

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

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

7 "Sec. 1. RCW 9.73.070 and 1994 c 49 s 1 are each amended to read
8 as follows:

9 (1) The provisions of this chapter shall not apply to any activity
10 in connection with services provided by a common carrier pursuant to
11 its tariffs on file with the Washington utilities and transportation
12 commission or the Federal Communication Commission and any activity of
13 any officer, agent or employee of a common carrier who performs any act
14 otherwise prohibited by this law in the construction, maintenance,
15 repair and operations of the common carrier's communications services,
16 facilities, or equipment or incident to the use of such services,
17 facilities or equipment, and shall not apply to the use of a pen
18 register or a trap and trace device by such common carrier:

19 (a) Relating to the operation, maintenance, and testing of a wire
20 or electronic communication service or to the protection of the rights
21 or property of such common carrier, or to the protection of users of
22 the common carrier's service from abuse of service or unlawful use of
23 service;

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

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

31 (2) "Common carrier" as used in this section means any person
32 engaged as a common carrier or public service company for hire in
33 intrastate, interstate or foreign communication by wire or radio or in
34 intrastate, interstate or foreign radio transmission of energy.

35 ~~((+2))~~ (3) The provisions of this chapter shall not apply to:

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

4 (b) A 911 or enhanced 911 emergency service as defined in RCW
5 82.14B.020, for purposes of aiding public health or public safety
6 agencies to respond to calls placed for emergency assistance.

7 NEW SECTION. **Sec. 2.** 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.

37 (e) "Trap and trace device" means a device that captures the
38 incoming electronic or other impulses that identify the originating

1 number of an instrument or device from which a wire or electronic
2 communication was transmitted.

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

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

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

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

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

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

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

37 The order shall direct, if the applicant has requested, the
38 furnishing of information, facilities, and technical assistance
39 necessary to accomplish the installation of the pen register or trap

1 and trace device. An order issued under this section shall authorize
2 the installation and use of a pen register or a trap and trace device
3 for a period not to exceed sixty days. Extensions of such an order may
4 be granted, but only upon a new application for an order under
5 subsection (3) of this section and upon the judicial findings required
6 by this subsection. The period of extension shall be for a period not
7 to exceed sixty days.

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

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

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

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

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

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

20 (6) Notwithstanding any other provision of this chapter, a law
21 enforcement officer and a prosecuting attorney or deputy prosecuting
22 attorney who jointly and reasonably determine that an emergency
23 situation exists that involves immediate danger of death or serious
24 bodily injury to any person that requires the installation and use of
25 a pen register or a trap and trace device before an order authorizing
26 such installation and use can, with due diligence, be obtained, and
27 there are grounds upon which an order could be entered under this
28 chapter to authorize such installation and use, may have installed and
29 use a pen register or trap and trace device if, within forty-eight
30 hours after the installation has occurred, or begins to occur, an order
31 approving the installation or use is issued in accordance with
32 subsection (4) of this section. In the absence of an authorizing
33 order, such use shall immediately terminate when the information sought
34 is obtained, when the application for the order is denied or when
35 forty-eight hours have lapsed since the installation of the pen
36 register or trap and trace device, whichever is earlier. If an order
37 approving the installation or use is not obtained within forty-eight
38 hours, any information obtained is not admissible as evidence in any
39 legal proceeding. The knowing installation or use by any law

1 enforcement officer of a pen register or trap and trace device pursuant
2 to this subsection without application for the authorizing order within
3 forty-eight hours of the installation shall constitute a violation of
4 this chapter and be punishable as a gross misdemeanor. A provider of
5 a wire or electronic service, landlord, custodian, or other person who
6 furnished facilities or technical assistance pursuant to this
7 subsection shall be reasonably compensated by the law enforcement
8 agency that requests the facilities or assistance for such reasonable
9 expenses incurred in providing such facilities and assistance."

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13 On page 1, line 2 of the title, after "communications;" strike the
14 remainder of the title and insert "amending RCW 9.73.070; adding a new
15 section to chapter 9.73 RCW; and prescribing penalties."

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