE

Passed Legislature - 1998 Regular Session

State of Washington 55th Legislature 1997 Regular Session

**By House Committee on Law & Justice (originally sponsored by
Representatives Sterk, Sheahan, Hickel and Delvin)**

Read first time 1/31/97.

1 AN ACT Relating to interception, transmission, recording, or
2 disclosure of communications; amending RCW 9.73.095 and 9.73.120;
3 adding a new section to chapter 9.73 RCW; creating a new section; and
4 prescribing penalties.

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

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

8 (1) As used in this section:

9 (a) "Wire communication" means any aural transfer made in whole or
10 in part through the use of facilities for the transmission of
11 communications by the aid of wire, cable, or other like connection
12 between the point of origin and the point of reception, including the
13 use of such connection in a switching station, furnished or operated by
14 any person engaged in providing or operating such facilities for the
15 transmission of intrastate, interstate, or foreign communications, and
16 such term includes any electronic storage of such communication.

17 (b) "Electronic communication" means any transfer of signs,
18 signals, writing, images, sounds, data, or intelligence of any nature

1 transmitted in whole or in part by a wire, radio, electromagnetic,
2 photoelectronic, or photo-optical system, but does not include:

3 (i) Any wire or oral communication;

4 (ii) Any communication made through a tone-only paging device; or
5 (iii) Any communication from a tracking device.

6 (c) "Electronic communication service" means any service that
7 provides to users thereof the ability to send or receive wire or
8 electronic communications.

9 (d) "Pen register" means a device that records or decodes
10 electronic or other impulses that identify the numbers dialed or
11 otherwise transmitted on the telephone line to which such device is
12 attached, but such term does not include any device used by a provider
13 or customer of a wire or electronic communication service for billing,
14 or recording as an incident to billing, for communications services
15 provided by such provider or any device used by a provider or customer
16 of a wire communication service for cost accounting or other like
17 purposes in the ordinary course of its business.

18 (e) "Trap and trace device" means a device that captures the
19 incoming electronic or other impulses that identify the originating
20 number of an instrument or device from which a wire or electronic
21 communication was transmitted.

22 (2) No person may install or use a pen register or trap and trace
23 device without a prior court order issued under this section except as
24 provided under subsection (6) of this section or RCW 9.73.070.

25 (3) A law enforcement officer may apply for and the superior court
26 may issue orders and extensions of orders authorizing the installation
27 and use of pen registers and trap and trace devices as provided in this
28 section. The application shall be under oath and shall include the
29 identity of the officer making the application and the identity of the
30 law enforcement agency conducting the investigation. The applicant
31 must certify that the information likely to be obtained is relevant to
32 an ongoing criminal investigation being conducted by that agency.

33 (4) If the court finds that the information likely to be obtained
34 by such installation and use is relevant to an ongoing criminal
35 investigation and finds that there is probable cause to believe that
36 the pen register or trap and trace device will lead to obtaining
37 evidence of a crime, contraband, fruits of crime, things criminally
38 possessed, weapons, or other things by means of which a crime has been
39 committed or reasonably appears about to be committed, or will lead to

1 learning the location of a person who is unlawfully restrained or
2 reasonably believed to be a witness in a criminal investigation or for
3 whose arrest there is probable cause, the court shall enter an ex parte
4 order authorizing the installation and use of a pen register or a trap
5 and trace device. The order shall specify:

6 (a) The identity, if known, of the person to whom is leased or in
7 whose name is listed the telephone line to which the pen register or
8 trap and trace device is to be attached;

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

11 (c) The number and, if known, physical location of the telephone
12 line to which the pen register or trap and trace device is to be
13 attached and, in the case of a trap and trace device, the geographic
14 limits of the trap and trace order; and

15 (d) A statement of the offense to which the information likely to
16 be obtained by the pen register or trap and trace device relates.

17 The order shall direct, if the applicant has requested, the
18 furnishing of information, facilities, and technical assistance
19 necessary to accomplish the installation of the pen register or trap
20 and trace device. An order issued under this section shall authorize
21 the installation and use of a pen register or a trap and trace device
22 for a period not to exceed sixty days. An extension of the original
23 order may only be granted upon: A new application for an order under
24 subsection (3) of this section; and a showing that there is a
25 probability that the information or items sought under this subsection
26 are more likely to be obtained under the extension than under the
27 original order. No extension beyond the first extension shall be
28 granted unless: There is a showing that there is a high probability
29 that the information or items sought under this subsection are much
30 more likely to be obtained under the second or subsequent extension
31 than under the original order; and there are extraordinary
32 circumstances such as a direct and immediate danger of death or serious
33 bodily injury to a law enforcement officer. The period of extension
34 shall be for a period not to exceed sixty days.

35 An order authorizing or approving the installation and use of a pen
36 register or a trap and trace device shall direct that the order be
37 sealed until otherwise ordered by the court and that the person owning
38 or leasing the line to which the pen register or trap and trace device
39 is attached, or who has been ordered by the court to provide assistance

1 to the applicant, not disclose the existence of the pen register or
2 trap and trace device or the existence of the investigation to the
3 listed subscriber or to any other person, unless or until otherwise
4 ordered by the court.

5 (5) Upon the presentation of an order, entered under subsection (4)
6 of this section, by an officer of a law enforcement agency authorized
7 to install and use a pen register under this chapter, a provider of
8 wire or electronic communication service, landlord, custodian, or other
9 person shall furnish such law enforcement officer forthwith all
10 information, facilities, and technical assistance necessary to
11 accomplish the installation of the pen register unobtrusively and with
12 a minimum of interference with the services that the person so ordered
13 by the court accords the party with respect to whom the installation
14 and use is to take place, if such assistance is directed by a court
15 order as provided in subsection (4) of this section.

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

32 A provider of a wire or electronic communication service, landlord,
33 custodian, or other person who furnishes facilities or technical
34 assistance pursuant to this subsection shall be reasonably compensated
35 by the law enforcement agency that requests the facilities or
36 assistance for such reasonable expenses incurred in providing such
37 facilities and assistance.

38 No cause of action shall lie in any court against any provider of
39 a wire or electronic communication service, its officers, employees,

1 agents, or other specified persons for providing information,
2 facilities, or assistance in accordance with the terms of a court order
3 under this section. A good faith reliance on a court order under this
4 section, a request pursuant to this section, a legislative
5 authorization, or a statutory authorization is a complete defense
6 against any civil or criminal action brought under this chapter or any
7 other law.

8 (6)(a) Notwithstanding any other provision of this chapter, a law
9 enforcement officer and a prosecuting attorney or deputy prosecuting
10 attorney who jointly and reasonably determine that there is probable
11 cause to believe that an emergency situation exists that involves
12 immediate danger of death or serious bodily injury to any person that
13 requires the installation and use of a pen register or a trap and trace
14 device before an order authorizing such installation and use can, with
15 due diligence, be obtained, and there are grounds upon which an order
16 could be entered under this chapter to authorize such installation and
17 use, may have installed and use a pen register or trap and trace device
18 if, within forty-eight hours after the installation has occurred, or
19 begins to occur, an order approving the installation or use is issued
20 in accordance with subsection (4) of this section. In the absence of
21 an authorizing order, such use shall immediately terminate when the
22 information sought is obtained, when the application for the order is
23 denied or when forty-eight hours have lapsed since the installation of
24 the pen register or trap and trace device, whichever is earlier. If an
25 order approving the installation or use is not obtained within forty-
26 eight hours, any information obtained is not admissible as evidence in
27 any legal proceeding. The knowing installation or use by any law
28 enforcement officer of a pen register or trap and trace device pursuant
29 to this subsection without application for the authorizing order within
30 forty-eight hours of the installation shall constitute a violation of
31 this chapter and be punishable as a gross misdemeanor. A provider of
32 a wire or electronic service, landlord, custodian, or other person who
33 furnished facilities or technical assistance pursuant to this
34 subsection shall be reasonably compensated by the law enforcement
35 agency that requests the facilities or assistance for such reasonable
36 expenses incurred in providing such facilities and assistance.

37 (b) A law enforcement agency that authorizes the installation of a
38 pen register or trap and trace device under this subsection (6) shall
39 file a monthly report with the administrator for the courts. The

1 report shall indicate the number of authorizations made, the date and
2 time of each authorization, whether a court authorization was sought
3 within forty-eight hours, and whether a subsequent court authorization
4 was granted.

5 **Sec. 2.** RCW 9.73.095 and 1996 c 197 s 1 are each amended to read
6 as follows:

7 (1) RCW 9.73.030 through 9.73.080 and section 1 of this act shall
8 not apply to employees of the department of corrections in the
9 following instances: Intercepting, recording, or divulging any
10 telephone calls from an inmate or resident of a state correctional
11 facility; or intercepting, recording, or divulging any monitored
12 nontelephonic conversations in inmate living units, cells, rooms,
13 dormitories, and common spaces where inmates may be present. For the
14 purposes of this section, "state correctional facility" means a
15 facility that is under the control and authority of the department of
16 corrections, and used for the incarceration, treatment, or
17 rehabilitation of convicted felons.

18 (2) All personal calls made by inmates shall be collect calls only.
19 The calls will be "operator announcement" type calls. The operator
20 shall notify the receiver of the call that the call is coming from a
21 prison inmate, and that it will be recorded and may be monitored.

22 (3) The department of corrections shall adhere to the following
23 procedures and restrictions when intercepting, recording, or divulging
24 any telephone calls from an inmate or resident of a state correctional
25 facility as provided for by this section. The department shall also
26 adhere to the following procedures and restrictions when intercepting,
27 recording, or divulging any monitored nontelephonic conversations in
28 inmate living units, cells, rooms, dormitories, and common spaces where
29 inmates may be present:

30 (a) Unless otherwise provided for in this section, after
31 intercepting or recording any conversation, only the superintendent and
32 his or her designee shall have access to that recording.

33 (b) The contents of any intercepted and recorded conversation shall
34 be divulged only as is necessary to safeguard the orderly operation of
35 the correctional facility, in response to a court order, or in the
36 prosecution or investigation of any crime.

37 (c) All conversations that are recorded under this section, unless
38 being used in the ongoing investigation or prosecution of a crime, or

1 as is necessary to assure the orderly operation of the correctional
2 facility, shall be destroyed one year after the intercepting and
3 recording.

4 (4) So as to safeguard the sanctity of the attorney-client
5 privilege, the department of corrections shall not intercept, record,
6 or divulge any conversation between an inmate or resident and an
7 attorney. The department shall develop policies and procedures to
8 implement this section. The department's policies and procedures
9 implemented under this section shall also recognize the privileged
10 nature of confessions made by an offender to a member of the clergy or
11 a priest in his or her professional character, in the course of
12 discipline enjoined by the church to which he or she belongs as
13 provided in RCW 5.60.060(3).

14 (5) The department shall notify in writing all inmates, residents,
15 and personnel of state correctional facilities that their nontelephonic
16 conversations may be intercepted, recorded, or divulged in accordance
17 with the provisions of this section.

18 (6) The department shall notify all visitors to state correctional
19 facilities who may enter inmate living units, cells, rooms,
20 dormitories, or common spaces where inmates may be present, that their
21 conversations may be intercepted, recorded, or divulged in accordance with
22 the provisions of this section. The notice required under this
23 subsection shall be accomplished through a means no less conspicuous
24 than a general posting in a location likely to be seen by visitors
25 entering the facility.

26 **Sec. 3.** RCW 9.73.120 and 1989 c 271 s 207 are each amended to read
27 as follows:

28 (1) Within thirty days after the expiration of an authorization or
29 an extension or renewal thereof issued pursuant to RCW 9.73.090(2) as
30 now or hereafter amended, the issuing or denying judge shall make a
31 report to the administrator for the courts stating that:

32 (a) An authorization, extension or renewal was applied for;

33 (b) The kind of authorization applied for;

34 (c) The authorization was granted as applied for, was modified, or
35 was denied;

36 (d) The period of recording authorized by the authorization and the
37 number and duration of any extensions or renewals of the authorization;

1 (e) The offense specified in the authorization or extension or
2 renewal of authorization;

3 (f) The identity of the person authorizing the application and of
4 the investigative or law enforcement officer and agency for whom it was
5 made;

6 (g) Whether an arrest resulted from the communication which was the
7 subject of the authorization; and

8 (h) The character of the facilities from which or the place where
9 the communications were to be recorded.

10 (2) In addition to reports required to be made by applicants
11 pursuant to federal law, all judges of the superior court authorized to
12 issue authority pursuant to this chapter shall make annual reports on
13 the operation of this chapter to the administrator for the courts. The
14 reports made under this subsection must include information on
15 authorizations for the installation and use of pen registers and trap
16 and trace devices under section 1 of this act. The reports by the
17 judges shall contain (a) the number of applications made; (b) the
18 number of authorizations issued; (c) the respective periods of such
19 authorizations; (d) the number and duration of any renewals thereof;
20 (e) the crimes in connection with which the communications or
21 conversations were sought; (f) the names of the applicants; and (g)
22 such other and further particulars as the administrator for the courts
23 may require, except that the administrator for the courts shall not
24 require the reporting of information that might lead to the disclosure
25 of the identity of a confidential informant.

26 The chief justice of the supreme court shall annually report to the
27 governor and the legislature on such aspects of the operation of this
28 chapter as ((he deems)) appropriate including any recommendations ((he
29 may care to make)) as to legislative changes or improvements to
30 effectuate the purposes of this chapter and to assure and protect
31 individual rights.

32 NEW SECTION. **Sec. 4.** If this act mandates an increased level of
33 service by local governments, the local government may, under RCW
34 43.135.060 and chapter 4.92 RCW, submit claims for reimbursement by the
35 legislature. The claims shall be subject to verification by the office
36 of financial management.

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