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## Judiciary Committee

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### HB 1108

**Title:** An act relating to controlled substances trafficking investigations pursuant to the privacy act.

**Brief Description:** Addressing controlled substances trafficking investigations pursuant to the privacy act.

**Sponsors:** Representative Klippert.

#### Brief Summary of Bill

- Amends the Washington Privacy Act to establish new provisions authorizing the interception and recording of communications in cases involving trafficking in controlled substances.
- Establishes procedures for the application and issuance of warrants for the interception of communications in investigations involving trafficking in controlled substances, and provides for the sharing, use, and admissibility of evidence gathered in these investigations.

**Hearing Date:** 1/24/17

**Staff:** Edie Adams (786-7180).

#### Background:

The nonconsensual interception and recording of private conversations and communication is regulated under the Washington Privacy Act and under provisions of federal law.

#### Washington Privacy Act.

The Privacy Act restricts the interception or recording of private communications or conversations. As a general rule, it is unlawful for any person, whether a government official or private person, to intercept or record a private communication or conversation without first obtaining the consent of all persons participating in the communication or conversation.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Exceptions to this general rule are provided in several instances, each with its own set of procedural requirements.

*No-party Consent:* The interception or recording of a private communication where no party to the communication has consented is authorized only in limited circumstances. With prior judicial authorization, the police may intercept a communication without the consent of any party if there are reasonable grounds to believe evidence will be obtained that is essential to the protection of national security, the preservation of human life, or the prevention of arson or riot. Evidence lawfully obtained with judicial authorization under this provision is inadmissible in any civil or criminal proceeding, unless the case involves a crime that might jeopardize national security.

*One-party Consent - Prior Judicial Authorization:* If at least one party to a communication has consented, the police may get prior judicial authorization for an interception upon a showing of probable cause that the communication will reveal evidence of a felony. An authorization under these circumstances is limited to seven days. If there is probable cause to believe the communications involves a controlled substances offense, the court may authorize the interception even though the true name of the nonconsenting party, or the particular time and place for the interception is not known at the time of the request if the authorization describes the nonconsenting party and subject matter of the communication with reasonable certainty. Authorizations under this circumstance can last up to 14 days.

*One-party Consent - Law Enforcement Authorization:* As part of a bona fide criminal investigation, a chief law enforcement official may authorize an officer to intercept, transmit, or record a private communication or conversation with the consent of only one party if there is probable cause to believe the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession of controlled substances, or crimes involving the commercial sexual abuse of a minor. The officer conducting the interception must complete a written report containing specified information and submit the report to the court for judicial review of the authorization within 15 days afterwards. An authorization under these circumstances is limited to 24 hours and may not be extended more than twice. Evidence obtained in this manner is admissible only in prosecuting certain offenses involving controlled substances or commercial sexual abuse of a minor, and in a few other limited circumstances.

*Other Circumstances:* Communications or conversations of an emergency nature, that convey threats of extortion, blackmail, or bodily harm, that occur anonymously, repeatedly, or at an extremely inconvenient hour, or that relate to communications by a hostage holder or barricaded person may be recorded or intercepted with the consent of only one party.

#### Federal Law.

Federal law generally prohibits the unauthorized, nonconsensual interception of wire, oral, or electronic communications by government agencies as well as private parties. Under the federal law, interceptions of communications where no party consents to the interception are allowed upon judicial authorization. Federal law does not prohibit the interception of private communications where one party to the communication has consented to the interception.

A judge may issue a warrant authorizing interception of communications for up to 30 days upon a showing of probable cause that the interception will reveal evidence that a person is

committing, has committed, or is about to commit any of numerous listed offenses under the law. The federal law contains detailed procedures for obtaining warrants, including particularized information that must be included in warrant applications, information that must be contained in issued warrants, and standards for executing and extending the warrant. The federal law also regulates the disclosure and use of authorized intercepted communications by investigative and law enforcement officers and use of intercepted communications as evidence in civil or criminal proceedings.

### **Summary of Bill:**

The Privacy Act is amended to establish new provisions authorizing the interception and recording of communications in cases involving trafficking in controlled substances. These provisions closely follow the federal law governing interception of private communications. "Trafficking in controlled substances" means the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances, legend drugs, or imitation controlled substances, or conspiracy to commit any of these offenses, when the offense involves the collaboration of two or more persons and the volume of controlled substances, legend drugs, or imitation controlled substances at issue exceeds one pound.

### Procedural Requirements for Intercept Warrants.

The Attorney General or his or her designee, or a prosecutor, may authorize an application to the superior court for a warrant to intercept wire, oral, or electronic communications that may provide evidence of an act of trafficking in controlled substances.

*Contents of the Application.* An application for the interception of communications relating to trafficking in controlled substances must include:

- the identity of the officer making the application and the authorizing officer;
- facts and circumstances relied upon by the applicant, including:
  - details of the particular crime in question;
  - description of the nature and location of the facilities or places where the interception is to occur;
  - particular description of the type of communication involved; and
  - identity of the suspect, if known.
- a statement of whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed or are too dangerous;
- the period of time for which the interception is to be maintained;
- the facts concerning all previous applications for interception from the same persons, facilities, or places;
- if the application is for an extension, a statement of the results thus far obtained; and
- any additional information required by the court.

*Standards for Issuance of an Intercept Warrant.* The court may enter an ex parte order authorizing interception if it determines that normal investigative procedures have failed or appear reasonably unlikely to succeed or are too dangerous, and there is probable cause to believe that:

- a person is committing, has committed, or is about to commit an act of trafficking in controlled substances;

- particular communications concerning the offense will be obtained through the interception; and
- the facilities or place from which the communications are to be intercepted are being used in connection with the offense or used by the person.

Exceptions are provided to the requirement that the application must include, and the order be based on, a specific description of the location and nature of the facilities or places from which an interception is to occur. The specification requirement does not apply if:

- in the case of an oral communication, the application identifies the suspect and contains a full and complete statement as to why specification is not practical, and the court finds specification is not practical; or
- in the case of a wire or electronic communication, the application identifies the suspect and the court finds that the applicant has shown there is probable cause to believe the suspect's actions could have the effect of thwarting the interception from a specified facility. An authorization under this exception must be limited to the time it is reasonable to presume the suspect will be reasonably near the instrument through which the communication is to be transmitted.

*Contents of the Warrant.* Orders authorizing the interception of communications must contain certain specified information based on the application and the court's findings. A warrant is valid only as long as necessary to achieve its objective, and in no event longer than 30 days.

Extensions of up to 30 days may be granted upon subsequent applications. The order may require periodic progress reports. Any recordings must be made in a way that protects against editing or alterations, and the recordings must be delivered to the court for sealing. Applications and orders also must be sealed. The sealed items must be kept for at least 10 years and cannot be destroyed except upon order of the court.

Within 90 days of termination of an order, the persons named in the order must be served with notice of the entry of the order, the applicable time period of authorized interception, and whether communications were or were not intercepted. No evidence derived from the intercepted communications may be used in a proceeding unless each party receives a copy of the intercept order and application at least 10 days prior to the proceeding. Grounds and procedures are established for a person to move to suppress the contents of intercepted communications, or evidence derived from the contents, where the interception did not comply with the requirements of the act.

#### Disclosure and Use of Intercepted Communications.

Standards are provided for the disclosure and use of information obtained through interceptions authorized in controlled substances trafficking investigations.

- Officers who obtain intercepted communications may use that evidence as appropriate in accordance with official duties and may disclose that evidence to other law enforcement officers for official use, including officers from other states and federal agents in certain circumstances.
- Any person lawfully receiving information or evidence contained in intercepted communications may testify regarding the contents of those communications.
- An officer who intercepts communications relating to a different offense while in the course of a lawful interception may use that information in the course of official duties,

including disclosure to other officers. The evidence of another crime may be testified to in state court upon a showing that it was obtained in accordance with the intercept authorization.

- State officers are authorized to disclose to federal officials any evidence of foreign intelligence or counterintelligence obtained during a lawful interception under the controlled substances trafficking provisions.
- Federal agents who have received evidence regarding trafficking in controlled substances through use of an authorized interception may testify in a state proceeding as to that evidence, so long as, in cases in which there was no consenting communicating party, the intercepted evidence was acquired with prior judicial authorization.

#### Miscellaneous Provisions.

Various terms are defined for the purposes of the provisions governing interception of private communications in investigations relating to trafficking in controlled substances.

The Attorney General's concurrent authority with county prosecutors to investigate violations of the Privacy Act is extended to the new trafficking in controlled substances provisions of the Privacy Act.

**Appropriation:** None.

**Fiscal Note:** Requested on 1/19/17

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.