
SENATE BILL 6390

State of Washington

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By Senators Smith, Johnson, Haugen, Schow, Long, Fairley, Wood, Prince and Heavey

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1 AN ACT Relating to interception, transmission, recording, or
2 disclosure of communications; amending RCW 9.73.070 and 9.73.230;
3 adding a new 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
6 as follows:

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

18 (a) Relating to the operation, maintenance, and testing of a wire
19 or electronic communication service or to the protection of the

1 rights or property of such common carrier, or to the protection of
2 users of the common carrier's service from abuse of service or
3 unlawful use of service;

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

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

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

15 ~~((+2))~~ (3) The provisions of this chapter shall not apply to:

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

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

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

24 (1) As used in this section:

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

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

38 (i) Any wire or oral communication;

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

2 (iii) Any communication from a tracking device.

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

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

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

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

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

1 order authorizing the installation and use of a pen register or a
2 trap and trace device. The order shall specify:

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

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

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

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

14 The order shall direct, if the applicant has requested, the
15 furnishing of information, facilities, and technical assistance
16 necessary to accomplish the installation of the pen register or trap
17 and trace device. An order issued under this section shall authorize
18 the installation and use of a pen register or a trap and trace device
19 for a period not to exceed sixty days. Extensions of such an order
20 may be granted, but only upon a new application for an order under
21 subsection (2) of this section and upon the judicial findings
22 required by subsection (3) of this section. The period of extension
23 shall be for a period not to exceed sixty days.

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

33 (4) Upon the request of an officer of a law enforcement agency
34 authorized to install and use a pen register under this chapter, a
35 provider of wire or electronic communication service, landlord,
36 custodian, or other person shall furnish such law enforcement officer
37 forthwith all information, facilities, and technical assistance
38 necessary to accomplish the installation of the pen register
39 unobtrusively and with a minimum of interference with the services

1 that the person so ordered by the court accords the party with
2 respect to whom the installation and use is to take place, if such
3 assistance is directed by a court order as provided in subsection (3)
4 of this section.

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

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

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

36 Pursuant to this section, an order may be issued to enforce the
37 assistance capability and capacity requirements under the federal
38 communications assistance for law enforcement act.

1 (5) Notwithstanding any other provision of this chapter, a law
2 enforcement officer specially designated by a prosecuting attorney
3 who reasonably determines that an emergency situation exists that
4 involves immediate danger of death or serious bodily injury to any
5 person or conspiratorial activities characteristic of organized crime
6 that requires the installation and use of a pen register or a trap
7 and trace device before an order authorizing such installation and
8 use can, with due diligence, be obtained, and there are grounds upon
9 which an order could be entered under this chapter to authorize such
10 installation and
11 use, may have installed and use a pen register or trap and trace
12 device if, within forty-eight hours after the installation has
13 occurred, or begins to occur, an order approving the installation or
14 use is issued in accordance with subsection (3) of this section. In
15 the absence of an authorizing order, such use shall immediately
16 terminate when the information sought is obtained, when the
17 application for the order is denied or when forty-eight hours have
18 lapsed since the installation of the pen register or trap and trace
19 device, whichever is earlier. If an order approving the installation
20 or use is not obtained within forty-eight hours, any information
21 obtained is not admissible as evidence in any legal proceeding. The
22 knowing installation or use by any law enforcement officer of a pen
23 register or trap and trace device pursuant to this subsection without
24 application for the authorizing order within forth-eight hours of the
25 installation shall constitute a violation of this chapter and be
26 punishable as a gross misdemeanor. A provider of a wire or
27 electronic service, landlord, custodian, or other person who
28 furnished facilities or technical assistance pursuant to this
29 subsection shall be reasonably compensated by the law enforcement
30 agency that requests the facilities or assistance for such reasonable
31 expenses incurred in providing such facilities and assistance.

32 **Sec. 3.** RCW 9.73.230 and 1989 c 271 s 204 are each amended to
33 read as follows:

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

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

3 (b) Probable cause exists to believe that the conversation or
4 communication involves the unlawful manufacture, delivery, sale, or
5 possession with intent to manufacture, deliver, or sell, controlled
6 substances as defined in chapter 69.50 RCW, or legend drugs as
7 defined in chapter 69.41 RCW, or imitation controlled substances as
8 defined in chapter 69.52 RCW; and

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

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

15 (a) The circumstances that meet the requirements of subsection
16 (1) of this section;

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

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

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

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

28 (f) Whether there was an attempt to obtain authorization pursuant
29 to RCW 9.73.090(2) and, if there was such an attempt, the outcome of
30 the attempt.

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

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

1 (5) An authorization made under this section is valid for no more
2 than twenty-four hours from the time it is signed by the authorizing
3 officer, and each authorization shall independently meet all of the
4 requirements of this section. The authorizing officer shall sign the
5 written report required under subsection (2) of this section,
6 certifying the exact date and time of his or her signature. An
7 authorization under this section may be extended not more than twice
8 for an additional consecutive twenty-four hour period based upon the
9 same probable cause regarding the same suspected transaction. Each
10 such extension shall be signed by the authorizing officer.

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

20 In those cases where the consenting party is a confidential
21 informant, the name of the confidential informant need not be
22 divulged.

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

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

1 (b) Absent a continuation under (c) of this subsection, six
2 months following a determination under (a) of this subsection that
3 probable cause did not exist, the court shall cause a notice to be
4 mailed to the last known address of any nonconsenting party to the
5 conversation or communication that was the subject of the
6 authorization. The notice shall indicate the date, time, and place
7 of any interception, transmission, or recording made pursuant to the
8 authorization. The notice shall also identify the agency that sought
9 the authorization and shall indicate that a review under (a) of this
10 subsection resulted in a determination that the authorization was
11 made in violation of this section.

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

16 (8) (~~In any subsequent judicial proceeding,~~) Evidence obtained
17 through the interception, transmission, or recording of a
18 conversation or communication pursuant to this section shall be
19 (admissible only if) inadmissible in any civil or criminal case in
20 all courts of general or limited jurisdiction in this state unless:

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

24 (b) The evidence is admitted with the permission of (~~the~~) any
25 nonconsenting person whose communication or conversation was
26 intercepted, transmitted, or recorded; (~~or~~)

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

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

35 Nothing in this subsection bars the admission of testimony of a
36 party or (~~eyewitness~~) witness to the intercepted, transmitted, or
37 recorded conversation or communication when that testimony is unaided
38 by information obtained solely by violation of RCW 9.73.030.

1 (9) Any determination of invalidity of an authorization under
2 this section shall be reported by the court to the office of the
3 administrator for the courts.

4 (10) Any person who intentionally intercepts, transmits, or
5 records or who intentionally authorizes the interception,
6 transmission, or recording of a conversation or communication in
7 violation of this section, is guilty of a class C felony punishable
8 according to chapter 9A.20 RCW.

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

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

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

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