
SUBSTITUTE SENATE BILL 5545

State of Washington

62nd Legislature

2011 Regular Session

By Senate Human Services & Corrections (originally sponsored by Senators Delvin, Kohl-Welles, Hargrove, Stevens, Fraser, Swecker, Chase, McAuliffe, White, Eide, Roach, Shin, and Regala)

READ FIRST TIME 02/21/11.

1 AN ACT Relating to police investigations of commercial sexual
2 exploitation of children and human trafficking; amending RCW 9.73.230
3 and 9.73.210; reenacting and amending RCW 9.68A.110; creating a new
4 section; and providing an effective date.

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

6 NEW SECTION. **Sec. 1.** The legislature finds increasing incidents
7 of commercial sexual exploitation of children in our state, and further
8 protection of victims require giving law enforcement agencies the tool
9 to have a unified victim-centered police investigation approach to
10 further protect victims by ensuring their safety by prosecuting
11 traffickers. The one-party consent provision permitted for drug
12 trafficking investigation passed in the comprehensive bill to
13 facilitate police investigation and prosecution of drug trafficking
14 crimes is a helpful tool to this end. The legislature also finds that
15 exceptions should be allowed for minors employed for investigation when
16 the minor is a victim and involves only electronic communication with
17 the defendant.

1 **Sec. 2.** RCW 9.73.230 and 2005 c 282 s 17 are each amended to read
2 as follows:

3 (1) As part of a bona fide criminal investigation, the chief law
4 enforcement officer of a law enforcement agency or his or her designee
5 above the rank of first line supervisor may authorize the interception,
6 transmission, or recording of a conversation or communication by
7 officers under the following circumstances:

8 (a) At least one party to the conversation or communication has
9 consented to the interception, transmission, or recording;

10 (b) Probable cause exists to believe that the conversation or
11 communication involves:

12 (i) The unlawful manufacture, delivery, sale, or possession with
13 intent to manufacture, deliver, or sell, controlled substances as
14 defined in chapter 69.50 RCW, or legend drugs as defined in chapter
15 69.41 RCW, or imitation controlled substances as defined in chapter
16 69.52 RCW;

17 (ii) A party engaging in the commercial sexual abuse of a minor
18 under RCW 9.68A.100, or promoting commercial sexual abuse of a minor
19 under RCW 9.68A.101, or promoting travel for commercial sexual abuse of
20 a minor under RCW 9.68A.102; and

21 (c) A written report has been completed as required by subsection
22 (2) of this section.

23 (2) The agency's chief officer or designee authorizing an
24 interception, transmission, or recording under subsection (1) of this
25 section, shall prepare and sign a written report at the time of
26 authorization indicating:

27 (a) The circumstances that meet the requirements of subsection (1)
28 of this section;

29 (b) The names of the authorizing and consenting parties, except
30 that in those cases where the consenting party is a confidential
31 informant, the name of the confidential informant need not be divulged;

32 (c) The names of the officers authorized to intercept, transmit,
33 and record the conversation or communication;

34 (d) The identity of the particular person or persons, if known, who
35 may have committed or may commit the offense;

36 (e) The details of the particular offense or offenses that may have
37 been or may be committed and the expected date, location, and
38 approximate time of the conversation or communication; and

1 (f) Whether there was an attempt to obtain authorization pursuant
2 to RCW 9.73.090(2) and, if there was such an attempt, the outcome of
3 the attempt.

4 (3) An authorization under this section is valid in all
5 jurisdictions within Washington state and for the interception of
6 communications from additional persons if the persons are brought into
7 the conversation or transaction by the nonconsenting party or if the
8 nonconsenting party or such additional persons cause or invite the
9 consenting party to enter another jurisdiction.

10 (4) The recording of any conversation or communication under this
11 section shall be done in such a manner that protects the recording from
12 editing or other alterations.

13 (5) An authorization made under this section is valid for no more
14 than twenty-four hours from the time it is signed by the authorizing
15 officer, and each authorization shall independently meet all of the
16 requirements of this section. The authorizing officer shall sign the
17 written report required under subsection (2) of this section,
18 certifying the exact date and time of his or her signature. An
19 authorization under this section may be extended not more than twice
20 for an additional consecutive twenty-four hour period based upon the
21 same probable cause regarding the same suspected transaction. Each
22 such extension shall be signed by the authorizing officer.

23 (6) Within fifteen days after the signing of an authorization that
24 results in any interception, transmission, or recording of a
25 conversation or communication pursuant to this section, the law
26 enforcement agency which made the interception, transmission, or
27 recording shall submit a report including the original authorization
28 under subsection (2) of this section to a judge of a court having
29 jurisdiction which report shall identify (a) the persons, including the
30 consenting party, who participated in the conversation, and (b) the
31 date, location, and approximate time of the conversation.

32 In those cases where the consenting party is a confidential
33 informant, the name of the confidential informant need not be divulged.

34 A monthly report shall be filed by the law enforcement agency with
35 the administrator for the courts indicating the number of
36 authorizations granted, the date and time of each authorization,
37 interceptions made, arrests resulting from an interception, and
38 subsequent invalidations.

1 (7)(a) Within two judicial days of receipt of a report under
2 subsection (6) of this section, the court shall make an ex parte review
3 of the authorization(~~(, but not of the evidence,)~~) and shall make a
4 determination whether the requirements of subsection (1) of this
5 section were met. Evidence obtained as a result of the interception,
6 transmission, or recording need not be submitted to the court. If the
7 court determines that any of the requirements of subsection (1) of this
8 section were not met, the court shall order that any recording and any
9 copies or transcriptions of the conversation or communication be
10 destroyed. Destruction of recordings, copies, or transcriptions shall
11 be stayed pending any appeal of a finding that the requirements of
12 subsection (1) of this section were not met.

13 (b) Absent a continuation under (c) of this subsection, six months
14 following a determination under (a) of this subsection that probable
15 cause did not exist, the court shall cause a notice to be mailed to the
16 last known address of any nonconsenting party to the conversation or
17 communication that was the subject of the authorization. The notice
18 shall indicate the date, time, and place of any interception,
19 transmission, or recording made pursuant to the authorization. The
20 notice shall also identify the agency that sought the authorization and
21 shall indicate that a review under (a) of this subsection resulted in
22 a determination that the authorization was made in violation of this
23 section provided that, if the confidential informant was a minor at the
24 time of the recording or an alleged victim of commercial child sexual
25 abuse under RCW 9.68A.100 through 9.68A.102 or 9.40.100, no such notice
26 shall be given.

27 (c) An authorizing agency may obtain six-month extensions to the
28 notice requirement of (b) of this subsection in cases of active,
29 ongoing criminal investigations that might be jeopardized by sending
30 the notice.

31 (8) In any subsequent judicial proceeding, evidence obtained
32 through the interception or recording of a conversation or
33 communication pursuant to this section shall be admissible only if:

34 (a) The court finds that the requirements of subsection (1) of this
35 section were met and the evidence is used in prosecuting an offense
36 listed in subsection (1)(b) of this section; or

37 (b) The evidence is admitted with the permission of the person

1 whose communication or conversation was intercepted, transmitted, or
2 recorded; or

3 (c) The evidence is admitted in a prosecution for a "serious
4 violent offense" as defined in RCW 9.94A.030 in which a party who
5 consented to the interception, transmission, or recording was a victim
6 of the offense; or

7 (d) The evidence is admitted in a civil suit for personal injury or
8 wrongful death arising out of the same incident, in which a party who
9 consented to the interception, transmission, or recording was a victim
10 of a serious violent offense as defined in RCW 9.94A.030.

11 Nothing in this subsection bars the admission of testimony of a
12 party or eyewitness to the intercepted, transmitted, or recorded
13 conversation or communication when that testimony is unaided by
14 information obtained solely by violation of RCW 9.73.030.

15 (9) Any determination of invalidity of an authorization under this
16 section shall be reported by the court to the administrative office of
17 the courts.

18 (10) Any person who intentionally intercepts, transmits, or records
19 or who intentionally authorizes the interception, transmission, or
20 recording of a conversation or communication in violation of this
21 section, is guilty of a class C felony punishable according to chapter
22 9A.20 RCW.

23 (11) An authorizing agency is liable for twenty-five thousand
24 dollars in exemplary damages, in addition to any other damages
25 authorized by this chapter or by other law, to a person whose
26 conversation or communication was intercepted, transmitted, or recorded
27 pursuant to an authorization under this section if:

28 (a) In a review under subsection (7) of this section, or in a
29 suppression of evidence proceeding, it has been determined that the
30 authorization was made without the probable cause required by
31 subsection (1)(b) of this section; and

32 (b) The authorization was also made without a reasonable suspicion
33 that the conversation or communication would involve the unlawful acts
34 identified in subsection (1)(b) of this section.

35 **Sec. 3.** RCW 9.73.210 and 1989 c 271 s 202 are each amended to read
36 as follows:

37 (1) If a police commander or officer above the rank of first line

1 supervisor has reasonable suspicion that the safety of the consenting
2 party is in danger, law enforcement personnel may, for the sole purpose
3 of protecting the safety of the consenting party, intercept, transmit,
4 or record a private conversation or communication concerning:

5 (a) The unlawful manufacture, delivery, sale, or possession with
6 intent to manufacture, deliver, or sell, controlled substances as
7 defined in chapter 69.50 RCW, or legend drugs as defined in chapter
8 69.41 RCW, or imitation controlled substances as defined in chapter
9 69.52 RCW; or

10 (b) Person(s) engaging in the commercial sexual abuse of a minor
11 under RCW 9.68A.100, or promoting commercial sexual abuse of a minor
12 under RCW 9.68A.101, or promoting travel for commercial sexual abuse of
13 a minor under RCW 9.68A.102.

14 (2) Before any interception, transmission, or recording of a
15 private conversation or communication pursuant to this section, the
16 police commander or officer making the determination required by
17 subsection (1) of this section shall complete a written authorization
18 which shall include (a) the date and time the authorization is given;
19 (b) the persons, including the consenting party, expected to
20 participate in the conversation or communication, to the extent known;
21 (c) the expected date, location, and approximate time of the
22 conversation or communication; and (d) the reasons for believing the
23 consenting party's safety will be in danger.

24 (3) A monthly report shall be filed by the law enforcement agency
25 with the administrator for the courts indicating the number of
26 authorizations made under this section, the date and time of each
27 authorization, and whether an interception, transmission, or recording
28 was made with respect to each authorization.

29 (4) Any information obtained pursuant to this section is
30 inadmissible in any civil or criminal case in all courts of general or
31 limited jurisdiction in this state, except:

32 (a) With the permission of the person whose communication or
33 conversation was intercepted, transmitted, or recorded without his or
34 her knowledge;

35 (b) In a civil action for personal injury or wrongful death arising
36 out of the same incident, where the cause of action is based upon an
37 act of physical violence against the consenting party; or

1 (c) In a criminal prosecution, arising out of the same incident for
2 a serious violent offense as defined in RCW 9.94A.030 in which a party
3 who consented to the interception, transmission, or recording was a
4 victim of the offense.

5 (5) Nothing in this section bars the admission of testimony of a
6 participant in the communication or conversation unaided by information
7 obtained pursuant to this section.

8 (6) The authorizing agency shall immediately destroy any written,
9 transcribed, or recorded information obtained from an interception,
10 transmission, or recording authorized under this section unless the
11 agency determines there has been a personal injury or death or a
12 serious violent offense which may give rise to a civil action or
13 criminal prosecution in which the information may be admissible under
14 subsection (4)(b) or (c) of this section.

15 (7) Nothing in this section authorizes the interception, recording,
16 or transmission of a telephonic communication or conversation.

17 **Sec. 4.** RCW 9.68A.110 and 2010 c 289 s 17 and 2010 c 227 s 8 are
18 each reenacted and amended to read as follows:

19 (1) In a prosecution under RCW 9.68A.040, it is not a defense that
20 the defendant was involved in activities of law enforcement and
21 prosecution agencies in the investigation and prosecution of criminal
22 offenses. Law enforcement and prosecution agencies shall not employ
23 minors to aid in the investigation of a violation of RCW 9.68A.090 or
24 9.68A.100, except for the purpose of facilitating an investigation
25 where the minor is also the alleged victim and the:

26 (a) Investigation is authorized pursuant to RCW 9.73.230(1)(b)(ii)
27 or 9.73.210(2)(b); or

28 (b) Minor's aid in the investigation involves only telephone or
29 electronic communication with the defendant.

30 (2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
31 9.68A.080, it is not a defense that the defendant did not know the age
32 of the child depicted in the visual or printed matter. It is a
33 defense, which the defendant must prove by a preponderance of the
34 evidence, that at the time of the offense the defendant was not in
35 possession of any facts on the basis of which he or she should
36 reasonably have known that the person depicted was a minor.

1 (3) In a prosecution under RCW 9.68A.040, 9.68A.090, 9.68A.100,
2 9.68A.101, or 9.68A.102, it is not a defense that the defendant did not
3 know the alleged victim's age. It is a defense, which the defendant
4 must prove by a preponderance of the evidence, that at the time of the
5 offense, the defendant made a reasonable bona fide attempt to ascertain
6 the true age of the minor by requiring production of a driver's
7 license, marriage license, birth certificate, or other governmental or
8 educational identification card or paper and did not rely solely on the
9 oral allegations or apparent age of the minor.

10 (4) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
11 9.68A.075, it shall be an affirmative defense that the defendant was a
12 law enforcement officer or a person specifically authorized, in
13 writing, to assist a law enforcement officer and acting at the
14 direction of a law enforcement officer in the process of conducting an
15 official investigation of a sex-related crime against a minor, or that
16 the defendant was providing individual case treatment as a recognized
17 medical facility or as a psychiatrist or psychologist licensed under
18 Title 18 RCW. Nothing in chapter 227, Laws of 2010 is intended to in
19 any way affect or diminish the immunity afforded an electronic
20 communication service provider, remote computing service provider, or
21 domain name registrar acting in the performance of its reporting or
22 preservation responsibilities under 18 U.S.C. Secs. 2258a, 2258b, or
23 2258c.

24 (5) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or
25 9.68A.075, the state is not required to establish the identity of the
26 alleged victim.

27 (6) In a prosecution under RCW 9.68A.070 or 9.68A.075, it shall be
28 an affirmative defense that:

29 (a) The defendant was employed at or conducting research in
30 partnership or in cooperation with any institution of higher education
31 as defined in RCW 28B.07.020 or 28B.10.016, and:

32 (i) He or she was engaged in a research activity;

33 (ii) The research activity was specifically approved prior to the
34 possession or viewing activity being conducted in writing by a person,
35 or other such entity vested with the authority to grant such approval
36 by the institution of higher (~~learning~~) education; and

37 (iii) Viewing or possessing the visual or printed matter is an
38 essential component of the authorized research; or

1 (b) The defendant was an employee of the Washington state
2 legislature engaged in research at the request of a member of the
3 legislature and:

4 (i) The request for research is made prior to the possession or
5 viewing activity being conducted in writing by a member of the
6 legislature;

7 (ii) The research is directly related to a legislative activity;
8 and

9 (iii) Viewing or possessing the visual or printed matter is an
10 essential component of the requested research and legislative activity.

11 ((+e+)) (7) Nothing in this section authorizes otherwise unlawful
12 viewing or possession of visual or printed matter depicting a minor
13 engaged in sexually explicit conduct.

14 NEW SECTION. **Sec. 5.** This act takes effect August 1, 2011.

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