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**Technology & Economic Development  
Committee**

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**HB 2179**

**Brief Description:** Regarding government surveillance conducted with extraordinary sensing devices.

**Sponsors:** Representatives Morris and Morrell.

**Brief Summary of Bill**

- Prohibits Washington state, its agencies, and political subdivisions from using an "extraordinary sensing device" to conduct surveillance of private property from an "extraordinary vantage point" without a warrant issued by a court of competent jurisdiction.
- Provides exceptions for certain exigent circumstances and surveillance conduct on a military base as part of a training exercise.
- Enforces violations by excluding unlawfully-obtained personal information from being introduced as evidence in a civil or criminal case.
- Requires agencies to obtain approval from their governing body and follow certain public procedures before procuring an extraordinary sensing device.
- Restricts use of extraordinary sensing devices for regulatory surveillance activities.
- Establishes civil liability in the form of damages or liquidate damages, attorneys fees, and costs.

**Hearing Date:** 1/16/14

**Staff:** Jasmine Vasavada (786-7301).

**Background:**

Government Surveillance.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

The Fourth Amendment of the United States Constitution protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” However, individuals must have a "reasonable" or "legitimate" expectation of privacy to qualify for Fourth Amendment protection. Courts have held that an individual does not hold a reasonable expectation of privacy in information transmitted to a third party, that is then re-transmitted to the government.

Article 1, section 7 of the Washington State Constitution provides “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” In analyzing whether the government has violated Article I, Section 7, the court uses a two-step analysis, first determining whether the state has intruded into a person's private affairs, and second, whether authority of law justifies the intrusion. Typically, unless an exception applies, the second step is satisfied only by a valid warrant. In determining whether the state has intruded into "private affairs," Washington courts have looked beyond a person's subjective expectation of privacy. In 2012 the Court of Appeals determined that a defendant's text messages were not private affairs, because there was no long history and tradition of strict legislative protection of a text message displayed on another person's phone.

#### Wiretap Statutes.

Both Congress and the Legislature have enacted statutes to regulate the process by which government may intercept or record private conversations or communications. Current federal law on intercepting private communications was originally passed as part of the Omnibus Crime Control and Safe Streets Act of 1968. The Washington State Privacy Act was originally passed in 1967 and is more restrictive than the federal law, in that it establishes a crime for anyone, government official or private person, to intercept a private communication without the consent of all parties to the communication, unless a court issues an order permitting interception based on statutory grounds, such as when there is reason to believe a human life is in danger. Information obtained in violation of this requirement is generally inadmissible in civil or criminal court.

#### Regulatory Enforcement.

Under current law, many public officials are granted immunity from trespass violations and are given statutory authority to enter private property in furtherance of achieving the statutory goals. Under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution, either consent of the landowner or a search warrant must be obtained prior to an official's entry onto private property. A court will issue a search warrant only if the official establishes a reasonable cause to believe that a violation has occurred. However, state and federal courts have held that warrantless, administrative searches may legally occur in limited circumstances to enforce regulatory and licensing statutes, if necessary to enforce a substantial public interest. These warrantless searches have been approved under a number of legal theories, including a determination that heavily-regulated industries do not have a reasonable expectation of privacy, or that obtaining a governmental license (for example, to operate a nursing home or a restaurant) includes an implied consent to periodic inspections.

#### **Summary of Bill:**

Washington state agencies and political subdivisions are prohibited from using an extraordinary sensing device to conduct surveillance of private property from an extraordinary vantage point,

without the consent of the individual or individuals entitled to privacy in that place, except under circumstances specified in the bill.

- "Sensing device" means a device capable of remotely acquiring personal information from its surroundings, using any frequency of the electromagnetic spectrum. "Sensing device" does not include equipment whose sole function is to provide information directly necessary for safe air navigation or operation of a vehicle.
- An "extraordinary sensing device" means a sensing device that is uncommon to society, under a community-based standard. A sensing device is uncommon if its use and existence has not become integrated into the ordinary societal experience of the community as of January 1, 2014, as determined by a set of factors.
- "Extraordinary vantage point" means a vantage point to which an ordinary member of the public would not have ready access.

#### Exceptions.

Washington state agencies and political subdivisions may conduct surveillance using an extraordinary sensing device from an extraordinary vantage point under the following circumstances:

- If a court has issued a warrant upon a finding of probable cause.
- If certain exigent circumstances exist and an application for a warrant is made within 48 hours.
- If the operation is part of a training exercise conducted on a military base and no personal information is collected on persons located outside the military base.

#### Government Procurement of Extraordinary Sensing Devices for Surveillance Purposes.

Agencies must obtain approval from their governing body before procuring an extraordinary sensing device for surveillance purposes. The governing body shall develop and make available written policies and procedures, and provide notice and opportunity for public comment. The governing body shall conduct an annual comprehensive audit of each agency that conducts surveillance using an extraordinary sensing device, reporting the types of devices used, the specific kinds of personal information collected, and steps taken to mitigate the impacts on personal privacy, among other categories of information. State agencies shall submit the annual audit to the state patrol, who shall compile the results and submit them to the Legislature annually, beginning November 1, 2015.

#### Exclusionary Rule.

Personal information obtained in violation of these requirements is inadmissible in a civil or criminal case, except:

- in an action for damages brought by a person claiming their rights were violated as a result of a violation of the act's requirements; and
- in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

#### Regulatory Surveillance.

Agencies and political subdivisions are prohibited from using an extraordinary sensing device to conduct surveillance for the purpose of regulatory enforcement, unless:

- the permittee or licensee is given clear and conspicuous notice at the time the permit or license is granted;
- the agency has adopted and published a data minimization protocol; and

- the agency provides an annual report to the Legislature and the public, including detailed information about the purpose of such surveillance and the kinds of information obtained.

Civil Liability.

A person who violates the surveillance restrictions is subject to legal action for damages. Damages may be actual damages or liquidated damages of \$1,000 per day, not to exceed \$10,000, plus attorneys' fees and costs.

**Appropriation:** None.

**Fiscal Note:** Requested January 10, 20143.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.