

SSB 5545 - H COMM AMD

By Committee on Public Safety & Emergency Preparedness

NOT CONSIDERED 04/22/2011

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds increasing incidents
4 of commercial sexual exploitation of children in our state, and further
5 protection of victims require giving law enforcement agencies the tool
6 to have a unified victim-centered police investigation approach to
7 further protect victims by ensuring their safety by prosecuting
8 traffickers. The one-party consent provision permitted for drug
9 trafficking investigation passed in the comprehensive bill to
10 facilitate police investigation and prosecution of drug trafficking
11 crimes is a helpful tool to this end. The legislature also finds that
12 exceptions should be allowed for minors employed for investigation when
13 the minor is a victim and involves only electronic communication with
14 the defendant.

15 **Sec. 2.** RCW 9.73.230 and 2005 c 282 s 17 are each amended to read
16 as follows:

17 (1) As part of a bona fide criminal investigation, the chief law
18 enforcement officer of a law enforcement agency or his or her designee
19 above the rank of first line supervisor may authorize the interception,
20 transmission, or recording of a conversation or communication by
21 officers under the following circumstances:

22 (a) At least one party to the conversation or communication has
23 consented to the interception, transmission, or recording;

24 (b) Probable cause exists to believe that the conversation or
25 communication involves:

26 (i) The unlawful manufacture, delivery, sale, or possession with
27 intent to manufacture, deliver, or sell, controlled substances as
28 defined in chapter 69.50 RCW, or legend drugs as defined in chapter

1 69.41 RCW, or imitation controlled substances as defined in chapter
2 69.52 RCW; or

3 (ii) A party engaging in the commercial sexual abuse of a minor
4 under RCW 9.68A.100, or promoting commercial sexual abuse of a minor
5 under RCW 9.68A.101, or promoting travel for commercial sexual abuse of
6 a minor under RCW 9.68A.102; and

7 (c) A written report has been completed as required by subsection
8 (2) of this section.

9 (2) The agency's chief officer or designee authorizing an
10 interception, transmission, or recording under subsection (1) of this
11 section, shall prepare and sign a written report at the time of
12 authorization indicating:

13 (a) The circumstances that meet the requirements of subsection (1)
14 of this section;

15 (b) The names of the authorizing and consenting parties, except
16 that in those cases where the consenting party is a confidential
17 informant, the name of the confidential informant need not be divulged;

18 (c) The names of the officers authorized to intercept, transmit,
19 and record the conversation or communication;

20 (d) The identity of the particular person or persons, if known, who
21 may have committed or may commit the offense;

22 (e) The details of the particular offense or offenses that may have
23 been or may be committed and the expected date, location, and
24 approximate time of the conversation or communication; and

25 (f) Whether there was an attempt to obtain authorization pursuant
26 to RCW 9.73.090(2) and, if there was such an attempt, the outcome of
27 the attempt.

28 (3) An authorization under this section is valid in all
29 jurisdictions within Washington state and for the interception of
30 communications from additional persons if the persons are brought into
31 the conversation or transaction by the nonconsenting party or if the
32 nonconsenting party or such additional persons cause or invite the
33 consenting party to enter another jurisdiction.

34 (4) The recording of any conversation or communication under this
35 section shall be done in such a manner that protects the recording from
36 editing or other alterations.

37 (5) An authorization made under this section is valid for no more
38 than twenty-four hours from the time it is signed by the authorizing

1 officer, and each authorization shall independently meet all of the
2 requirements of this section. The authorizing officer shall sign the
3 written report required under subsection (2) of this section,
4 certifying the exact date and time of his or her signature. An
5 authorization under this section may be extended not more than twice
6 for an additional consecutive twenty-four hour period based upon the
7 same probable cause regarding the same suspected transaction. Each
8 such extension shall be signed by the authorizing officer.

9 (6) Within fifteen days after the signing of an authorization that
10 results in any interception, transmission, or recording of a
11 conversation or communication pursuant to this section, the law
12 enforcement agency which made the interception, transmission, or
13 recording shall submit a report including the original authorization
14 under subsection (2) of this section to a judge of a court having
15 jurisdiction which report shall identify (a) the persons, including the
16 consenting party, who participated in the conversation, and (b) the
17 date, location, and approximate time of the conversation.

18 In those cases where the consenting party is a confidential
19 informant, the name of the confidential informant need not be divulged.

20 A monthly report shall be filed by the law enforcement agency with
21 the administrator for the courts indicating the number of
22 authorizations granted, the date and time of each authorization,
23 interceptions made, arrests resulting from an interception, and
24 subsequent invalidations.

25 (7)(a) Within two judicial days of receipt of a report under
26 subsection (6) of this section, the court shall make an ex parte review
27 of the authorization, but not of the evidence, and shall make a
28 determination whether the requirements of subsection (1) of this
29 section were met. If the court determines that any of the requirements
30 of subsection (1) of this section were not met, the court shall order
31 that any recording and any copies or transcriptions of the conversation
32 or communication be destroyed. Destruction of recordings, copies, or
33 transcriptions shall be stayed pending any appeal of a finding that the
34 requirements of subsection (1) of this section were not met.

35 (b) Absent a continuation under (c) of this subsection, six months
36 following a determination under (a) of this subsection that probable
37 cause did not exist, the court shall cause a notice to be mailed to the
38 last known address of any nonconsenting party to the conversation or

1 communication that was the subject of the authorization. The notice
2 shall indicate the date, time, and place of any interception,
3 transmission, or recording made pursuant to the authorization. The
4 notice shall also identify the agency that sought the authorization and
5 shall indicate that a review under (a) of this subsection resulted in
6 a determination that the authorization was made in violation of this
7 section.

8 (c) An authorizing agency may obtain six-month extensions to the
9 notice requirement of (b) of this subsection in cases of active,
10 ongoing criminal investigations that might be jeopardized by sending
11 the notice.

12 (8) In any subsequent judicial proceeding, evidence obtained
13 through the interception or recording of a conversation or
14 communication pursuant to this section shall be admissible only if:

15 (a) The court finds that the requirements of subsection (1) of this
16 section were met and the evidence is used in prosecuting an offense
17 listed in subsection (1)(b) of this section; or

18 (b) The evidence is admitted with the permission of the person
19 whose communication or conversation was intercepted, transmitted, or
20 recorded; or

21 (c) The evidence is admitted in a prosecution for a "serious
22 violent offense" as defined in RCW 9.94A.030 in which a party who
23 consented to the interception, transmission, or recording was a victim
24 of the offense; or

25 (d) The evidence is admitted in a civil suit for personal injury or
26 wrongful death arising out of the same incident, in which a party who
27 consented to the interception, transmission, or recording was a victim
28 of a serious violent offense as defined in RCW 9.94A.030.

29 Nothing in this subsection bars the admission of testimony of a
30 party or eyewitness to the intercepted, transmitted, or recorded
31 conversation or communication when that testimony is unaided by
32 information obtained solely by violation of RCW 9.73.030.

33 (9) Any determination of invalidity of an authorization under this
34 section shall be reported by the court to the administrative office of
35 the courts.

36 (10) Any person who intentionally intercepts, transmits, or records
37 or who intentionally authorizes the interception, transmission, or

1 recording of a conversation or communication in violation of this
2 section, is guilty of a class C felony punishable according to chapter
3 9A.20 RCW.

4 (11) An authorizing agency is liable for twenty-five thousand
5 dollars in exemplary damages, in addition to any other damages
6 authorized by this chapter or by other law, to a person whose
7 conversation or communication was intercepted, transmitted, or recorded
8 pursuant to an authorization under this section if:

9 (a) In a review under subsection (7) of this section, or in a
10 suppression of evidence proceeding, it has been determined that the
11 authorization was made without the probable cause required by
12 subsection (1)(b) of this section; and

13 (b) The authorization was also made without a reasonable suspicion
14 that the conversation or communication would involve the unlawful acts
15 identified in subsection (1)(b) of this section.

16 **Sec. 3.** RCW 9.73.210 and 1989 c 271 s 202 are each amended to read
17 as follows:

18 (1) If a police commander or officer above the rank of first line
19 supervisor has reasonable suspicion that the safety of the consenting
20 party is in danger, law enforcement personnel may, for the sole purpose
21 of protecting the safety of the consenting party, intercept, transmit,
22 or record a private conversation or communication concerning:

23 (a) The unlawful manufacture, delivery, sale, or possession with
24 intent to manufacture, deliver, or sell, controlled substances as
25 defined in chapter 69.50 RCW, or legend drugs as defined in chapter
26 69.41 RCW, or imitation controlled substances as defined in chapter
27 69.52 RCW; or

28 (b) Person(s) engaging in the commercial sexual abuse of a minor
29 under RCW 9.68A.100, or promoting commercial sexual abuse of a minor
30 under RCW 9.68A.101, or promoting travel for commercial sexual abuse of
31 a minor under RCW 9.68A.102.

32 (2) Before any interception, transmission, or recording of a
33 private conversation or communication pursuant to this section, the
34 police commander or officer making the determination required by
35 subsection (1) of this section shall complete a written authorization

36 which shall include (a) the date and time the authorization is given;
37 (b) the persons, including the consenting party, expected to

1 participate in the conversation or communication, to the extent known;
2 (c) the expected date, location, and approximate time of the
3 conversation or communication; and (d) the reasons for believing the
4 consenting party's safety will be in danger.

5 (3) A monthly report shall be filed by the law enforcement agency
6 with the administrator for the courts indicating the number of
7 authorizations made under this section, the date and time of each
8 authorization, and whether an interception, transmission, or recording
9 was made with respect to each authorization.

10 (4) Any information obtained pursuant to this section is
11 inadmissible in any civil or criminal case in all courts of general or
12 limited jurisdiction in this state, except:

13 (a) With the permission of the person whose communication or
14 conversation was intercepted, transmitted, or recorded without his or
15 her knowledge;

16 (b) In a civil action for personal injury or wrongful death arising
17 out of the same incident, where the cause of action is based upon an
18 act of physical violence against the consenting party; or

19 (c) In a criminal prosecution, arising out of the same incident for
20 a serious violent offense as defined in RCW 9.94A.030 in which a party
21 who consented to the interception, transmission, or recording was a
22 victim of the offense.

23 (5) Nothing in this section bars the admission of testimony of a
24 participant in the communication or conversation unaided by information
25 obtained pursuant to this section.

26 (6) The authorizing agency shall immediately destroy any written,
27 transcribed, or recorded information obtained from an interception,
28 transmission, or recording authorized under this section unless the
29 agency determines there has been a personal injury or death or a
30 serious violent offense which may give rise to a civil action or
31 criminal prosecution in which the information may be admissible under
32 subsection (4)(b) or (c) of this section.

33 (7) Nothing in this section authorizes the interception, recording,
34 or transmission of a telephonic communication or conversation.

35 **Sec. 4.** RCW 9.68A.110 and 2010 c 289 s 17 and 2010 c 227 s 8 are
36 each reenacted and amended to read as follows:

37 (1) In a prosecution under RCW 9.68A.040, it is not a defense that

1 the defendant was involved in activities of law enforcement and
2 prosecution agencies in the investigation and prosecution of criminal
3 offenses. Law enforcement and prosecution agencies shall not employ
4 minors to aid in the investigation of a violation of RCW 9.68A.090 or
5 9.68A.100 through 9.68A.102, except for the purpose of facilitating an
6 investigation where the minor is also the alleged victim, the minor is
7 advised of the risk that the alleged perpetrator may learn of his or
8 her participation in the investigation, and the:

9 (a) Investigation is authorized pursuant to RCW 9.73.230(1)(b)(ii)
10 or 9.73.210(1)(b); or

11 (b) Minor's aid in the investigation involves only telephone or
12 electronic communication with the defendant.

13 (2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
14 9.68A.080, it is not a defense that the defendant did not know the age
15 of the child depicted in the visual or printed matter. It is a
16 defense, which the defendant must prove by a preponderance of the
17 evidence, that at the time of the offense the defendant was not in
18 possession of any facts on the basis of which he or she should
19 reasonably have known that the person depicted was a minor.

20 (3) In a prosecution under RCW 9.68A.040, 9.68A.090, 9.68A.100,
21 9.68A.101, or 9.68A.102, it is not a defense that the defendant did not
22 know the alleged victim's age. It is a defense, which the defendant
23 must prove by a preponderance of the evidence, that at the time of the
24 offense, the defendant made a reasonable bona fide attempt to ascertain
25 the true age of the minor by requiring production of a driver's
26 license, marriage license, birth certificate, or other governmental or
27 educational identification card or paper and did not rely solely on the
28 oral allegations or apparent age of the minor.

29 (4) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
30 9.68A.075, it shall be an affirmative defense that the defendant was a
31 law enforcement officer or a person specifically authorized, in
32 writing, to assist a law enforcement officer and acting at the
33 direction of a law enforcement officer in the process of conducting an
34 official investigation of a sex-related crime against a minor, or that
35 the defendant was providing individual case treatment as a recognized
36 medical facility or as a psychiatrist or psychologist licensed under
37 Title 18 RCW. Nothing in chapter 227, Laws of 2010 is intended to in
38 any way affect or diminish the immunity afforded an electronic

1 communication service provider, remote computing service provider, or
2 domain name registrar acting in the performance of its reporting or
3 preservation responsibilities under 18 U.S.C. Secs. 2258a, 2258b, or
4 2258c.

5 (5) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
6 9.68A.075, the state is not required to establish the identity of the
7 alleged victim.

8 (6) In a prosecution under RCW 9.68A.070 or 9.68A.075, it shall be
9 an affirmative defense that:

10 (a) The defendant was employed at or conducting research in
11 partnership or in cooperation with any institution of higher education
12 as defined in RCW 28B.07.020 or 28B.10.016, and:

- 13 (i) He or she was engaged in a research activity;
- 14 (ii) The research activity was specifically approved prior to the
15 possession or viewing activity being conducted in writing by a person,
16 or other such entity vested with the authority to grant such approval
17 by the institution of higher (~~learning~~) education; and

18 (iii) Viewing or possessing the visual or printed matter is an
19 essential component of the authorized research; or

20 (b) The defendant was an employee of the Washington state
21 legislature engaged in research at the request of a member of the
22 legislature and:

23 (i) The request for research is made prior to the possession or
24 viewing activity being conducted in writing by a member of the
25 legislature;

26 (ii) The research is directly related to a legislative activity;
27 and

28 (iii) Viewing or possessing the visual or printed matter is an
29 essential component of the requested research and legislative activity.

30 (~~(c)~~) (7) Nothing in this section authorizes otherwise unlawful
31 viewing or possession of visual or printed matter depicting a minor
32 engaged in sexually explicit conduct.

33 NEW SECTION. **Sec. 5.** This act takes effect August 1, 2011."

34 Correct the title.

EFFECT: (1) Restores current law providing that a judge must

review the authorization, but not the evidence, to record a communication with one-party consent. Deletes language providing that evidence obtained as a result of the recording need not be submitted to the court.

(2) Deletes language exempting cases where the confidential informant was a minor or a victim of Commercial Sexual Abuse of a Minor from the requirement that the nonconsenting party receive notice if there was no probable cause.

(3) Adds Promoting Commercial Sexual Abuse of a Minor and Promoting Travel for Commercial Sexual Abuse of a Minor to the offenses for which law enforcement and prosecutors may not use minors to aid investigations unless the minor is the victim and the recording is authorized by the one-party consent laws or only involves telephone or electronic communication. Permits that a minor be employed to aid in an investigation only after the minor is advised of the risk that the perpetrator may learn of his or her participation.

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