

2 SHB 1072 - S COMM AMD

3 By Committee on Law & Justice

4 ADOPTED 3/5/98

5 Strike everything after the enacting clause and insert the
6 following:

7 NEW SECTION. Sec. 1. A new section is added to chapter 9.73 RCW
8 to read as follows:

9 (1) As used in this section:

10 (a) "Wire communication" means any aural transfer made in whole or
11 in part through the use of facilities for the transmission of
12 communications by the aid of wire, cable, or other like connection
13 between the point of origin and the point of reception, including the
14 use of such connection in a switching station, furnished or operated by
15 any person engaged in providing or operating such facilities for the
16 transmission of intrastate, interstate, or foreign communications, and
17 such term includes any electronic storage of such communication.

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

22 (i) Any wire or oral communication;

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

24 (iii) Any communication from a tracking device.

25 (c) "Electronic communication service" means any service that
26 provides to users thereof the ability to send or receive wire or
27 electronic communications.

28 (d) "Pen register" means a device that records or decodes
29 electronic or other impulses that identify the numbers dialed or
30 otherwise transmitted on the telephone line to which such device is
31 attached, but such term does not include any device used by a provider
32 or customer of a wire or electronic communication service for billing,
33 or recording as an incident to billing, for communications services
34 provided by such provider or any device used by a provider or customer
35 of a wire communication service for cost accounting or other like
36 purposes in the ordinary course of its business.

1 (e) "Trap and trace device" means a device that captures the
2 incoming electronic or other impulses that identify the originating
3 number of an instrument or device from which a wire or electronic
4 communication was transmitted.

5 (2) No person may install or use a pen register or trap and trace
6 device without a prior court order issued under this section except as
7 provided under subsection (6) of this section or RCW 9.73.070.

8 (3) A law enforcement officer may apply for and the superior court
9 may issue orders and extensions of orders authorizing the installation
10 and use of pen registers and trap and trace devices as provided in this
11 section. The application shall be under oath and shall include the
12 identity of the officer making the application and the identity of the
13 law enforcement agency conducting the investigation. The applicant
14 must certify that the information likely to be obtained is relevant to
15 an ongoing criminal investigation being conducted by that agency.

16 (4) If the court finds that the information likely to be obtained
17 by such installation and use is relevant to an ongoing criminal
18 investigation and finds that there is probable cause to believe that
19 the pen register or trap and trace device will lead to obtaining
20 evidence of a crime, contraband, fruits of crime, things criminally
21 possessed, weapons, or other things by means of which a crime has been
22 committed or reasonably appears about to be committed, or will lead to
23 learning the location of a person who is unlawfully restrained or
24 reasonably believed to be a witness in a criminal investigation or for
25 whose arrest there is probable cause, the court shall enter an ex parte
26 order authorizing the installation and use of a pen register or a trap
27 and trace device. The order shall specify:

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

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

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

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

1 The order shall direct, if the applicant has requested, the
2 furnishing of information, facilities, and technical assistance
3 necessary to accomplish the installation of the pen register or trap
4 and trace device. An order issued under this section shall authorize
5 the installation and use of a pen register or a trap and trace device
6 for a period not to exceed sixty days. An extension of the original
7 order may only be granted upon: A new application for an order under
8 subsection (3) of this section; and a showing that there is a
9 probability that the information or items sought under this subsection
10 are more likely to be obtained under the extension than under the
11 original order. No extension beyond the first extension shall be
12 granted unless: There is a showing that there is a high probability
13 that the information or items sought under this subsection are much
14 more likely to be obtained under the second or subsequent extension
15 than under the original order; and there are extraordinary
16 circumstances such as a direct and immediate danger of death or serious
17 bodily injury to a law enforcement officer. The period of extension
18 shall be for a period not to exceed sixty days.

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

28 (5) Upon the presentation of an order, entered under subsection (4)
29 of this section, by an officer of a law enforcement agency authorized
30 to install and use a pen register under this chapter, a provider of
31 wire or electronic communication service, landlord, custodian, or other
32 person shall furnish such law enforcement officer forthwith all
33 information, facilities, and technical assistance necessary to
34 accomplish the installation of the pen register unobtrusively and with
35 a minimum of interference with the services that the person so ordered
36 by the court accords the party with respect to whom the installation
37 and use is to take place, if such assistance is directed by a court
38 order as provided in subsection (4) of this section.

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

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

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

32 (6)(a) Notwithstanding any other provision of this chapter, a law
33 enforcement officer and a prosecuting attorney or deputy prosecuting
34 attorney who jointly and reasonably determine that there is probable
35 cause to believe that an emergency situation exists that involves
36 immediate danger of death or serious bodily injury to any person that
37 requires the installation and use of a pen register or a trap and trace
38 device before an order authorizing such installation and use can, with
39 due diligence, be obtained, and there are grounds upon which an order

1 could be entered under this chapter to authorize such installation and
2 use, may have installed and use a pen register or trap and trace device
3 if, within forty-eight hours after the installation has occurred, or
4 begins to occur, an order approving the installation or use is issued
5 in accordance with subsection (4) of this section. In the absence of
6 an authorizing order, such use shall immediately terminate when the
7 information sought is obtained, when the application for the order is
8 denied or when forty-eight hours have lapsed since the installation of
9 the pen register or trap and trace device, whichever is earlier. If an
10 order approving the installation or use is not obtained within forty-
11 eight hours, any information obtained is not admissible as evidence in
12 any legal proceeding. The knowing installation or use by any law
13 enforcement officer of a pen register or trap and trace device pursuant
14 to this subsection without application for the authorizing order within
15 forty-eight hours of the installation shall constitute a violation of
16 this chapter and be punishable as a gross misdemeanor. A provider of
17 a wire or electronic service, landlord, custodian, or other person who
18 furnished facilities or technical assistance pursuant to this
19 subsection shall be reasonably compensated by the law enforcement
20 agency that requests the facilities or assistance for such reasonable
21 expenses incurred in providing such facilities and assistance.

22 (b) A law enforcement agency that authorizes the installation of a
23 pen register or trap and trace device under this subsection (6) shall
24 file a monthly report with the administrator for the courts. The
25 report shall indicate the number of authorizations made, the date and
26 time of each authorization, whether a court authorization was sought
27 within forty-eight hours, and whether a subsequent court authorization
28 was granted.

29 **Sec. 2.** RCW 9.73.095 and 1996 c 197 s 1 are each amended to read
30 as follows:

31 (1) RCW 9.73.030 through 9.73.080 and section 1 of this act shall
32 not apply to employees of the department of corrections in the
33 following instances: Intercepting, recording, or divulging any
34 telephone calls from an inmate or resident of a state correctional
35 facility; or intercepting, recording, or divulging any monitored
36 nontelephonic conversations in inmate living units, cells, rooms,
37 dormitories, and common spaces where inmates may be present. For the
38 purposes of this section, "state correctional facility" means a

1 facility that is under the control and authority of the department of
2 corrections, and used for the incarceration, treatment, or
3 rehabilitation of convicted felons.

4 (2) All personal calls made by inmates shall be collect calls only.
5 The calls will be "operator announcement" type calls. The operator
6 shall notify the receiver of the call that the call is coming from a
7 prison inmate, and that it will be recorded and may be monitored.

8 (3) The department of corrections shall adhere to the following
9 procedures and restrictions when intercepting, recording, or divulging
10 any telephone calls from an inmate or resident of a state correctional
11 facility as provided for by this section. The department shall also
12 adhere to the following procedures and restrictions when intercepting,
13 recording, or divulging any monitored nontelephonic conversations in
14 inmate living units, cells, rooms, dormitories, and common spaces where
15 inmates may be present:

16 (a) Unless otherwise provided for in this section, after
17 intercepting or recording any conversation, only the superintendent and
18 his or her designee shall have access to that recording.

19 (b) The contents of any intercepted and recorded conversation shall
20 be divulged only as is necessary to safeguard the orderly operation of
21 the correctional facility, in response to a court order, or in the
22 prosecution or investigation of any crime.

23 (c) All conversations that are recorded under this section, unless
24 being used in the ongoing investigation or prosecution of a crime, or
25 as is necessary to assure the orderly operation of the correctional
26 facility, shall be destroyed one year after the intercepting and
27 recording.

28 (4) So as to safeguard the sanctity of the attorney-client
29 privilege, the department of corrections shall not intercept, record,
30 or divulge any conversation between an inmate or resident and an
31 attorney. The department shall develop policies and procedures to
32 implement this section. The department's policies and procedures
33 implemented under this section shall also recognize the privileged
34 nature of confessions made by an offender to a member of the clergy or
35 a priest in his or her professional character, in the course of
36 discipline enjoined by the church to which he or she belongs as
37 provided in RCW 5.60.060(3).

38 (5) The department shall notify in writing all inmates, residents,
39 and personnel of state correctional facilities that their nontelephonic

1 conversations may be intercepted, recorded, or divulged in accordance
2 with the provisions of this section.

3 (6) The department shall notify all visitors to state correctional
4 facilities who may enter inmate living units, cells, rooms,
5 dormitories, or common spaces where inmates may be present, that their
6 conversations may be intercepted, recorded, or divulged in accordance with
7 the provisions of this section. The notice required under this
8 subsection shall be accomplished through a means no less conspicuous
9 than a general posting in a location likely to be seen by visitors
10 entering the facility.

11 **Sec. 3.** RCW 9.73.120 and 1989 c 271 s 207 are each amended to read
12 as follows:

13 (1) Within thirty days after the expiration of an authorization or
14 an extension or renewal thereof issued pursuant to RCW 9.73.090(2) as
15 now or hereafter amended, the issuing or denying judge shall make a
16 report to the administrator for the courts stating that:

17 (a) An authorization, extension or renewal was applied for;

18 (b) The kind of authorization applied for;

19 (c) The authorization was granted as applied for, was modified, or
20 was denied;

21 (d) The period of recording authorized by the authorization and the
22 number and duration of any extensions or renewals of the authorization;

23 (e) The offense specified in the authorization or extension or
24 renewal of authorization;

25 (f) The identity of the person authorizing the application and of
26 the investigative or law enforcement officer and agency for whom it was
27 made;

28 (g) Whether an arrest resulted from the communication which was the
29 subject of the authorization; and

30 (h) The character of the facilities from which or the place where
31 the communications were to be recorded.

32 (2) In addition to reports required to be made by applicants
33 pursuant to federal law, all judges of the superior court authorized to
34 issue authority pursuant to this chapter shall make annual reports on
35 the operation of this chapter to the administrator for the courts. The
36 reports made under this subsection must include information on
37 authorizations for the installation and use of pen registers and trap
38 and trace devices under section 1 of this act. The reports by the

1 judges shall contain (a) the number of applications made; (b) the
2 number of authorizations issued; (c) the respective periods of such
3 authorizations; (d) the number and duration of any renewals thereof;
4 (e) the crimes in connection with which the communications or
5 conversations were sought; (f) the names of the applicants; and (g)
6 such other and further particulars as the administrator for the courts
7 may require, except that the administrator for the courts shall not
8 require the reporting of information that might lead to the disclosure
9 of the identity of a confidential informant.

10 The chief justice of the supreme court shall annually report to the
11 governor and the legislature on such aspects of the operation of this
12 chapter as ((he deems)) appropriate including any recommendations ((he
13 may care to make)) as to legislative changes or improvements to
14 effectuate the purposes of this chapter and to assure and protect
15 individual rights."

16 **SHB 1072** - S COMM AMD
17 By Committee on Law & Justice

18 ADOPTED 3/5/98

19 On page 1, line 2 of the title, after "communications;" strike the
20 remainder of the title and insert "amending RCW 9.73.095 and 9.73.120;
21 adding a new section to chapter 9.73 RCW; and prescribing penalties."

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