

2 **ESHB 2406** - S COMM AMD
3 By Committee on Law & Justice

4 ADOPTED AS AMENDED 3/1/96

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 reason to believe that the pen register or trap
19 and trace device will lead to obtaining evidence of a crime,
20 contraband, fruits of crime, things criminally possessed, weapons, or
21 other things by means of which a crime has been committed or reasonably
22 appears about to be committed, or will lead to learning the location of
23 a person who is unlawfully restrained or reasonably believed to be a
24 witness in a criminal investigation or for whose arrest there is
25 probable cause, the court shall enter an ex parte order authorizing the
26 installation and use of a pen register or a trap and trace device. The
27 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. Extensions of such an order may
7 be granted, but only upon a new application for an order under
8 subsection (3) of this section and upon the judicial findings required
9 by this subsection. The period of extension shall be for a period not
10 to exceed sixty days.

11 An order authorizing or approving the installation and use of a pen
12 register or a trap and trace device shall direct that the order be
13 sealed until otherwise ordered by the court and that the person owning
14 or leasing the line to which the pen register or trap and trace device
15 is attached, or who has been ordered by the court to provide assistance
16 to the applicant, not disclose the existence of the pen register or
17 trap and trace device or the existence of the investigation to the
18 listed subscriber or to any other person, unless or until otherwise
19 ordered by the court.

20 (5) Upon the request of an officer of a law enforcement agency
21 authorized to install and use a pen register under this chapter, a
22 provider of wire or electronic communication service, landlord,
23 custodian, or other person shall furnish such law enforcement officer
24 forthwith all information, facilities, and technical assistance
25 necessary to accomplish the installation of the pen register
26 unobtrusively and with a minimum of interference with the services that
27 the person so ordered by the court accords the party with respect to
28 whom the installation and use is to take place, if such assistance is
29 directed by a court order as provided in subsection (4) of this
30 section.

31 Upon the request of an officer of a law enforcement agency
32 authorized to receive the results of a trap and trace device under this
33 chapter, a provider of a wire or electronic communication service,
34 landlord, custodian, or other person shall install such device
35 forthwith on the appropriate line and shall furnish such law
36 enforcement officer all additional information, facilities, and
37 technical assistance including installation and operation of the device
38 unobtrusively and with a minimum of interference with the services that
39 the person so ordered by the court accords the party with respect to

1 whom the installation and use is to take place, if such installation
2 and assistance is directed by a court order as provided in subsection
3 (4) of this section. Unless otherwise ordered by the court, the
4 results of the trap and trace device shall be furnished to the officer
5 of a law enforcement agency, designated in the court order, at
6 reasonable intervals during regular business hours for the duration of
7 the order.

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

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

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

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

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16 On page 1, line 2 of the title, after "communications;" strike the
17 remainder of the title and insert "adding a new section to chapter 9.73
18 RCW; and prescribing penalties."

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