
SUBSTITUTE HOUSE BILL 2179

State of Washington

63rd Legislature

2014 Regular Session

By House Technology & Economic Development (originally sponsored by Representatives Morris and Morrell)

READ FIRST TIME 02/04/14.

1 AN ACT Relating to technology-enhanced government surveillance;
2 adding new sections to chapter 9.73 RCW; creating a new section; and
3 prescribing penalties.

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

5 NEW SECTION. **Sec. 1.** The rapid development of advanced
6 technologies that can monitor and record private behavior beyond the
7 ability of normal human senses has made it necessary for the
8 legislature to establish new technology-neutral standards to protect
9 individual liberty. While all technology is neutral in itself, it is
10 the application by humans that can be both good and bad. Whether
11 surveillance is conducted by the individual, groups, or the government,
12 citizens are not always aware when technology is being used to record
13 and monitor their personal and private behavior. Surveillance
14 conducted remotely and observing activities that were previously not
15 viewable by the naked eye is rapidly increasing. As a consequence,
16 conduct that was formerly considered private may be at risk of losing
17 legal protection from government intrusion--for example, satellites
18 equipped with high resolution cameras can peer into our backyards and
19 our skylights, or read the book we are reading on a park bench. The

1 legislature finds that, while constitutional protections against
2 government invasions into private affairs are strongest inside one's
3 home with the windows shuttered, the scope of legal protections drops
4 precipitously for the private affairs of an individual who leaves his
5 or her home, and for those private affairs of an individual conducted
6 inside the home but from a public vantage point. The legislature finds
7 that the right to privacy protects people, not places, and although the
8 expectation of privacy in public spaces may be lower than in private
9 spaces, it is not entirely eliminated. The legislature finds that when
10 legal protections for personal privacy fail to keep up with evolving
11 technology, the delicate balance of power between an individual and the
12 state may be disturbed in a manner destructive to the personal freedom
13 that is essential to our democracy. It is the intent of the
14 legislature to restore this delicate balance, by ensuring that the
15 gathering of personal information by the state is restricted to that
16 which is reasonably necessary to meet legitimate societal objectives,
17 and by establishing an expectation that certain forms of government
18 surveillance using extraordinary sensing devices may not be conducted,
19 from a vantage point not readily accessible to members of the general
20 public, without the supervision of a court, through a court-ordered
21 warrant.

22 NEW SECTION. **Sec. 2.** The definitions in this section apply
23 throughout this section and sections 3 through 10 of this act unless
24 the context clearly requires otherwise.

25 (1)(a) "Agency" means the state of Washington, its agencies, and
26 political subdivisions.

27 (b) "Agency" also includes any entity, whether public or private,
28 with which any of the entities identified in (a) of this subsection has
29 entered into a contractual relationship for the operation of a system
30 of personal information to accomplish an agency function.

31 (2) "Clear and conspicuous notice" means notice that is reasonably
32 easy to find and easily understandable in terms of content and style to
33 the average reader, informing the public of the form of surveillance
34 used and how the information obtained by the surveillance will be
35 stored, used, or disclosed.

36 (3) "Conduct surveillance" means to engage in or induce a third

1 party to engage in the act of collecting personal information using an
2 extraordinary sensing device.

3 (4) "Court of competent jurisdiction" means any district court of
4 the United States or any United States court of appeals that has
5 jurisdiction over the offense being investigated or is located in a
6 district in which surveillance with the assistance of the extraordinary
7 sensing device will be conducted, or a court of general jurisdiction
8 authorized by the state of Washington to issue search warrants.

9 (5) "Extraordinary sensing device" means a sensing device that:

10 (a) Is uncommon to society, meaning that as of January 1, 2014, the
11 sensing device was not generally commercially available to individual
12 consumers at retail stores physically located in the state; and

13 (b) Is used in such a manner that it allows personal information to
14 be acquired from an extraordinary vantage point that would not have
15 been easily acquired from an ordinary vantage point.

16 (6) "Extraordinary vantage point" means a vantage point to which an
17 ordinary member of the public does not have ready access.

18 (7) "Imperceptible" means highly unlikely to be perceived by the
19 unassisted senses of a human being of ordinary abilities.

20 (8) "Personal information" means all information that:

21 (a) Describes, locates, or indexes anything about a person
22 including, but not limited to, his or her social security number,
23 driver's license number, agency-issued identification number, student
24 identification number, real or personal property holdings derived from
25 tax returns, and the person's education, financial transactions,
26 medical history, ancestry, religion, political ideology, or criminal or
27 employment record;

28 (b) Affords a basis for inferring personal characteristics, such as
29 finger and voice prints, photographs, or things done by or to such a
30 person; and the record of the person's presence, registration, or
31 membership in an organization or activity, or admission to an
32 institution; or

33 (c) Describes, locates, or indexes anything about a person
34 including, but not limited to, intellectual property, trade secrets,
35 proprietary information, or operational information.

36 (9)(a) "Sensing device" means a device capable of remotely
37 acquiring personal information from its surroundings, using any
38 frequency of the electromagnetic spectrum.

1 (b) "Sensing device" does not include equipment whose sole function
2 is to provide information directly necessary for safe air navigation or
3 operation of a vehicle.

4 NEW SECTION. **Sec. 3.** (1) Except as otherwise specifically
5 authorized in this section and sections 4 through 6 of this act, it is
6 unlawful for the state of Washington, its agencies, and political
7 subdivisions to conduct surveillance with an extraordinary sensing
8 device from an extraordinary vantage point.

9 (2) The use of extraordinary sensing devices by state agencies and
10 law enforcement for the following purposes is not deemed "conducting
11 surveillance" under sections 2 through 10 of this act, as long as the
12 operation is not intended to collect personal information and the
13 purpose of the operation is not investigation of criminal activity or
14 investigation or enforcement of regulatory violations or noncompliance:

15 (a) Monitoring to discover, locate, observe, and prevent forest
16 fires;

17 (b) Monitoring an environmental or weather-related catastrophe or
18 damage from such an event;

19 (c) Surveying for wildlife management, habitat preservation, or
20 environmental damage; and

21 (d) Surveying for the assessment and evaluation of environmental or
22 weather-related damage, erosion, flood, or contamination.

23 NEW SECTION. **Sec. 4.** (1) The state of Washington, its agencies,
24 and political subdivisions may conduct surveillance otherwise
25 prohibited under section 3 of this act pursuant to a criminal search
26 warrant issued by a court of competent jurisdiction upon a finding of
27 probable cause.

28 (2) Evidence obtained in violation of sections 2 through 9 of this
29 act may not be used to support a finding of probable cause under this
30 section.

31 (3) Except as provided in section 8 of this act, no personal
32 information collected on an individual or area other than the target
33 that justified the issuance of the search warrant may be used, copied,
34 or disclosed for any purpose. This personal information must be
35 deleted as soon as possible, and in no event later than ten days after
36 collection.

1 NEW SECTION. **Sec. 5.** (1) It is lawful for the state of
2 Washington, its agencies, and political subdivisions to conduct
3 surveillance and disclose personal information derived from operation
4 of an extraordinary sensing device under the following exigent
5 circumstances:

6 (a) An agency elected official, appointed official, director, or
7 deputy director reasonably determines that:

8 (i) An emergency situation exists that involves criminal activity
9 and presents immediate danger of death or serious physical injury to
10 any person;

11 (ii) Addressing the danger identified in (a)(i) of this subsection
12 requires operation of the device before a warrant authorizing the
13 operation can, with due diligence, be obtained; and

14 (iii) There are grounds upon which such a warrant could be entered
15 to authorize such an operation.

16 (b) An agency employee or authorized agent reasonably determines
17 that an emergency situation exists and:

18 (i) The emergency presents an immediate danger of death or serious
19 physical injury to any person;

20 (ii) Addressing the emergency situation identified in (b)(i) of
21 this subsection requires operation of an extraordinary sensing device
22 to reduce the danger of death or serious physical injury;

23 (iii) The purpose of the operation is not investigation of criminal
24 activity; and

25 (iv) The operation is not intended to collect personal information.

26 (2)(a) An application for a warrant providing for the operation of
27 the extraordinary sensing device under subsection (1) of this section
28 must be made within forty-eight hours after the operation has occurred
29 or begins to occur.

30 (b) The surveillance must be immediately terminated when the
31 personal information sought is obtained or when the application for the
32 warrant is denied, whichever is earlier.

33 (c) Any personal information incidentally collected during the
34 operation must be deleted within seventy-two hours of the operation's
35 completion.

36 (3) In the event an application for a warrant under subsection
37 (2)(a) of this section is denied, the personal information obtained

1 from the operation of an extraordinary sensing device must be treated
2 as having been obtained in violation of this chapter for the purpose of
3 the exclusion of evidence under section 4(2) of this act.

4 (4) Any law enforcement or other agency that conducts surveillance
5 under the authority of this section must issue an annual public audit
6 as required under section 6 of this act.

7 NEW SECTION. **Sec. 6.** Agency procurement and use of extraordinary
8 sensing devices for surveillance purposes must be conducted in a
9 transparent manner that is open to public scrutiny, as provided in this
10 section.

11 (1) For the purposes of this section, "governing body" means the
12 council, commission, board, or other controlling body in which
13 legislative powers are vested, except where no governing body exists
14 other than the state legislature, in which case, "governing body" means
15 the chief executive officer responsible for the governance of the
16 agency.

17 (2) No agency may procure an extraordinary sensing device for
18 surveillance purposes without first obtaining explicit approval from
19 the agency's governing body.

20 (3) The governing body shall develop and make publicly available
21 written policies and procedures for the use of the extraordinary
22 sensing device and provide notice and opportunity for public comment
23 prior to adoption of the written policies and procedures.

24 (4) For any calendar year in which an agency has procured or used
25 an extraordinary sensing device to conduct surveillance, the agency
26 must prepare an annual report. The report must be made publicly
27 available and must at a minimum include the following:

28 (a) The types of extraordinary sensing devices used, the purposes
29 for which each type of extraordinary sensing device was used, the
30 circumstances under which use was authorized, and the name of the
31 officer or official who authorized the use;

32 (b) Whether deployment of the device was perceptible to the public;

33 (c) The specific kinds of personal information that the
34 extraordinary sensing device collected about individuals;

35 (d) The length of time for which any personal information collected
36 by the extraordinary sensing device was retained;

1 (e) The specific steps taken to mitigate the impact on an
2 individual's privacy, including protections against unauthorized use
3 and disclosure and a data minimization protocol; and

4 (f) An individual point of contact for citizen complaints and
5 concerns.

6 (5) The data minimization protocol required under subsection (4)(e)
7 of this section must state the steps taken by the agency to ensure
8 that:

9 (a) Personal information is collected for legitimate, limited, and
10 specifically stated purposes;

11 (b) Collection of personal information is limited to the minimum
12 amount necessary for the specified purposes and appropriate
13 technologies are used to minimize the data collected. For example, the
14 agency uses encryption where practicable to obscure the images of
15 individuals whose identity is not related to the regulatory purpose of
16 the surveillance;

17 (c) Personal information is only used and disclosed for the
18 purposes specified;

19 (d) Personal information is deleted pursuant to precise and
20 appropriately limited retention schedules and in such a manner that
21 prevents the agency or a third party from being able to reconstruct the
22 personal information after deletion; and

23 (e) Only authorized persons have access to information and data
24 obtained through surveillance and authorized persons have received
25 training on their duties and obligations to ensure the confidentiality
26 of the information and data.

27 (6) Each agency, if required to report under subsection (4) of this
28 section, must submit the annual report for the previous calendar year
29 by March 1st, beginning in 2015, as follows:

30 (a) In the case of local government agencies, the annual reports
31 must be submitted to the agency's governing body.

32 (b) In the case of state agencies, the annual reports must be
33 submitted to the joint legislative audit and review committee, who
34 shall compile the results and submit them to the legislature by
35 September 1st of each year, beginning in 2015.

36 NEW SECTION. **Sec. 7.** It is lawful for the state of Washington,
37 its agencies, and political subdivisions to conduct surveillance using

1 an extraordinary sensing device without meeting the requirements of
2 sections 3 through 6 of this act if the operation is part of a training
3 exercise conducted on a military base and the extraordinary sensing
4 device does not collect the personal information of persons located
5 outside the military base.

6 NEW SECTION. **Sec. 8.** Any personal information obtained in
7 violation of sections 3 through 7 of this act is inadmissible in any
8 civil or criminal case in all courts of general or limited jurisdiction
9 in this state, except:

10 (1) In an action for damages under section 10 of this act, with the
11 permission of the person whose rights have been violated; or

12 (2) In a criminal action in which the defendant is charged with a
13 crime, the commission of which would jeopardize national security.

14 NEW SECTION. **Sec. 9.** (1) The state of Washington, its agencies,
15 and political subdivisions may only use an extraordinary sensing device
16 to conduct surveillance for the purpose of regulatory enforcement of a
17 permitted or licensed activity if the agency gives the permittee or
18 licensee clear and conspicuous notice at the time that the permit or
19 license is granted or renewed that the permitted or licensed activity
20 is subject to surveillance by the agency.

21 (2) The requirements of this section are in addition to, and do not
22 replace, the requirements for an agency's conduct of surveillance
23 established in sections 3 through 6 of this act.

24 NEW SECTION. **Sec. 10.** Any person who intentionally violates the
25 provisions of sections 2 through 9 of this act is subject to legal
26 action for damages, to be brought by any other individual claiming that
27 a violation of sections 2 through 9 of this act has injured his or her
28 business, his or her person, or his or her reputation. An individual
29 so injured is entitled to actual damages, including mental pain and
30 suffering endured by the individual on account of the violation, or
31 liquidated damages, computed at the rate of one thousand dollars per
32 day for each day of violation, not to exceed ten thousand dollars. In
33 addition, the individual is entitled to reasonable attorneys' fees and
34 other costs of litigation.

1 NEW SECTION. **Sec. 11.** The attorney general is encouraged to
2 compile and make available to agencies a list of devices that it has
3 determined to be "extraordinary sensing devices." The legislature
4 delegates to the attorney general the authority to make such a
5 determination based on the definition established in section 2 of this
6 act and the stated intent of sections 2 through 10 of this act. It is
7 the intent of the legislature that the attorney general's determination
8 be accorded the utmost deference.

9 NEW SECTION. **Sec. 12.** Sections 2 through 11 of this act are each
10 added to chapter 9.73 RCW and codified with the subchapter heading of
11 "extraordinary sensing devices."

12 NEW SECTION. **Sec. 13.** If any provision of this act or its
13 application to any person or circumstance is held invalid, the
14 remainder of the act or the application of the provision to other
15 persons or circumstances is not affected.

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