

ESHB 1440 - S COMM AMD

By Committee on Law & Justice

ADOPTED 4/14/2015

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** A new section is added to chapter 9.73
4 RCW to read as follows:

5 The state and its political subdivisions shall not, by means of a
6 cell site simulator device, collect or use a person's electronic data
7 or metadata without (1) that person's informed consent, (2) a
8 warrant, based upon probable cause, that describes with particularity
9 the person, place, or thing to be searched or seized, or (3) acting
10 in accordance with a legally recognized exception to the warrant
11 requirements.

12 **Sec. 2.** RCW 9.73.260 and 1998 c 217 s 1 are each amended to read
13 as follows:

14 (1) As used in this section:

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

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

28 (i) Any wire or oral communication;

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

30 (iii) Any communication from a tracking device, but solely to the
31 extent the tracking device is owned by the applicable law enforcement
32 agency.

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 used
11 by a provider or customer of a wire communication service for cost
12 accounting or other like purposes in the ordinary course of its
13 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 (f) "Cell site simulator device" means a device that transmits or
19 receives radio waves for the purpose of conducting one or more of the
20 following operations: (i) Identifying, locating, or tracking the
21 movements of a communications device; (ii) intercepting, obtaining,
22 accessing, or forwarding the communications, stored data, or metadata
23 of a communications device; (iii) affecting the hardware or software
24 operations or functions of a communications device; (iv) forcing
25 transmissions from or connections to a communications device; (v)
26 denying a communications device access to other communications
27 devices, communications protocols, or services; or (vi) spoofing or
28 simulating a communications device, cell tower, cell site, or
29 service, including, but not limited to, an international mobile
30 subscriber identity catcher or other invasive cell phone or telephone
31 surveillance or eavesdropping device that mimics a cell phone tower
32 and sends out signals to cause cell phones in the area to transmit
33 their locations, identifying information, and communications content,
34 or a passive interception device or digital analyzer that does not
35 send signals to a communications device under surveillance. A cell
36 site simulator device does not include any device used or installed
37 by an electric utility, as defined in RCW 19.280.020, solely to the
38 extent such device is used by that utility to measure electrical
39 usage, to provide services to customers, or to operate the electric
40 grid.

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

5 (3) A law enforcement officer may apply for and the superior
6 court may issue orders and extensions of orders authorizing the
7 installation and use of pen registers (~~and~~), trap and trace
8 devices, and cell site simulator devices as provided in this section.
9 The application shall be under oath and shall include the identity of
10 the officer making the application and the identity of the law
11 enforcement agency conducting the investigation. The applicant must
12 certify that the information likely to be obtained is relevant to an
13 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 that there is probable cause to believe that
17 the pen register (~~(or)~~), trap and trace device, or cell site
18 simulator device will lead to obtaining evidence of a crime,
19 contraband, fruits of crime, things criminally possessed, weapons, or
20 other things by means of which a crime has been committed or
21 reasonably appears about to be committed, or will lead to learning
22 the location of a person who is unlawfully restrained or reasonably
23 believed to be a witness in a criminal investigation or for whose
24 arrest there is probable cause, the court shall enter an ex parte
25 order authorizing the installation and use of a pen register (~~(or~~
26 ~~a)~~), trap and trace device, or cell site simulator device. The order
27 shall specify:

28 (a)(i) In the case of a pen register or trap and trace device,
29 the identity, if known, of the person to whom is leased or in whose
30 name is listed the telephone line to which the pen register or trap
31 and trace device is to be attached; or

32 (ii) In the case of a cell site simulator device, the identity,
33 if known, of (A) the person to whom is subscribed or in whose name is
34 subscribed the electronic communications service utilized by the
35 device to which the cell site simulator device is to be used and (B)
36 the person who possesses the device to which the cell site simulator
37 device is to be used;

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

1 (c)(i) In the case of a pen register or trap and trace device,
2 the number and, if known, physical location of the telephone line to
3 which the pen register or trap and trace device is to be attached
4 and, in the case of a trap and trace device, the geographic limits of
5 the trap and trace order; or

6 (ii) In the case of a cell site simulator device: (A) The
7 telephone number or other unique subscriber account number
8 identifying the wire or electronic communications service account
9 used by the device to which the cell site simulator device is to be
10 attached or used; (B) if known, the physical location of the device
11 to which the cell site simulator device is to be attached or used;
12 (C) the type of device, and the communications protocols being used
13 by the device, to which the cell site simulator device is to be
14 attached or used; (D) the geographic area that will be covered by the
15 cell site simulator device; (E) all categories of metadata, data, or
16 information to be collected by the cell site simulator device from
17 the targeted device including, but not limited to, call records and
18 geolocation information; (F) whether or not the cell site simulator
19 device will incidentally collect metadata, data, or information from
20 any parties or devices not specified in the court order, and if so,
21 what categories of information or metadata will be collected; and (G)
22 any disruptions to access or use of a communications or internet
23 access network that may be created by use of the device; and

24 (d) A statement of the offense to which the information likely to
25 be obtained by the pen register ((~~o~~)), trap and trace device, or
26 cell site simulator device relates.

27 The order shall direct, if the applicant has requested, the
28 furnishing of information, facilities, and technical assistance
29 necessary to accomplish the installation of the pen register ((~~o~~)),
30 trap and trace device, or cell site simulator device. An order issued
31 under this section shall authorize the installation and use of a: (i)
32 Pen register or a trap and trace device for a period not to exceed
33 sixty days; and (ii) a cell site simulator device for sixty days. An
34 extension of the original order may only be granted upon: A new
35 application for an order under subsection (3) of this section; and a
36 showing that there is a probability that the information or items
37 sought under this subsection are more likely to be obtained under the
38 extension than under the original order. No extension beyond the
39 first extension shall be granted unless: There is a showing that
40 there is a high probability that the information or items sought

1 under this subsection are much more likely to be obtained under the
2 second or subsequent extension than under the original order; and
3 there are extraordinary circumstances such as a direct and immediate
4 danger of death or serious bodily injury to a law enforcement
5 officer. The period of extension shall be for a period not to exceed
6 sixty days.

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

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

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

1 provided in subsection (4) of this section. Unless otherwise ordered
2 by the court, the results of the trap and trace device shall be
3 furnished to the officer of a law enforcement agency, designated in
4 the court order, at reasonable intervals during regular business
5 hours for the duration of the order.

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

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

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

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

14 (b) A law enforcement agency that authorizes the installation of
15 a pen register (~~(e)~~), trap and trace device, or cell site simulator
16 device under this subsection (6) shall file a monthly report with the
17 administrator for the courts. The report shall indicate the number of
18 authorizations made, the date and time of each authorization, whether
19 a court authorization was sought within forty-eight hours, and
20 whether a subsequent court authorization was granted.

21 (c) A law enforcement agency authorized to use a cell site
22 simulator device in accordance with this section must: (i) Take all
23 steps necessary to limit the collection of any information or
24 metadata to the target specified in the applicable court order; (ii)
25 take all steps necessary to permanently delete any information or
26 metadata collected from any party not specified in the applicable
27 court order immediately following such collection and must not
28 transmit, use, or retain such information or metadata for any purpose
29 whatsoever; and (iii) must delete any information or metadata
30 collected from the target specified in the court order within thirty
31 days if there is no longer probable cause to support the belief that
32 such information or metadata is evidence of a crime.

33 NEW SECTION. Sec. 3. If any provision of this act or its
34 application to any person or circumstance is held invalid, the
35 remainder of the act or the application of the provision to other
36 persons or circumstances is not affected.

37 NEW SECTION. Sec. 4. This act is necessary for the immediate
38 preservation of the public peace, health, or safety, or support of

1 the state government and its existing public institutions, and takes
2 effect immediately."

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3 On page 1, line 2 of the title, after "warrant;" strike the
4 remainder of the title and insert "amending RCW 9.73.260; adding a
5 new section to chapter 9.73 RCW; and declaring an emergency."

EFFECT: Devices used by electric utilities to measure electrical usage, to provide services to customers, or to operate the electric grid are not included in the definition of a cell site simulator device.

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