

HOUSE BILL REPORT

ESHB 2406

As Amended by the Senate

Title: An act relating to interception, transmission, recording, or disclosure of communications.

Brief Description: Regulating interception of communications.

Sponsors: By House Committee on Law & Justice (originally sponsored by Representatives Sterk, Chappell, Delvin, Hickel, Smith and Hymes).

Brief History:

Committee Activity:

Law & Justice: 1/19/96, 1/24/96 [DPS].

Floor Activity:

Passed House: 2/9/96, 90-7.

Senate Amended.

HOUSE COMMITTEE ON LAW & JUSTICE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Sheahan, Chairman; Delvin, Vice Chairman; Hickel, Vice Chairman; Dellwo, Ranking Minority Member; Costa, Assistant Ranking Minority Member; Campbell; Carrell; Chappell; Cody; Lambert; McMahan; Morris; Murray; Robertson; Smith; Sterk and Veloria.

Staff: Edie Adams (786-7180).

Background: The Privacy Act restricts the interception or recording of private communications or conversations. As a general rule, it is unlawful for any person to intercept or record any private communication or conversation without first obtaining the consent of all persons participating. There are some exceptions to this general rule. Wire communications or conversations of an emergency nature, that convey threats of extortion, blackmail, or bodily harm, or that occur anonymously, repeatedly, or at an extremely inconvenient hour may be recorded or intercepted with the consent of only one party.

A court may order the interception of a communication without the consent of any of the parties to the communication if the national security or a human life is

endangered, or if an arson or riot is about to occur, and there are no other means readily available for obtaining the information.

Under some circumstances, law enforcement personnel may intercept, transmit, or record a private communication or conversation with the consent of only one party if there is probable cause to believe the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession of controlled substances. Evidence obtained in this manner is admissible only in prosecuting some drug offenses and in a few other limited circumstances.

A "pen register" is a device attached to a telephone line that records or decodes electronic impulses that identify the numbers dialed or transmitted from that line. A "trap and trace device" is a device that captures incoming electronic or other impulses that identify the originating number from which a wire or electronic communication was sent.

The Washington Supreme Court, in State v. Gunwall, 106 Wn.2d 54 (1986), ruled that use of pen registers without valid legal process violates the state constitution's right of privacy. The court concluded that pen registers are private communications under the Privacy Act, and therefore may not be used except as specifically authorized by that statute. The Privacy Act allows a court to order interceptions without the consent of any party only in cases involving danger to national security or a human life, or imminent arson or riot.

Summary of Bill: The Privacy Act is amended to provide that no person may install or use a pen register or trap and trace device without prior court authorization except as authorized under the act. A common carrier may install and use a pen register or a trap and trace device without court authorization, when the use is to test equipment, to prevent unlawful use of services, or undertaken with the consent of the user of the service.

A law enforcement officer may apply to the Superior Court for an order authorizing the installation and use of pen registers and trap and trace devices. The court shall authorize the installation and use of a pen register or trap and trace device if the court finds that the information likely to be gained is relevant to an ongoing criminal investigation and will lead to evidence of a crime, or things by means of which a crime has been committed, or reasonably appears about to be committed.

The court order shall specify the identity of the person in whose name the line to which the pen register or trap and trace device is to be attached is registered, the identity of the subject of the criminal investigation, the number and physical location of the line to which the device is to be attached, and a statement of the offense to which the information likely to be obtained relates.

The authorizing order is valid for a period not to exceed 60 days, with a possible 60-day extension based upon a new application and a court finding of appropriate grounds. The existence of the pen register or trap and trace device shall not be disclosed by any person except by court order.

If requested by the law enforcement officer and directed by the court, providers of wire or electronic communication services and other appropriate persons shall provide a law enforcement officer authorized to install a pen register or trap and trace device with all information, facilities, and technical assistance necessary to complete the installation. Persons providing assistance shall be reasonably compensated for their services and shall not be liable for any information, facilities, or assistance provided in good faith reliance on a court order authorizing installation.

A pen register or trap and trace device may be installed without court authorization if a law enforcement officer and a prosecuting attorney or deputy prosecuting attorney jointly and reasonably determine that (1) an emergency situation exists involving immediate danger of death or serious bodily injury to any person; (2) the pen register or trap and trace device needs to be installed before an authorizing court order could be obtained; and (3) grounds exist upon which an authorizing court order could be entered. The officer or prosecuting attorney must seek an order approving the use of the pen register or trap and trace device within 48 hours after its installation. The use must immediately terminate once the information sought is obtained, or when the application for the order is denied, or 48 hours have elapsed since installation, whichever is earlier. An officer who knowingly installs a pen register without authorization and does not seek authorization within 48 hours is guilty of a class C felony.

EFFECT OF SENATE AMENDMENT(S): The exemption from the Privacy Act for common carriers who install and use pen registers and trap and trace devices to test equipment, to prevent unlawful use of services, or with the consent of the customer is deleted.

The penalty is decreased from a class C felony to a gross misdemeanor for a law enforcement officer who installs and uses a pen register or trap and trace device without court authorization and without seeking court authorization within 48 hours.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This bill does not authorize the interception or recording of conversations, just the telephone numbers dialed and the telephone numbers dialing

in. Pen registers and trap and trace devices are very useful in the investigation of drug cases to show conspiracy and connection between drug dealers. The bill provides substantial procedures to prevent abuse.

Testimony Against: None.

Testified: Representative Sterk, prime sponsor; Pat Sainsbury, Washington Association of Prosecuting Attorneys (pro); and Bruce Shaull, Sprint and United Telephone (pro).