

SENATE BILL REPORT

ESHB 2406

As Reported By Senate Committee On:
Law & Justice, February 14, 1996

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

Brief Description: Regulating interception of communications.

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

Brief History:

Committee Activity: Law & Justice: 2/14/96 [DPA].

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended.

Signed by Senators Smith, Chair; Fairley, Vice Chair; Goings, Haugen, Johnson, Long, McCaslin and Schow.

Staff: Martin Lovinger (786-7443)

Background: The pen register is a device which is used to tap into a telephone line and decode the number being dialed. A trap and trace device captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

These devices were used by law enforcement to gather information regarding criminal activity, particularly in the area of illegal drug transactions, until 1986. At that time, the State Supreme Court held in State v. Gunwall, 106 Wn.2d 54, that pen registers without valid legal process violate privacy rights under the State Constitution. The court concluded that a pen register intercept comes within the definition of a "private communication transmitted by telephone" and may only be installed pursuant to the stricter requirements of Washington's statutes controlling electronic eavesdropping. The court further stated that because "no consent" interceptions of this kind require a valid court order, and can only be authorized by the courts in cases involving national security, danger to human life, or in the face of imminent arson or riot, legislative action may be required before a pen register can be authorized to intercept telephone information concerning illegal drug transactions.

It is suggested that law enforcement's ability to conduct effective criminal investigations would be enhanced if the Legislature statutorily authorized the use of pen registers and trap and trace devices.

Summary of Amended Bill: Under the striking amendment, the crime of violating the right of privacy does not apply to common carriers for the use of a pen register or trap and trace device 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 superior court for an order authorizing the installation and use of a pen register or trap and trace device. The court must issue an authorizing order if the court finds that the information likely to be obtained is relevant to an ongoing criminal investigation. No person may install or use a pen register or a trap or trace device without first obtaining a court order. However, a pen register or trap or trace device may be installed without first obtaining a court order if the following criteria are met: (1) a prosecuting attorney and a law enforcement officer reasonably determine that an emergency involving an immediate danger of death or serious bodily injury exists, (2) there are grounds to obtain an order; (3) there is insufficient time to obtain a court order; and (4) a court order is obtained within 48 hours of installing the pen register or trap and trace device. In the absence of a court order, the use of the device must immediately terminate upon obtaining the information sought, or when an order is denied, or when 48 hours have passed, whichever comes first. If no order is obtained within 48 hours, the use of the pen register or trap and trace device must be terminated and the evidence obtained is inadmissible in any legal proceeding. It is a gross misdemeanor to install a pen register or trap and trace device without a court order and not make application for an authorizing order within 48 hours.

The authorizing order must specify the identities of both the suspect and the person who leases the telephone line to which the pen register or trap and trace device is attached. In addition, the order must indicate the number and location of the telephone line and, in the case of the trap and trace device, the geographic limits of the trap and trace order. The order is also required to state the offense which is likely to be charged as a result of the information obtained.

Upon the law enforcement officer's request, the order must direct the telephone company and others to furnish information, facilities, and technical assistance necessary to install the devices. 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 person owning or leasing the line to which the device is attached, or who provides assistance to the applicant, must not disclose the existence of the device to any person, unless otherwise ordered by the court. Telephone companies and others must be reimbursed for reasonable expenses incurred in providing facilities and assistance by the law enforcement agency that makes the request.

No cause of action may be brought against a telephone company or other specified persons for complying with the terms of a court order. A good faith reliance on a court order, authorization, or request pursuant to this statute is a complete defense against any civil or criminal action brought under these provisions.

Amended Bill Compared to Original Bill: The amended bill decreases the penalty for a law enforcement officer who knowingly installs a pen register without court authorization

and without seeking court authorization within 48 hours from a class C felony to a gross misdemeanor.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: This bill represents an agreement that addresses past concerns about the use of these devices. A safety net is provided to avoid the possible abuse that has been the source of concerns. These devices are important tools for law enforcement.

Testimony Against: None.

Testified: Representative Sterk, prime sponsor (pro).