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**SENATE BILL 5732**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** Senators Jayapal, Hasegawa, Kohl-Welles, Chase, and Darneille

AN ACT Relating to law enforcement oversight recorders; amending RCW 9.73.090; reenacting and amending RCW 42.56.240; adding a new chapter to Title 10 RCW; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature finds that accounts of interactions between law enforcement officers and members of the public often have wide variations. Recordings of such interactions could help determine the truth and serve as an effective deterrent to both law enforcement misconduct and false allegations of misconduct. The legislature further finds that recording devices have the potential to serve as a surveillance infrastructure, invade privacy, and subject members of the public to unwarranted public attention. Therefore, the legislature finds that the use of such recording devices should be closely regulated to provide effective oversight of law enforcement conduct without unduly infringing on privacy.

NEW SECTION. **Sec.**  The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Flag" means to identify a recording as potentially containing evidence that is useful for purposes of oversight of law enforcement conduct in a manner consistent with section 4 of this act.

(2) "Law enforcement oversight recorder" means a recorder that is mounted in a law enforcement vehicle marked pursuant to RCW 46.08.065 or attached to the uniform or otherwise worn by a law enforcement officer.

(3) "Recorder" means a device that captures and stores video, audio, or both, in either digital or analog format. It includes, but is not limited to, a video camera, voice recorder, or sound recorder.

(4) "Recording" means the audio and/or video of a specific incident captured by a law enforcement oversight recorder.

(5) "Redact" means to blur video or distort audio so that the identity of the subject in a recording is obscured sufficiently to render him or her unidentifiable.

(6) "Subject" means an individual, other than an on-duty law enforcement officer, whose communications or image is contained within a recording.

(7) "Use of force" means any physical coercion by a law enforcement officer including, but not limited to, any physical interaction between an officer and a civilian that causes or should reasonably be expected to cause pain, bodily harm, or physical injury, the complaint of pain or physical injury, disorientation, or intentionally pointing a firearm or beanbag shotgun or otherwise brandishing a weapon at a civilian.

NEW SECTION. **Sec.**  The use of law enforcement oversight recorders is subject to the following requirements:

(1) When a functional law enforcement oversight recorder is mounted in a vehicle or attached to a law enforcement officer or his or her uniform or otherwise provided to a law enforcement officer for use in recording his or her on‑duty activities, it must be operated to continuously record while law enforcement officers are on duty;

(2) For purposes of this section, a law enforcement officer is not considered on duty in the following circumstances:

(a) The law enforcement officer is using a public or private restroom, except when the officer's presence in the restroom is related to law enforcement activity; or

(b) The law enforcement officer is on a scheduled or routine break and not engaged in any law enforcement activity;

(3) A law enforcement officer communicating with a member of the public shall inform that person when a recording is being made by a law enforcement oversight recorder and the statement so informing the person shall be included in the recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances;

(4) The storage and retrieval system associated with a law enforcement oversight recorder must be capable of identifying and labeling the data collected by the law enforcement oversight recorder into recordings associated with specific law enforcement officers. The storage and retrieval system must also permit that those recordings may be further searched and segregated into shorter recordings of specific incidents that may be labeled to indicate the officers involved, members of the public, if known, date, time, and location, and allow access of a recording identified by any of those indicators. The system must allow recordings to be flagged pursuant to section 4 of this act, maintain flag status of recordings, and allow retaining and destroying recordings in compliance with section 5 of this act. The system must maintain a complete metadata log of the foregoing features and the capture, storage, alteration, and enhancement of every recording;

(5) Notwithstanding any other provision of law, all audio and video captured and stored by a law enforcement oversight recorder is for the exclusive use of investigations of potential law enforcement misconduct and may not be disclosed to any person or entity except as specified in section 6 of this act. Audio and video may be used only by law enforcement supervisors, internal investigation officers, and external investigators and prosecutors and only during investigations of potential law enforcement misconduct. Audio and video may not be used in a court in a pending action or proceeding unless the action or proceeding relates to or arises as a result of law enforcement misconduct.

NEW SECTION. **Sec.**  A recording may be flagged at any time it is maintained pursuant to section 5 of this act, but exclusively under the following circumstances:

(1) All recordings shall be flagged when related to an incident involving the use of force, or for which a complaint, formal or informal, is registered;

(2) A recording shall be flagged when requested by a subject of the recording;

(3) A recording shall be flagged when requested by any other person only if:

(a) The recording was not made inside a private residence; and

(b) The requester presents specific, articulable facts to support a reasonable belief that law enforcement misconduct occurred during the incident related to the recording;

(4) Once flagged, a recording shall not be unflagged.

NEW SECTION. **Sec.**  (1) All recordings shall be retained in a secure system that limits any individual or entity, except as necessary to comply with section 6 of this act or to effectuate oversight and accountability of police misconduct related to flagged recordings, from accessing, viewing, deleting, or distributing any recordings.

(2) Unflagged recordings shall be retained for not less than sixty days and not more than seventy-five days.

(3) Flagged recordings shall be retained for three years, or during the pendency of any investigation of potential law enforcement misconduct during the incident related to the recording, whichever time period is longer.

NEW SECTION. **Sec.**  (1) Disclosure of recordings shall be governed by the following:

(a) Flagged recordings shall be subject to public disclosure pursuant to chapter 42.56 RCW;

(b) A recording shall be disclosed to a subject of the recording, or to a third party with the written consent of the subject of the recording. If the recording has multiple subjects, the recording shall be redacted prior to disclosure, if feasible, to obscure the identity of all subjects who have not consented to disclosure;

(c) Unflagged recordings are confidential and shall not be disclosed or distributed to any person or entity without the consent of all subjects of the recording except as provided in (b) of this subsection.

(2) Any person who knowingly violates this section is guilty of a gross misdemeanor.

NEW SECTION. **Sec.**  Any person who violates the provisions of this chapter is subject to legal action for damages or equitable relief, to be brought by any other person claiming that a violation of this chapter has injured his or her business, his or her person, or his or her reputation. A person so injured is entitled to actual damages, including mental pain and suffering endured by him or her on account of violation of the provisions of this chapter, and reasonable attorneys' fees and other costs of litigation.

NEW SECTION. **Sec.**  (1) Any jurisdiction that uses law enforcement oversight recorders shall provide for an audit and evaluation of the law enforcement oversight recorder program, to be conducted by an independent entity outside the law enforcement agency. The audit and evaluation must be conducted at least biennially. The auditor shall examine actual use of law enforcement oversight recorders, the storage and retrieval system, use of force reports, incident complaints, requests for flagging, requests for public disclosure of recordings, and any other materials the auditor finds relevant to aid in program evaluation and assessment of compliance with this chapter. The auditor shall provide a report of the audit and evaluation to the governing body of the jurisdiction and make it available to the public.

(2) The report shall include:

(a) The number of law enforcement oversight recorders used, subdivided by the number mounted in vehicles and the number attached to uniforms;

(b) The hours of recordings made by law enforcement oversight recorders;

(c) The number and percentage of recordings flagged, subdivided by the justification for flagging;

(d) The number of complaints of police misconduct, and the percentage of those complaints in which a law enforcement oversight recording provided useful information to the investigation of the complaint;

(e) The number of requests for public disclosure of recordings, and the percentage of requests that were filled or denied, along with the reasons for denial; and

(f) Additional information and analysis that the auditor deems useful.

**Sec.**  RCW 9.73.090 and 2011 c 336 s 325 are each amended to read as follows:

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations, licensed emergency medical service providers, emergency communication centers, and poison centers;

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities;

(c) ((~~Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.~~

~~No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.~~

~~A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video~~))Recordings made by law enforcement officers pursuant to sections 2 through 8 of this act.

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.

(4) Authorizations issued under subsection (2) of this section shall be effective for not more than seven days, after which period the issuing authority may renew or continue the authorization for additional periods not to exceed seven days.

(5) If the judge or magistrate determines that there is probable cause to believe that the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW, the judge or magistrate may authorize the interception, transmission, recording, or disclosure of communications or conversations under subsection (2) of this section even though the true name of the nonconsenting party, or the particular time and place for the interception, transmission, recording, or disclosure, is not known at the time of the request, if the authorization describes the nonconsenting party and subject matter of the communication or conversation with reasonable certainty under the circumstances. Any such communication or conversation may be intercepted, transmitted, recorded, or disclosed as authorized notwithstanding a change in the time or location of the communication or conversation after the authorization has been obtained or the presence of or participation in the communication or conversation by any additional party not named in the authorization.

Authorizations issued under this subsection shall be effective for not more than fourteen days, after which period the issuing authority may renew or continue the authorization for an additional period not to exceed fourteen days.

**Sec.**  RCW 42.56.240 and 2013 c 315 s 2, 2013 c 190 s 7, and 2013 c 183 s 1 are each reenacted and amended to read as follows:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

(2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;

(3) Any records of investigative reports prepared by any state, county, municipal, or other law enforcement agency pertaining to sex offenses contained in chapter 9A.44 RCW or sexually violent offenses as defined in RCW 71.09.020, which have been transferred to the Washington association of sheriffs and police chiefs for permanent electronic retention and retrieval pursuant to RCW 40.14.070(2)(b);

(4) License applications under RCW 9.41.070; copies of license applications or information on the applications may be released to law enforcement or corrections agencies;

(5) Information revealing the identity of child victims of sexual assault who are under age eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator;

(6) The statewide gang database referenced in RCW 43.43.762;

(7) Data from the electronic sales tracking system established in RCW 69.43.165;

(8) Information submitted to the statewide unified sex offender notification and registration program under RCW 36.28A.040(6) by a person for the purpose of receiving notification regarding a registered sex offender, including the person's name, residential address, and email address;

(9) Personally identifying information collected by law enforcement agencies pursuant to local security alarm system programs and vacation crime watch programs. Nothing in this subsection shall be interpreted so as to prohibit the legal owner of a residence or business from accessing information regarding his or her residence or business; ((~~and~~))

(10) The felony firearm offense conviction database of felony firearm offenders established in RCW 43.43.822; ((~~and~~))

(11) The identity of a state employee or officer who has in good faith filed a complaint with an ethics board, as provided in RCW 42.52.410, or who has in good faith reported improper governmental action, as defined in RCW 42.40.020, to the auditor or other public official, as defined in RCW 42.40.020; ((~~and~~))

(12) The following security threat group information collected and maintained by the department of corrections pursuant to RCW 72.09.745: (a) Information that could lead to the identification of a person's security threat group status, affiliation, or activities; (b) information that reveals specific security threats associated with the operation and activities of security threat groups; and (c) information that identifies the number of security threat group members, affiliates, or associates; and

(13) Recordings made by law enforcement officers pursuant to sections 2 through 8 of this act, except as specified in section 6 of this act.

NEW SECTION. **Sec.**  Sections 1 through 8 of this act constitute a new chapter in Title 10 RCW.

**--- END ---**