
ENGROSSED SUBSTITUTE HOUSE BILL 2406

State of Washington

54th Legislature

1996 Regular Session

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

Read first time 01/26/96.

1 AN ACT Relating to interception, transmission, recording, or
2 disclosure of communications; amending RCW 9.73.070; adding a new
3 section to chapter 9.73 RCW; and prescribing penalties.

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

5 **Sec. 1.** RCW 9.73.070 and 1994 c 49 s 1 are each amended to read as
6 follows:

7 (1) The provisions of this chapter shall not apply to any activity
8 in connection with services provided by a common carrier pursuant to
9 its tariffs on file with the Washington utilities and transportation
10 commission or the Federal Communication Commission and any activity of
11 any officer, agent or employee of a common carrier who performs any act
12 otherwise prohibited by this law in the construction, maintenance,
13 repair and operations of the common carrier's communications services,
14 facilities, or equipment or incident to the use of such services,
15 facilities or equipment, and shall not apply to the use of a pen
16 register or a trap and trace device by such common carrier:

17 (a) Relating to the operation, maintenance, and testing of a wire
18 or electronic communication service or to the protection of the rights
19 or property of such common carrier, or to the protection of users of

1 the common carrier's service from abuse of service or unlawful use of
2 service;

3 (b) To record the fact that a wire or electronic communication was
4 initiated or completed in order to protect such common carrier, another
5 common carrier furnishing service toward the completion of the wire
6 communication, or a user of that service, from fraudulent, unlawful, or
7 abusive use of service; or

8 (c) Where the consent of the user of that service has been
9 obtained.

10 (2) "Common carrier" as used in this section means any person
11 engaged as a common carrier or public service company for hire in
12 intrastate, interstate or foreign communication by wire or radio or in
13 intrastate, interstate or foreign radio transmission of energy.

14 ((+2)) (3) The provisions of this chapter shall not apply to:

15 (a) Any common carrier automatic number, caller, or location
16 identification service that has been approved by the Washington
17 utilities and transportation commission; or

18 (b) A 911 or enhanced 911 emergency service as defined in RCW
19 82.14B.020, for purposes of aiding public health or public safety
20 agencies to respond to calls placed for emergency assistance.

21 NEW SECTION. Sec. 2. A new section is added to chapter 9.73 RCW
22 to read as follows:

23 (1) As used in this section:

24 (a) "Wire communication" means any aural transfer made in whole or
25 in part through the use of facilities for the transmission of
26 communications by the aid of wire, cable, or other like connection
27 between the point of origin and the point of reception, including the
28 use of such connection in a switching station, furnished or operated by
29 any person engaged in providing or operating such facilities for the
30 transmission of intrastate, interstate, or foreign communications, and
31 such term includes any electronic storage of such communication.

32 (b) "Electronic communication" means any transfer of signs,
33 signals, writing, images, sounds, data, or intelligence of any nature
34 transmitted in whole or in part by a wire, radio, electromagnetic,
35 photoelectronic, or photo-optical system, but does not include:

36 (i) Any wire or oral communication;

37 (ii) Any communication made through a tone-only paging device; or

38 (iii) Any communication from a tracking device.

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

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

13 (e) "Trap and trace device" means a device that captures the
14 incoming electronic or other impulses that identify the originating
15 number of an instrument or device from which a wire or electronic
16 communication was transmitted.

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

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

28 (4) If the court finds that the information likely to be obtained
29 by such installation and use is relevant to an ongoing criminal
30 investigation and finds reason to believe that the pen register or trap
31 and trace device will lead to obtaining evidence of a crime,
32 contraband, fruits of crime, things criminally possessed, weapons, or
33 other things by means of which a crime has been committed or reasonably
34 appears about to be committed, or will lead to learning the location of
35 a person who is unlawfully restrained or reasonably believed to be a
36 witness in a criminal investigation or for whose arrest there is
37 probable cause, the court shall enter an ex parte order authorizing the
38 installation and use of a pen register or a trap and trace device. The
39 order shall specify:

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

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

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

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

12 The order shall direct, if the applicant has requested, the
13 furnishing of information, facilities, and technical assistance
14 necessary to accomplish the installation of the pen register or trap
15 and trace device. An order issued under this section shall authorize
16 the installation and use of a pen register or a trap and trace device
17 for a period not to exceed sixty days. Extensions of such an order may
18 be granted, but only upon a new application for an order under
19 subsection (3) of this section and upon the judicial findings required
20 by this subsection. The period of extension shall be for a period not
21 to exceed sixty days.

22 An order authorizing or approving the installation and use of a pen
23 register or a trap and trace device shall direct that the order be
24 sealed until otherwise ordered by the court and that the person owning
25 or leasing the line to which the pen register or trap and trace device
26 is attached, or who has been ordered by the court to provide assistance
27 to the applicant, not disclose the existence of the pen register or
28 trap and trace device or the existence of the investigation to the
29 listed subscriber or to any other person, unless or until otherwise
30 ordered by the court.

31 (5) Upon the request of an officer of a law enforcement agency
32 authorized to install and use a pen register under this chapter, a
33 provider of wire or electronic communication service, landlord,
34 custodian, or other person shall furnish such law enforcement officer
35 forthwith all information, facilities, and technical assistance
36 necessary to accomplish the installation of the pen register
37 unobtrusively and with a minimum of interference with the services that
38 the person so ordered by the court accords the party with respect to
39 whom the installation and use is to take place, if such assistance is

1 directed by a court order as provided in subsection (4) of this
2 section.

3 Upon the request of an officer of a law enforcement agency
4 authorized to receive the results of a trap and trace device under this
5 chapter, a provider of a wire or electronic communication service,
6 landlord, custodian, or other person shall install such device
7 forthwith on the appropriate line and shall furnish such law
8 enforcement officer all additional information, facilities, and
9 technical assistance including installation and operation of the device
10 unobtrusively and with a minimum of interference with the services that
11 the person so ordered by the court accords the party with respect to
12 whom the installation and use is to take place, if such installation
13 and assistance is directed by a court order as provided in subsection
14 (4) of this section. Unless otherwise ordered by the court, the
15 results of the trap and trace device shall be furnished to the officer
16 of a law enforcement agency, designated in the court order, at
17 reasonable intervals during regular business hours for the duration of
18 the order.

19 A provider of a wire or electronic communication service, landlord,
20 custodian, or other person who furnishes facilities or technical
21 assistance pursuant to this subsection shall be reasonably compensated
22 by the law enforcement agency that requests the facilities or
23 assistance for such reasonable expenses incurred in providing such
24 facilities and assistance.

25 No cause of action shall lie in any court against any provider of
26 a wire or electronic communication service, its officers, employees,
27 agents, or other specified persons for providing information,
28 facilities, or assistance in accordance with the terms of a court order
29 under this section. A good faith reliance on a court order under this
30 section, a request pursuant to this section, a legislative
31 authorization, or a statutory authorization is a complete defense
32 against any civil or criminal action brought under this chapter or any
33 other law.

34 (6) Notwithstanding any other provision of this chapter, a law
35 enforcement officer and a prosecuting attorney or deputy prosecuting
36 attorney who jointly and reasonably determine that an emergency
37 situation exists that involves immediate danger of death or serious
38 bodily injury to any person that requires the installation and use of
39 a pen register or a trap and trace device before an order authorizing

1 such installation and use can, with due diligence, be obtained, and
2 there are grounds upon which an order could be entered under this
3 chapter to authorize such installation and use, may have installed and
4 use a pen register or trap and trace device if, within forty-eight
5 hours after the installation has occurred, or begins to occur, an order
6 approving the installation or use is issued in accordance with
7 subsection (4) of this section. In the absence of an authorizing
8 order, such use shall immediately terminate when the information sought
9 is obtained, when the application for the order is denied or when
10 forty-eight hours have lapsed since the installation of the pen
11 register or trap and trace device, whichever is earlier. If an order
12 approving the installation or use is not obtained within forty-eight
13 hours, any information obtained is not admissible as evidence in any
14 legal proceeding. The knowing installation or use by any law
15 enforcement officer of a pen register or trap and trace device pursuant
16 to this subsection without application for the authorizing order within
17 forty-eight hours of the installation shall constitute a violation of
18 this chapter and be punishable as a class C felony. A provider of a
19 wire or electronic service, landlord, custodian, or other person who
20 furnished facilities or technical assistance pursuant to this
21 subsection shall be reasonably compensated by the law enforcement
22 agency that requests the facilities or assistance for such reasonable
23 expenses incurred in providing such facilities and assistance.

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