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**HOUSE BILL 1108**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Representative Klippert

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

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

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

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

The attorney general or any deputy or assistant attorney general specifically designated by the attorney general, or a prosecuting attorney or any deputy or assistant prosecuting attorney specifically designated by a prosecuting attorney, may authorize an application to a superior court for, and the court may grant, in conformity with section 3 of this act, an order authorizing the interception, by a law enforcement agency having responsibility for the investigation of the offense as to which the application is made, of wire, oral, or electronic communications if the interception may provide evidence of an act of trafficking in controlled substances.

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

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

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

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

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

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

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any court for authorization to intercept wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the court on each application; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) No order entered under this section may authorize the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. The thirty‑day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing court deems necessary to achieve the purposes for which it is granted and in no event for longer than thirty days. Every order and extension shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this section, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception. An interception under this section may be conducted in whole or in part by employees of the state or a political subdivision of the state, or by an individual operating under a contract with the state or a political subdivision of the state, when acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

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

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

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

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

(d) Within a reasonable time but not later than ninety days after the termination of the period of an order or extensions thereof, the issuing court shall cause to be served, on the persons named in the order, and other parties to intercepted communications as the court may determine is in the interest of justice, an inventory which shall include notice of (i) the fact of the entry of the order, (ii) the date of the entry and the period of authorized interception, and (iii) whether during that period wire, oral, or electronic communications were or were not intercepted.

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

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

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

The motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, oral, or electronic communication, or evidence derived from such contents, shall be treated as having been obtained in violation of this section. The court or person presiding, upon the filing of a motion by the aggrieved person, may make available to the aggrieved person or his or her counsel for inspection the portions of the intercepted communication or derivative evidence as the court or person presiding determines to be in the interest of justice.

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

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

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

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

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

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

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

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

(ii) The application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

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

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

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

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

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

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

(3) Any person who, by any means authorized by this section or section 3 of this act, has received any information concerning the contents of a wire, oral, or electronic communication, or evidence derived from the contents, intercepted in accordance with this section or section 3 of this act, may disclose the contents or derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of this state or any political subdivision of this state.

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

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

(6) Any federal investigative or law enforcement officer who obtains information regarding an act of trafficking in controlled substances from the contents of a wire, oral, or electronic communication, or obtains any evidence derived from the information, may disclose the information or derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of this state or any political subdivision of this state, if the information or derivative evidence was obtained in compliance with federal law, and in a case in which no party to a communication has consented to an interception, if the information or derivative evidence was obtained through an interception that was also done with prior judicial authorization whether or not the prior authorization was required by federal law.

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

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

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

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

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

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

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

(a) Any wire or oral communication;

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

(c) Any communication from a tracking device;

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

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

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

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

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

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

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

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

(12) "Wire communication" means any transfer of the human voice made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, including the use of a connection in a switching station, furnished or operated by any person engaged in providing or operating facilities for the transmission of intrastate, interstate, or foreign communications.

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

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

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

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

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

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