

1 **SHB 2406 - H AMD 184 ADOPTED 02-10-96**

2 By Representatives Sterk, Appelwick and Sheahan

3 Strike everything after the enacting clause and insert the
4 following:

5 "Sec. 1. RCW 9.73.070 and 1994 c 49 s 1 are each amended to
6 read 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
11 and any activity of any officer, agent or employee of a common
12 carrier who performs any act otherwise prohibited by this law in
13 the 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
19 wire or electronic communication service or to the protection of
20 the rights or property of such common carrier, or to the protection
21 of users of the common carrier's service from abuse of service or
22 unlawful use of service;

23 (b) To record the fact that a wire or electronic communication
24 was initiated or completed in order to protect such common carrier,
25 another common carrier furnishing service toward the completion of
26 the wire communication, or a user of that service, from fraudulent,
27 unlawful, or abusive use of service; or

28 (c) Where the consent of the user of that service has been
29 obtained.

30 (2) "Common carrier" as used in this section means any person
31 engaged as a common carrier or public service company for hire in

1 intrastate, interstate or foreign communication by wire or radio or
2 in intrastate, interstate or foreign radio transmission of energy.

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

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

7 (b) A 911 or enhanced 911 emergency service as defined in RCW
8 82.14B.020, for purposes of aiding public health or public safety
9 agencies to respond to calls placed for emergency assistance.

10
11 NEW SECTION. **Sec. 2.** A new section is added to chapter 9.73
12 RCW to read as follows:

13 (1) As used in this section:

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

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

28 (i) Any wire or oral communication;

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

30 or

31 (iii) Any communication from a tracking device.

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

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

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

18 (2) No person may install or use a pen register or trap and
19 trace device without a prior court order issued under this section
20 except as provided under subsection (6) of this section or section
21 1 of this act.

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

31 (4) If the court finds that the information likely to be
32 obtained by such installation and use is relevant to an ongoing
33 criminal investigation and finds reason to believe that the pen

1 register or trap and trace device will lead to obtaining evidence
2 of a crime, contraband, fruits of crime, things criminally
3 possessed, weapons, or other things by means of which a crime has
4 been committed or reasonably appears about to be committed, or will
5 lead to learning the location of a person who is unlawfully
6 restrained or reasonably believed to be a witness in a criminal
7 investigation or for whose arrest there is probable cause, the
8 court shall enter an ex parte order authorizing the installation
9 and use of a pen register or a trap and trace device. The order
10 shall specify:

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

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

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

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

23 The order shall direct, if the applicant has requested, the
24 furnishing of information, facilities, and technical assistance
25 necessary to accomplish the installation of the pen register or
26 trap and trace device. An order issued under this section shall
27 authorize the installation and use of a pen register or a trap and
28 trace device for a period not to exceed sixty days. Extensions of
29 such an order may be granted, but only upon a new application for
30 an order under subsection (3) of this section and upon the judicial
31 findings required by this subsection. The period of extension
32 shall be for a period not to exceed sixty days.

1 An order authorizing or approving the installation and use of
2 a pen register or a trap and trace device shall direct that the
3 order be sealed until otherwise ordered by the court and that the
4 person owning or leasing the line to which the pen register or trap
5 and trace device is attached, or who has been ordered by the court
6 to provide assistance to the applicant, not disclose the existence
7 of the pen register or trap and trace device or the existence of
8 the investigation to the listed subscriber or to any other person,
9 unless or until otherwise ordered by the court.

10 (5) Upon the request of an officer of a law enforcement agency
11 authorized to install and use a pen register under this chapter, a
12 provider of wire or electronic communication service, landlord,
13 custodian, or other person shall furnish such law enforcement
14 officer forthwith all information, facilities, and technical
15 assistance necessary to accomplish the installation of the pen
16 register unobtrusively and with a minimum of interference with the
17 services that the person so ordered by the court accords the party
18 with respect to whom the installation and use is to take place, if
19 such assistance is directed by a court order as provided in
20 subsection (4) of this section.

21 Upon the request of an officer of a law enforcement agency
22 authorized to receive the results of a trap and trace device under
23 this chapter, a provider of a wire or electronic communication
24 service, landlord, custodian, or other person shall install such
25 device forthwith on the appropriate line and shall furnish such law
26 enforcement officer all additional information, facilities, and
27 technical assistance including installation and operation of the
28 device unobtrusively and with a minimum of interference with the
29 services that the person so ordered by the court accords the party
30 with respect to whom the installation and use is to take place, if
31 such installation and assistance is directed by a court order as
32 provided in subsection (4) of this section. Unless otherwise
33 ordered by the court, the results of the trap and trace device

1 shall be furnished to the officer of a law enforcement agency,
2 designated in the court order, at reasonable intervals during
3 regular business hours for the duration of the order.

4 A provider of a wire or electronic communication service,
5 landlord, custodian, or other person who furnishes facilities or
6 technical assistance pursuant to this subsection shall be
7 reasonably compensated by the law enforcement agency that requests
8 the facilities or assistance for such reasonable expenses incurred
9 in providing such facilities and assistance.

10 No cause of action shall lie in any court against any provider
11 of a wire or electronic communication service, its officers,
12 employees, agents, or other specified persons for providing
13 information, facilities, or assistance in accordance with the terms
14 of a court order under this section. A good faith reliance on a
15 court order under this section, a request pursuant to this section,
16 a legislative authorization, or a statutory authorization is a
17 complete defense against any civil or criminal action brought under
18 this chapter or any other law.

19 (6) Notwithstanding any other provision of this chapter, a law
20 enforcement officer and a prosecuting attorney or deputy
21 prosecuting attorney who jointly and reasonably determine that an
22 emergency situation exists that involves immediate danger of death
23 or serious bodily injury to any person that requires the
24 installation and use of a pen register or a trap and trace device
25 before an order authorizing such installation and use can, with due
26 diligence, be obtained, and there are grounds upon which an order
27 could be entered under this chapter to authorize such installation
28 and use, may have installed and use a pen register or trap and
29 trace device if, within forty-eight hours after the installation
30 has occurred, or begins to occur, an order approving the
31 installation or use is issued in accordance with subsection (4) of
32 this section. In the absence of an authorizing order, such use
33 shall immediately terminate when the information sought is

1 obtained, when the application for the order is denied or when
2 forty-eight hours have lapsed since the installation of the pen
3 register or trap and trace device, whichever is earlier. If an
4 order approving the installation or use is not obtained within
5 forty-eight hours, any information obtained is not admissible as
6 evidence in any legal proceeding. The knowing installation or use
7 by any law enforcement officer of a pen register or trap and trace
8 device pursuant to this subsection without application for the
9 authorizing order within forty-eight hours of the installation
10 shall constitute a violation of this chapter and be punishable as
11 a class C felony. A provider of a wire or electronic service,
12 landlord, custodian, or other person who furnished facilities or
13 technical assistance pursuant to this subsection shall be
14 reasonably compensated by the law enforcement agency that requests
15 the facilities or assistance for such reasonable expenses incurred
16 in providing such facilities and assistance."

17

18 Correct the title

EFFECT: Explicitly provides that no person may install or use a pen register or trap and trace device without prior court authorization except as specifically authorized under the act. The provision allowing a law enforcement officer specially designated by a prosecuting attorney to authorize installation and use without a court order is amended to require that the law enforcement officer and a prosecuting attorney or deputy prosecuting attorney must jointly determine that an emergency exists involving immediate danger of death or serious bodily injury to any person. Section three of the substitute bill is deleted. This section made amendments to current law to allow evidence obtained by intercepting or recording a private communication with the consent of one of the parties to be admissible: (1) in any civil or criminal proceeding (currently may only be admissible in a drug prosecution) if all procedural requirements were met; or (2) with the permission of any nonconsenting party to the intercepted or recorded communication (currently law requires the permission of the person whose communication was intercepted or recorded).