

ESHB 1639 - S AMD 429

By Senators Hargrove, Padden

ADOPTED 4/15/2015

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds that Washington is
4 a leader in responsible, effective, innovative government and the
5 industries that help make this possible. The legislature finds that
6 advances in technology have created valuable opportunities for
7 government agencies to carry out their missions more efficiently,
8 cost-effectively, precisely, and comprehensively. However, these
9 technological advances have provided new, unique equipment that may
10 be utilized for surveillance purposes. These technological advances
11 often outpace statutory protections and can lead to inconsistent or
12 contradictory interpretations between jurisdictions. The legislature
13 finds that regardless of application or size, the use of these
14 extraordinary surveillance technologies, without public debate or
15 clear legal authority, creates uncertainty for citizens and agencies
16 throughout Washington state. The legislature finds that extraordinary
17 surveillance technologies do present a substantial privacy risk
18 potentially contrary to the strong privacy protections enshrined in
19 Article I, section 7 of the Washington state Constitution that reads
20 "No person shall be disturbed in his private affairs, or his home
21 invaded, without authority of law." The legislature further finds
22 that the lack of clear statutory authority for the use of
23 extraordinary surveillance technologies may increase liability to
24 state and local jurisdictions. It is the intent of the legislature to
25 allow for the performance of legitimate state and local agency
26 functions in accordance with clear standards for the lawful use of
27 extraordinary sensing devices. Nothing in this act is intended to
28 affect the leasehold rights of the residents of Washington state.

29 NEW SECTION. **Sec. 2.** The definitions in this section apply
30 throughout this subchapter unless the context clearly requires
31 otherwise.

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

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

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

12 (4) "Governing body" means the council, commission, board, or
13 other controlling body of an agency in which legislative powers are
14 vested, except that for a state agency for which there is no
15 governing body other than the state legislature, "governing body"
16 means the chief executive officer responsible for the governance of
17 the agency.

18 (5) "Personally identifiable information" means information that
19 can be used to distinguish or trace an individual's identity
20 including, but not limited to, name, social security number, and
21 biometric records, either alone, or when combined with other personal
22 or identifying information that is linked or linkable to a specific
23 individual including, but not limited to, date and place of birth and
24 mother's maiden name.

25 (6)(a) "Sensing device" means a device capable of remotely
26 acquiring personally identifiable information from its surroundings.

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

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

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

1 NEW SECTION. **Sec. 4.** (1) The governing body for each local
2 agency and elected or appointed official in charge for each state
3 agency must develop and make publicly available, including on the
4 agency web site, written policies and procedures for the use of any
5 extraordinary sensing device procured, and provide notice and
6 opportunity for public comment prior to adoption of the written
7 policies and procedures. Such written policies and procedures must:
8 (a) Describe the purposes for using an extraordinary sensing device
9 and, if applicable, any agency program or study pursuant to which it
10 intends to use the extraordinary sensing device; (b) describe
11 categories of personally identifiable information, if applicable,
12 that the agency intends to collect during the operation of such
13 extraordinary sensing device, how the collection of such information
14 furthers the agency's purposes stated pursuant to (a) of this
15 subsection, and how the agency plans to use such information; (c)
16 establish policies and procedures for minimizing the collection of
17 information not specified in (b) of this subsection; (d) establish
18 policies and procedures to prevent unauthorized access to personally
19 identifiable information, which may be collected through the agency's
20 use of extraordinary sensing devices, and which policies and
21 procedures may include technical measures such as encryption,
22 hashing, anonymization, and/or deidentification of collected
23 information; (e) identify the unique registration number the agency
24 has affixed, or has previously been affixed, including by another
25 agency, to the extraordinary sensing device it is intending to use;
26 and (f) identify a point of contact for citizen complaints and
27 concerns regarding the agency's use and operation of an extraordinary
28 sensing device.

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

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

1 NEW SECTION. **Sec. 5.** Except as otherwise specifically
2 authorized in this subchapter, it is unlawful for an agency to
3 operate an extraordinary sensing device or use or disclose personally
4 identifiable information about any person acquired through the
5 operation of an extraordinary sensing device.

6 NEW SECTION. **Sec. 6.** All operations of an extraordinary sensing
7 device, by an agency, or disclosure of personally identifiable
8 information about any person acquired through the operation of an
9 extraordinary sensing device, by an agency, must be conducted in such
10 a way as to minimize the collection and disclosure of personally
11 identifiable information not authorized under this subchapter. If an
12 agency complies with section 4 of this act and adheres to the
13 minimization policies and procedures it adopts pursuant to section 4
14 of this act, there is a rebuttable presumption that the agency has
15 complied with the minimization requirement under this section. This
16 presumption can be overcome by clear and convincing evidence to the
17 contrary.

18 NEW SECTION. **Sec. 7.** (1) It is lawful under this section for an
19 agency to operate an extraordinary sensing device without obtaining a
20 warrant if the agency reasonably determines that the operation does
21 not intend to collect personally identifiable information. Allowable
22 purposes under this subsection include, but are not limited to:

23 (a) Monitoring to discover, locate, observe, and prevent forest
24 fires;

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

27 (c) Surveying for wildlife management, habitat preservation, or
28 environmental damage; and

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

31 (2) No agency may make any effort to identify an individual from
32 the information collected by the operation or to associate any
33 information collected by the operation with a particular individual,
34 nor shall the information be disclosed to a third party unless that
35 party agrees to be bound by the same restrictions. These restrictions
36 shall not apply if there is probable cause that the information is
37 evidence of criminal activity.

1 NEW SECTION. **Sec. 8.** (1) It is lawful under this section for
2 any agency to operate an extraordinary sensing device and disclose
3 personally identifiable information from the operation without
4 obtaining a warrant if:

5 (a) The agency reasonably determines that:

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

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

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

14 (b) The agency reasonably determines that an emergency situation
15 exists that:

16 (i) Does not involve criminal activity;

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

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

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

24 (d) The operation is limited to use for traffic crash scene
25 photography;

26 (e) The operation is part of a training exercise conducted on a
27 military base and the extraordinary sensing device does not collect
28 personally identifiable information on persons located outside the
29 military base;

30 (f) The operation is for training, testing, or research purposes
31 by an agency and is not intended to collect personally identifiable
32 information without the specific written consent of any individual
33 whose personally identifiable information is collected; or

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

37 (2) Upon completion of the operation of an extraordinary sensing
38 device pursuant to subsection (1)(b) through (g) of this section, any
39 personally identifiable information obtained must be treated as

1 information collected on an individual other than a target of a
2 warrant for purposes of section 10 of this act.

3 NEW SECTION. **Sec. 9.** (1) An extraordinary sensing device may be
4 operated by an agency and personally identifiable information from
5 the operation disclosed, if the operation and collection of
6 personally identifiable information is pursuant to a search warrant
7 issued by a court of competent jurisdiction, and the operation,
8 collection, and disclosure are compliant with the provisions of this
9 chapter.

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

14 (3) Within ten days of the execution of a search warrant, the
15 officer executing the warrant must serve a copy of the warrant upon
16 the target of the warrant, except if notice is delayed pursuant to
17 this section.

18 (4) An agency acting under this section may, when a warrant is
19 sought, include in the petition a request, which the court shall
20 grant, for an order delaying the notification for a period not to
21 exceed ninety days if the court determines that there is reason to
22 believe that notification of the existence of the warrant may have an
23 adverse result.

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

25 (a) Placing the life or physical safety of an individual in
26 danger;

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

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

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

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

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

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

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

1 (a) States with reasonable specificity the nature of the law
2 enforcement inquiry; and

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

7 NEW SECTION. **Sec. 10.** (1) Personally identifiable information
8 collected during the operation of an extraordinary sensing device
9 authorized under sections 7 through 9 of this act may not be used,
10 copied, or disclosed for any purpose after conclusion of the
11 operation for which the extraordinary sensing device was authorized,
12 unless there is probable cause that the personally identifiable
13 information is evidence of criminal activity.

14 (2) Personally identifiable information must be deleted, within
15 thirty days if the personally identifiable information was collected
16 on a target of a warrant authorizing the operation of the
17 extraordinary sensing device and within ten days for other personally
18 identifiable information, after there is no longer probable cause
19 that the personally identifiable information is evidence of criminal
20 activity that may be prosecuted. The foregoing shall only apply to
21 the extent the personally identifiable information can be destroyed
22 without destroying other evidence relevant to a pending criminal
23 investigation or case. There is a presumption that personally
24 identifiable information is not evidence of criminal activity if that
25 personally identifiable information is not used in a criminal
26 prosecution within one year of collection.

27 NEW SECTION. **Sec. 11.** Whenever any personally identifiable
28 information from an extraordinary sensing device has been acquired,
29 no part of such personally identifiable information and no evidence
30 derived therefrom may be received in evidence in any trial, hearing,
31 or other proceeding in or before any court, grand jury, department,
32 officer, agency, regulatory body, legislative committee, or other
33 authority of the state or a political subdivision thereof if the
34 collection or disclosure of that personally identifiable information
35 would be in violation of this subchapter.

36 NEW SECTION. **Sec. 12.** Any person who knowingly violates this
37 subchapter is subject to legal action for damages, to be brought by

1 any other person claiming that a violation of this subchapter has
2 injured his or her business, his or her person, or his or her
3 reputation. In addition, the individual is entitled to reasonable
4 attorneys' fees and other costs of litigation.

5 NEW SECTION. **Sec. 13.** Any use of an extraordinary sensing
6 device must fully comply with all federal aviation administration
7 requirements and guidelines. Compliance with the terms of this
8 subchapter is mandatory and supplemental to compliance with federal
9 aviation administration requirements and guidelines.

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

- 13 (a) Operator name;
- 14 (b) Identity of the agency;
- 15 (c) Date and time of the flight;
- 16 (d) Categories of information collected for each use;
- 17 (e) The purpose of using the extraordinary sensing device; and
- 18 (f) Whether a warrant was obtained prior to use.

19 (2) Each state agency having jurisdiction over criminal law or
20 regulatory violation enforcement, for any calendar year in which the
21 agency has used an extraordinary sensing device, must prepare an
22 annual report including, at a minimum in each case, the following:

- 23 (a) The number of uses of an extraordinary sensing device
24 organized by types of incidents and types of justification for use;
- 25 (b) The number of criminal or regulatory investigations aided by
26 the use and how the use was helpful to the investigation;
- 27 (c) The number of uses of an extraordinary sensing device for
28 reasons other than criminal or regulatory investigations and how the
29 use was helpful;
- 30 (d) The frequency and type of data collected for individuals or
31 areas other than targets;
- 32 (e) The total cost of the extraordinary sensing device;
- 33 (f) The dates when personally identifiable information and other
34 data was deleted or destroyed in compliance with the act;
- 35 (g) The number of warrants requested, issued, and extended; and
- 36 (h) Additional information and analysis the governing body deems
37 useful.

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

5 (a) The types of extraordinary sensing devices used, the purposes
6 for which each type of extraordinary sensing device was used, the
7 circumstances under which use was authorized, and the name of the
8 officer or official who authorized the use;

9 (b) Whether deployment of the device was imperceptible to the
10 public;

11 (c) The specific kinds of personally identifiable information
12 that the extraordinary sensing device collected about individuals;

13 (d) The length of time for which any personally identifiable
14 information collected by the extraordinary sensing device was
15 retained;

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

19 (f) An individual point of contact for citizen complaints and
20 concerns.

21 (4) The annual reports required pursuant to this section must be
22 filed electronically to the office of financial management, who must
23 compile the results and submit them electronically to the relevant
24 committees of the legislature by September 1st of each year,
25 beginning in 2016.

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

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

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

1 NEW SECTION. **Sec. 18.** If any provision of this act or its
2 application to any person or circumstance is held invalid, the
3 remainder of the act or the application of the provision to other
4 persons or circumstances is not affected.

5 NEW SECTION. **Sec. 19.** This act expires July 1, 2020."

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6 On page 1, line 1 of the title, after "surveillance;" strike the
7 remainder of the title and insert "adding new sections to chapter
8 9.73 RCW; creating a new section; prescribing penalties; and
9 providing an expiration date."

EFFECT: (1) The definition for personal information is replaced
with personally identifiable information used to distinguish an
individual's identity including name, social security number, and
biometric records.

(2) A sunset clause is added for July 1, 2020.

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