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ENGROSSED SUBSTITUTE HOUSE BILL 1639

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State of Washington

64th Legislature

2015 Regular Session

By House Public Safety (originally sponsored by Representatives Taylor, Goodman, Morris, Shea, Walkinshaw, Smith, Ryu, Appleton, Condotta, Moscoso, Kagi, Muri, Young, Scott, Schmick, G. Hunt, and Farrell)

READ FIRST TIME 02/17/15.

1 AN ACT Relating to technology-enhanced government surveillance;  
2 adding new sections to chapter 9.73 RCW; creating a new section; and  
3 prescribing penalties.

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

5 NEW SECTION. **Sec. 1.** The legislature finds that Washington is a  
6 leader in responsible, effective, innovative government and the  
7 industries that help make this possible. The legislature finds that  
8 advances in technology have created valuable opportunities for  
9 government agencies to carry out their missions more efficiently,  
10 cost-effectively, precisely, and comprehensively. However, these  
11 technological advances have provided new, unique equipment that may  
12 be utilized for surveillance purposes. These technological advances  
13 often outpace statutory protections and can lead to inconsistent or  
14 contradictory interpretations between jurisdictions. The legislature  
15 finds that regardless of application or size, the use of these  
16 extraordinary surveillance technologies, without public debate or  
17 clear legal authority, creates uncertainty for citizens and agencies  
18 throughout Washington state. The legislature finds that extraordinary  
19 surveillance technologies do present a substantial privacy risk  
20 potentially contrary to the strong privacy protections enshrined in  
21 Article I, section 7 of the Washington state Constitution that reads

1 "No person shall be disturbed in his private affairs, or his home  
2 invaded, without authority of law." The legislature further finds  
3 that the lack of clear statutory authority for the use of  
4 extraordinary surveillance technologies may increase liability to  
5 state and local jurisdictions. It is the intent of the legislature to  
6 allow for the performance of legitimate state and local agency  
7 functions in accordance with clear standards for the lawful use of  
8 extraordinary sensing devices. Nothing in this act is intended to  
9 affect the leasehold rights of the residents of Washington state.

10 NEW SECTION. **Sec. 2.** The definitions in this section apply  
11 throughout this subchapter unless the context clearly requires  
12 otherwise.

13 (1) "Agency" means the state of Washington, its state and local  
14 agencies, political subdivisions, and their respective employees and  
15 agents, except the Washington national guard in Title 32 U.S.C.  
16 status.

17 (2) "Court of competent jurisdiction" means any district court of  
18 the United States, or a court of general jurisdiction authorized by  
19 the state of Washington to issue search warrants.

20 (3) "Extraordinary sensing device" means a sensing device  
21 attached to or used in conjunction with an aircraft that is operated  
22 without the possibility of human intervention from within or on such  
23 aircraft, together with its associated elements.

24 (4) "Governing body" means the council, commission, board, or  
25 other controlling body of an agency in which legislative powers are  
26 vested, except that for a state agency for which there is no  
27 governing body other than the state legislature, "governing body"  
28 means the chief executive officer responsible for the governance of  
29 the agency.

30 (5) "Personal information" means any information relating to a  
31 particular identified or identifiable individual including, but not  
32 limited to: (a) An individual's location; (b) the categories of  
33 information identified in RCW 19.255.010(5); (c) the categories of  
34 information identified in RCW 42.56.230; and (d) information obtained  
35 from a particular vehicle or particular residence, including the  
36 curtilage thereof, relating to that individual. Personal information  
37 does not include information that an agency does not associate with a  
38 particular individual. The information may be in the form of, but is  
39 not limited to:

1 (a) Images obtained from any part of the electromagnetic spectrum  
2 including, but not limited to, visible, ultraviolet, and infrared  
3 light; X-rays and other radiation; and radio waves;

4 (b) Sounds of any frequency, including infrasonic, audible, and  
5 ultrasonic frequencies; or

6 (c) Scents of any type, whether or not detectable by the human  
7 nose.

8 (6)(a) "Sensing device" means a device capable of remotely  
9 acquiring personal information from its surroundings.

10 (b) "Sensing device" does not include equipment whose sole  
11 function is to provide information directly necessary for safe air  
12 navigation or operation of a vehicle.

13 NEW SECTION. **Sec. 3.** (1) No state agency including, but not  
14 limited to, the Washington state patrol and the department of natural  
15 resources, shall procure an extraordinary sensing device unless  
16 moneys are expressly appropriated by the legislature for this  
17 specific purpose.

18 (2) No local agency shall procure an extraordinary sensing device  
19 without the explicit approval of the governing body of such locality,  
20 given for that specific extraordinary sensing device to be used for a  
21 specific purpose.

22 NEW SECTION. **Sec. 4.** (1) The governing body for each local  
23 agency and elected or appointed official in charge for each state  
24 agency must develop and make publicly available, including on the  
25 agency web site, written policies and procedures for the use of any  
26 extraordinary sensing device procured, and provide notice and  
27 opportunity for public comment prior to adoption of the written  
28 policies and procedures. Such written policies and procedures must:

29 (a) Describe the purposes for using an extraordinary sensing device  
30 and, if applicable, any agency program or study pursuant to which it  
31 intends to use the extraordinary sensing device; (b) describe  
32 categories of personal information, if applicable, that the agency  
33 intends to collect during the operation of such extraordinary sensing  
34 device, how the collection of such information furthers the agency's  
35 purposes stated pursuant to (a) of this subsection, and how the  
36 agency plans to use such information; (c) establish policies and  
37 procedures for minimizing the collection of information not specified  
38 in (b) of this subsection; (d) establish policies and procedures to

1 prevent unauthorized access to personal information, which may be  
2 collected through the agency's use of extraordinary sensing devices,  
3 and which policies and procedures may include technical measures such  
4 as encryption, hashing, anonymization, and/or deidentification of  
5 collected information; (e) identify the unique registration number  
6 the agency has affixed, or has previously been affixed, including by  
7 another agency, to the extraordinary sensing device it is intending  
8 to use; and (f) identify a point of contact for citizen complaints  
9 and concerns regarding the agency's use and operation of an  
10 extraordinary sensing device.

11 (2) Within one hundred eighty days of the effective date of this  
12 section, the office of the chief information officer shall construct  
13 a web site publicly listing every agency's written policies and  
14 procedures mandated by this section. The web site shall be easily  
15 accessible by the public and a hyperlink to this web site shall  
16 appear on <http://access.wa.gov>, or other similar web site, if this  
17 web site is altered or ceases to exist.

18 (3) The operation of an extraordinary sensing device by an agency  
19 is prohibited unless the agency has affixed a unique identifier  
20 registration number assigned by the agency.

21 NEW SECTION. **Sec. 5.** Except as otherwise specifically  
22 authorized in this subchapter, it is unlawful for an agency to  
23 operate an extraordinary sensing device or use or disclose personal  
24 information about any person acquired through the operation of an  
25 extraordinary sensing device.

26 NEW SECTION. **Sec. 6.** All operations of an extraordinary sensing  
27 device, by an agency, or disclosure of personal information about any  
28 person acquired through the operation of an extraordinary sensing  
29 device, by an agency, must be conducted in such a way as to minimize  
30 the collection and disclosure of personal information not authorized  
31 under this subchapter. If an agency complies with section 4 of this  
32 act and adheres to the minimization policies and procedures it adopts  
33 pursuant to section 4 of this act, there is a rebuttable presumption  
34 that the agency has complied with the minimization requirement under  
35 this section. This presumption can be overcome by clear and  
36 convincing evidence to the contrary.

1        NEW SECTION.    **Sec. 7.**    (1) It is lawful under this section for an  
2 agency to operate an extraordinary sensing device without obtaining a  
3 warrant if the agency reasonably determines that the operation does  
4 not intend to collect personal information. Allowable purposes under  
5 this subsection include, but are not limited to:

6        (a) Monitoring to discover, locate, observe, and prevent forest  
7 fires;

8        (b) Monitoring an environmental or weather-related catastrophe or  
9 damage from such an event;

10       (c) Surveying for wildlife management, habitat preservation, or  
11 environmental damage; and

12       (d) Surveying for the assessment and evaluation of environmental  
13 or weather-related damage, erosion, flood, or contamination.

14       (2) No agency may make any effort to identify an individual from  
15 the information collected by the operation or to associate any  
16 information collected by the operation with a particular individual,  
17 nor shall the information be disclosed to a third party unless that  
18 party agrees to be bound by the same restrictions. These restrictions  
19 shall not apply if there is probable cause that the information is  
20 evidence of criminal activity.

21       NEW SECTION.    **Sec. 8.**    (1) It is lawful under this section for  
22 any agency to operate an extraordinary sensing device and disclose  
23 personal information from the operation without obtaining a warrant  
24 if:

25       (a) The agency reasonably determines that:

26       (i) An emergency situation exists that involves criminal activity  
27 and presents immediate danger of death or serious physical injury to  
28 any person, including risk of terrorist activity;

29       (ii) The emergency situation requires operation of an  
30 extraordinary sensing device before a warrant authorizing the use  
31 can, with due diligence, be obtained; and

32       (iii) There are grounds upon which a warrant could be entered to  
33 authorize such operation;

34       (b) The agency reasonably determines that an emergency situation  
35 exists that:

36       (i) Does not involve criminal activity;

37       (ii) Presents immediate danger of death or serious physical  
38 injury to any person; and

1 (iii) Has characteristics such that operation of an extraordinary  
2 sensing device may reasonably reduce the danger of death or serious  
3 physical injury;

4 (c) The agency determines that operation is reasonably necessary  
5 to locate a missing person;

6 (d) The operation is limited to use for traffic crash scene  
7 photography;

8 (e) The operation is part of a training exercise conducted on a  
9 military base and the extraordinary sensing device does not collect  
10 personal information on persons located outside the military base;

11 (f) The operation is for training, testing, or research purposes  
12 by an agency and is not intended to collect personal information  
13 without the specific written consent of any individual whose personal  
14 information is collected; or

15 (g) The operation is part of the response to an emergency or  
16 disaster for which the governor has proclaimed a state of emergency  
17 under RCW 43.06.010(12).

18 (2) Upon completion of the operation of an extraordinary sensing  
19 device pursuant to subsection (1)(b) through (g) of this section, any  
20 personal information obtained must be treated as information  
21 collected on an individual other than a target of a warrant for  
22 purposes of section 10 of this act.

23 NEW SECTION. **Sec. 9.** (1) An extraordinary sensing device may be  
24 operated by an agency and personal information from the operation  
25 disclosed, if the operation and collection of personal information is  
26 pursuant to a search warrant issued by a court of competent  
27 jurisdiction, and the operation, collection, and disclosure are  
28 compliant with the provisions of this chapter.

29 (2) Warrants may not be issued for a period greater than ten  
30 days. Extensions may be granted, but no longer than the authorizing  
31 judicial officer deems necessary to achieve the purposes for which it  
32 was granted and in no event for longer than thirty days.

33 (3) Within ten days of the execution of a search warrant, the  
34 officer executing the warrant must serve a copy of the warrant upon  
35 the target of the warrant, except if notice is delayed pursuant to  
36 this section.

37 (4) An agency acting under this section may, when a warrant is  
38 sought, include in the petition a request, which the court shall  
39 grant, for an order delaying the notification for a period not to

1 exceed ninety days if the court determines that there is reason to  
2 believe that notification of the existence of the warrant may have an  
3 adverse result.

4 (5) An adverse result for the purposes of this section is:

5 (a) Placing the life or physical safety of an individual in  
6 danger;

7 (b) Causing a person to flee from prosecution;

8 (c) Causing the destruction of or tampering with evidence;

9 (d) Causing the intimidation of potential witnesses; or

10 (e) Jeopardizing an investigation or unduly delaying a trial.

11 (6) The agency shall maintain a copy of the warrant.

12 (7) Extension of the delay of notification of up to ninety days  
13 each may be granted by the court upon certification by the agency  
14 that there is reason to believe that notification of the extension of  
15 the warrant may have an adverse result.

16 (8) Upon expiration of the period of delay of notification under  
17 subsection (4) or (7) of this section, the agency shall serve a copy  
18 of the warrant upon, or deliver it by registered or first-class mail  
19 to the target of the warrant, together with notice that:

20 (a) States with reasonable specificity the nature of the law  
21 enforcement inquiry; and

22 (b) Informs the target of the warrant: (i) That notification was  
23 delayed; (ii) what agency or court made the certification or  
24 determination pursuant to which that delay was made; and (iii) the  
25 provision of this section allowing the delay.

26 NEW SECTION. **Sec. 10.** (1) Personal information collected during  
27 the operation of an extraordinary sensing device authorized under  
28 sections 7 through 9 of this act may not be used, copied, or  
29 disclosed for any purpose after conclusion of the operation for which  
30 the extraordinary sensing device was authorized, unless there is  
31 probable cause that the personal information is evidence of criminal  
32 activity.

33 (2) Personal information must be deleted, within thirty days if  
34 the personal information was collected on a target of a warrant  
35 authorizing the operation of the extraordinary sensing device and  
36 within ten days for other personal information, after there is no  
37 longer probable cause that the personal information is evidence of  
38 criminal activity that may be prosecuted. The foregoing shall only  
39 apply to the extent the personal information can be destroyed without

1 destroying other evidence relevant to a pending criminal  
2 investigation or case. There is a presumption that personal  
3 information is not evidence of criminal activity if that personal  
4 information is not used in a criminal prosecution within one year of  
5 collection.

6 NEW SECTION. **Sec. 11.** Whenever any personal information from an  
7 extraordinary sensing device has been acquired, no part of such  
8 personal information and no evidence derived therefrom may be  
9 received in evidence in any trial, hearing, or other proceeding in or  
10 before any court, grand jury, department, officer, agency, regulatory  
11 body, legislative committee, or other authority of the state or a  
12 political subdivision thereof if the collection or disclosure of that  
13 personal information would be in violation of this subchapter.

14 NEW SECTION. **Sec. 12.** Any person who knowingly violates this  
15 subchapter is subject to legal action for damages, to be brought by  
16 any other person claiming that a violation of this subchapter has  
17 injured his or her business, his or her person, or his or her  
18 reputation. In addition, the individual is entitled to reasonable  
19 attorneys' fees and other costs of litigation.

20 NEW SECTION. **Sec. 13.** Any use of an extraordinary sensing  
21 device must fully comply with all federal aviation administration  
22 requirements and guidelines. Compliance with the terms of this  
23 subchapter is mandatory and supplemental to compliance with federal  
24 aviation administration requirements and guidelines.

25 NEW SECTION. **Sec. 14.** (1) An agency must maintain records  
26 identifying each use of an extraordinary sensing device. The records  
27 must include:

- 28 (a) Operator name;
- 29 (b) Identity of the agency;
- 30 (c) Date and time of the flight;
- 31 (d) Categories of information collected for each use;
- 32 (e) The purpose of using the extraordinary sensing device; and
- 33 (f) Whether a warrant was obtained prior to use.

34 (2) Each state agency having jurisdiction over criminal law or  
35 regulatory violation enforcement, for any calendar year in which the



1 agency has used an extraordinary sensing device, must prepare an  
2 annual report including, at a minimum in each case, the following:

3 (a) The number of uses of an extraordinary sensing device  
4 organized by types of incidents and types of justification for use;

5 (b) The number of criminal or regulatory investigations aided by  
6 the use and how the use was helpful to the investigation;

7 (c) The number of uses of an extraordinary sensing device for  
8 reasons other than criminal or regulatory investigations and how the  
9 use was helpful;

10 (d) The frequency and type of data collected for individuals or  
11 areas other than targets;

12 (e) The total cost of the extraordinary sensing device;

13 (f) The dates when personal information and other data was  
14 deleted or destroyed in compliance with the act;

15 (g) The number of warrants requested, issued, and extended; and

16 (h) Additional information and analysis the governing body deems  
17 useful.

18 (3) Each state agency other than that in subsection (2) of this  
19 section, for any calendar year in which the agency has used an  
20 extraordinary sensing device, must prepare an annual report  
21 including, at a minimum in each case, the following:

22 (a) The types of extraordinary sensing devices used, the purposes  
23 for which each type of extraordinary sensing device was used, the  
24 circumstances under which use was authorized, and the name of the  
25 officer or official who authorized the use;

26 (b) Whether deployment of the device was imperceptible to the  
27 public;

28 (c) The specific kinds of personal information that the  
29 extraordinary sensing device collected about individuals;

30 (d) The length of time for which any personal information  
31 collected by the extraordinary sensing device was retained;

32 (e) The specific steps taken to mitigate the impact on an  
33 individual's privacy, including protections against unauthorized use  
34 and disclosure and a data minimization protocol; and

35 (f) An individual point of contact for citizen complaints and  
36 concerns.

37 (4) The annual reports required pursuant to this section must be  
38 filed electronically to the office of financial management, who must  
39 compile the results and submit them electronically to the relevant

1 committees of the legislature by September 1st of each year,  
2 beginning in 2016.

3 NEW SECTION. **Sec. 15.** Any use of an extraordinary sensing  
4 device by an agency must fully comply with all applicable federal  
5 aviation administration regulations.

6 NEW SECTION. **Sec. 16.** Nothing in this act abridges, reduces,  
7 restricts, or prohibits an officer, employee, or agent of the United  
8 States armed forces, or the agent of the United States armed forces  
9 to include the national guard in Title 32 U.S.C. from operating an  
10 unmanned aerial vehicle.

11 NEW SECTION. **Sec. 17.** Sections 2 through 16 of this act are  
12 each added to chapter 9.73 RCW and codified with the subchapter  
13 heading of "extraordinary sensing devices."

14 NEW SECTION. **Sec. 18.** If any provision of this act or its  
15 application to any person or circumstance is held invalid, the  
16 remainder of the act or the application of the provision to other  
17 persons or circumstances is not affected.

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