
HOUSE BILL 2789

State of Washington

63rd Legislature

2014 Regular Session

By Representatives Taylor, Goodman, Shea, Morris, Smith, Walkinshaw, Overstreet, Condotta, Moscoso, Ryu, Short, and Scott

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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 legislature finds that technological
6 advances have provided new, unique equipment that may be utilized for
7 surveillance purposes. These technological advances often outpace
8 statutory protections and can lead to inconsistent or contradictory
9 interpretations between jurisdictions. The legislature finds that
10 regardless of application or size, the use of these extraordinary
11 surveillance technologies, without public debate or clear legal
12 authority, creates uncertainty for citizens and agencies throughout
13 Washington state. The legislature finds that extraordinary
14 surveillance technologies do present a substantial privacy risk
15 potentially contrary to the strong privacy protections enshrined in
16 Article I, section 7 of the Washington state Constitution that reads
17 "No person shall be disturbed in his private affairs, or his home
18 invaded, without authority of law." The legislature further finds that
19 the lack of clear statutory authority for the use of extraordinary

1 surveillance technologies may increase liability to state and local
2 jurisdictions. It is the intent of the legislature to provide clear
3 standards for the lawful use of extraordinary surveillance technologies
4 by state and local jurisdictions.

5 NEW SECTION. **Sec. 2.** The definitions in this section apply
6 throughout this section and sections 3 through 13 of this act unless
7 the context clearly requires otherwise.

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

10 (b) "Agency" also includes any entity, whether public or private,
11 with which any of the entities identified in (a) of this subsection has
12 entered into a contractual relationship for the operation of a system
13 of personal information or unmanned aircraft system to accomplish an
14 agency function.

15 (2) "Biometric identification system" is a system that collects
16 unique physical and behavioral characteristics including, but not
17 limited to, biographical data, facial photographs, fingerprints, and
18 iris scans to identify individuals.

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

25 (4) "Extraordinary sensing device" means an unmanned aircraft
26 system.

27 (5) "Personal information" means all information that:

28 (a) Describes, locates, or indexes anything about a person
29 including, but not limited to, the person's social security number,
30 driver's license number, agency-issued identification number, student
31 identification number, real or personal property holdings derived from
32 tax returns, and the person's education, financial transactions,
33 medical history, ancestry, religion, political ideology, or criminal or
34 employment record;

35 (b) Affords a basis for inferring personal characteristics, such as
36 finger and voice prints, photographs, or things done by or to such

1 person; and the record of the person's presence, registration, or
2 membership in an organization or activity, or admission to an
3 institution; or

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

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

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

13 (7) "Unmanned aircraft system" means an aircraft that is operated
14 without the possibility of human intervention from within or on the
15 aircraft, together with associated elements, including communication
16 links and components that control the unmanned aircraft that are
17 required for the pilot in command to operate safely and efficiently in
18 the national airspace system.

19 NEW SECTION. **Sec. 3.** (1) Agency procurement and use of
20 extraordinary sensing devices for surveillance purposes must be
21 conducted in a transparent manner that is open to public scrutiny, as
22 provided in this section.

23 (2)(a) For the purposes of this section, "governing body" means the
24 council, commission, board, or other controlling body in which
25 legislative powers are vested, except as provided in (b) of this
26 subsection.

27 (b) For a state agency in which there is no governing body other
28 than the state legislature, "governing body" means the chief executive
29 officer responsible for the governance of the agency.

30 (3) An agency may not procure an extraordinary sensing device for
31 surveillance purposes without first obtaining explicit approval from
32 the agency's governing body.

33 (4) The governing body shall develop and make publicly available
34 written policies and procedures for the use of any extraordinary
35 sensing device procured, and provide notice and opportunity for public
36 comment prior to adoption of the written policies and procedures.

1 NEW SECTION. **Sec. 4.** All operations of an extraordinary sensing
2 device or disclosure of personal information about any person acquired
3 through the operation of an extraordinary sensing device must be
4 conducted in such a way as to minimize the collection and disclosure of
5 personal information not authorized under this chapter.

6 NEW SECTION. **Sec. 5.** (1) An extraordinary sensing device may be
7 operated and personal information from such operation disclosed in
8 order to collect personal information pursuant to a search warrant
9 issued by a court of competent jurisdiction as provided in this
10 section.

11 (2) Each petition for a search warrant from a judicial officer to
12 permit the use of an extraordinary sensing device and personal
13 information collected from such operation must be made in writing, upon
14 oath or affirmation, to a judicial officer in a court of competent
15 jurisdiction for the geographic area in which an extraordinary sensing
16 device is to be operated or where there is probable cause to believe
17 the offense for which the extraordinary sensing device is sought has
18 been committed, is being committed, or will be committed.

19 (3) The law enforcement officer shall submit an affidavit that
20 includes:

21 (a) The identity of the applicant and the identity of the agency
22 conducting the investigation;

23 (b) The identity of the individual and area for which use of the
24 extraordinary sensing device is being sought;

25 (c) Specific and articulable facts demonstrating probable cause to
26 believe that there has been, is, or will be criminal activity and that
27 the operation of the extraordinary sensing device system will uncover
28 evidence of such activity or facts to support the finding that there is
29 probable cause for issuance of a search warrant pursuant to applicable
30 requirements; and

31 (d) A statement that other methods of data collection have been
32 investigated and found to be either cost prohibitive or pose an
33 unacceptable safety risk to a law enforcement officer or to the public.

34 (4) If the judicial officer finds, based on the affidavit
35 submitted, there is probable cause to believe a crime has been
36 committed, is being committed, or will be committed and there is
37 probable cause to believe the personal information likely to be

1 obtained from the use of the extraordinary sensing device will be
2 evidence of the commission of such offense, the judicial officer may
3 issue a search warrant authorizing the use of the extraordinary sensing
4 device. The search warrant must authorize the collection of personal
5 information contained in or obtained from the extraordinary sensing
6 device, but must not authorize the use of a biometric identification
7 system.

8 (5) Warrants may not be issued for a period greater than ten days.
9 Extensions may be granted, but no longer than the authorizing judicial
10 officer deems necessary to achieve the purposes for which it was
11 granted and in no event for longer than thirty days.

12 (6) Within ten days of the execution of a search warrant, the
13 officer executing the warrant must serve a copy of the warrant upon the
14 target of the warrant, except if notice is delayed pursuant to section
15 6 of this act.

16 NEW SECTION. **Sec. 6.** (1) A governmental entity acting under this
17 section may, when a warrant is sought, include in the petition a
18 request, which the court shall grant, for an order delaying the
19 notification required under section 5(6) of this act for a period not
20 to exceed ninety days if the court determines that there is a reason to
21 believe that notification of the existence of the warrant may have an
22 adverse result.

23 (2) An adverse result for the purposes of this section is:
24 (a) Placing the life or physical safety of an individual in danger;
25 (b) Causing a person to flee from prosecution;
26 (c) Causing the destruction of or tampering with evidence;
27 (d) Causing the intimidation of potential witnesses; or
28 (e) Jeopardizing an investigation or unduly delaying a trial.

29 (3) The governmental entity shall maintain a copy of certification.

30 (4) Extension of the delay of notification of up to ninety days
31 each may be granted by the court upon application or by certification
32 by a governmental entity.

33 (5) Upon expiration of the period of delay of notification under
34 subsection (2) or (4) of this section, the governmental entity shall
35 serve a copy of the warrant upon, or deliver it by registered or first-
36 class mail to, the target of the warrant, together with notice that:

1 (a) States with reasonable specificity the nature of the law
2 enforcement inquiry; and

3 (b) Informs the target of the warrant: (i) That notification was
4 delayed; (ii) what governmental entity or court made the certification
5 or determination pursuant to which that delay was made; and (iii) which
6 provision of this section allowed such delay.

7 NEW SECTION. **Sec. 7.** (1) It is lawful under this section for any
8 law enforcement officer or other public official to operate an
9 extraordinary sensing device and disclose personal information from
10 such operation if such officer reasonably determines that an emergency
11 situation exists that involves criminal activity and presents immediate
12 danger of death or serious physical injury to any person and:

13 (a) Requires operation of an extraordinary sensing device before a
14 warrant authorizing such interception can, with due diligence, be
15 obtained;

16 (b) There are grounds upon which such a warrant could be entered to
17 authorize such operation; and

18 (c) An application for a warrant providing such operation is made
19 within forty-eight hours after the operation has occurred or begins to
20 occur.

21 (2) In the absence of a warrant, an operation of an extraordinary
22 sensing device carried out under this section must immediately
23 terminate when the personal information sought is obtained or when the
24 application for the warrant is denied, whichever is earlier.

25 (3) In the event such application for approval is denied, the
26 personal information obtained from the operation of a device must be
27 treated as having been obtained in violation of this chapter, except
28 for purposes of section 12 of this act, and an inventory must be served
29 on the person named in the application.

30 NEW SECTION. **Sec. 8.** (1) It is lawful under this section for a
31 law enforcement officer, agency employee, or authorized agent to
32 operate an extraordinary sensing device and disclose personal
33 information from such operation if:

34 (a) An officer, employee, or agent reasonably determines that an
35 emergency situation exists that:

36 (i) Does not involve criminal activity;

1 (ii) Presents immediate danger of death or serious physical injury
2 to any person; and

3 (iii) Requires operation of an extraordinary sensing device to
4 reduce the danger of death or serious physical injury;

5 (b) An officer, employee, or agent reasonably determines that the
6 operation does not intend to collect personal information and is
7 unlikely to accidentally collect personal information, and such
8 operation is not for purposes of regulatory enforcement including, but
9 not limited to:

10 (i) Monitoring to discover, locate, observe, and prevent forest
11 fires;

12 (ii) Monitoring an environmental or weather-related catastrophe or
13 damage from such an event;

14 (iii) Surveying for wildlife management, habitat preservation, or
15 environmental damage; and

16 (iv) Surveying for the assessment and evaluation of environmental
17 or weather-related damage, erosion, flood, or contamination;

18 (c) The operation is part of a training exercise conducted on a
19 military base and the extraordinary sensing device does not collect
20 personal information on persons located outside the military base;

21 (d) The operation is for training and testing purposes by an agency
22 and does not collect personal information; or

23 (e) The operation is part of the response to an emergency or
24 disaster for which the governor has proclaimed a state of emergency
25 under RCW 43.06.010(12).

26 (2) Upon completion of the operation of an extraordinary sensing
27 device pursuant to this section, any personal information obtained must
28 be treated as information collected on an individual other than a
29 target for purposes of section 11 of this act.

30 NEW SECTION. **Sec. 9.** An unmanned aircraft system may not be
31 utilized for the purposes of investigation or enforcement of regulatory
32 violations or noncompliance until the legislature has adopted
33 legislation specifically permitting such use.

34 NEW SECTION. **Sec. 10.** Whenever any personal information from an
35 extraordinary sensing device has been acquired, no part of such
36 personal information and no evidence derived therefrom may be received

1 in evidence in any trial, hearing, or other proceeding in or before any
2 court, grand jury, department, officer, agency, regulatory body,
3 legislative committee, or other authority of the state or a political
4 subdivision thereof if the collection or disclosure of that personal
5 information would be in violation of this chapter.

6 NEW SECTION. **Sec. 11.** Personal information collected during the
7 operation of an extraordinary sensing device authorized by and
8 consistent with this chapter may not be used, copied, or disclosed for
9 any purpose after conclusion of the operation, unless there is probable
10 cause that the personal information is evidence of criminal activity.
11 Personal information must be deleted as soon as possible after there is
12 no longer probable cause that the personal information is evidence of
13 criminal activity; this must be within thirty days if the personal
14 information was collected on the target of a warrant authorizing the
15 operation of the extraordinary sensing device, and within ten days for
16 other personal information collected incidentally to the operation of
17 an extraordinary sensing device otherwise authorized by and consistent
18 with this chapter. There is a presumption that personal information is
19 not evidence of criminal activity if that personal information is not
20 used in a criminal prosecution within one year of collection.

21 NEW SECTION. **Sec. 12.** Any person who knowingly violates this
22 chapter is subject to legal action for damages, to be brought by any
23 other person claiming that a violation of this chapter has injured his
24 or her business, his or her person, or his or her reputation. A person
25 so injured is entitled to actual damages and reasonable attorneys' fees
26 and other costs of litigation.

27 NEW SECTION. **Sec. 13.** (1) For any calendar year in which an
28 agency has procured or used an extraordinary sensing device, the agency
29 must prepare an annual report. The report must be made publicly
30 available electronically and must, at a minimum, include the following:

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

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

1 (c) The specific kinds of personal information that the
2 extraordinary sensing device collected;

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

5 (e) The specific steps taken to mitigate the impact on an
6 individual's privacy, including protections against unauthorized use
7 and disclosure and adoption of a data minimization protocol; and

8 (f) An individual point of contact for citizen complaints and
9 concerns.

10 (2)(a) Each agency, except as provided in (b) of this subsection,
11 must submit to the agency's governing body the annual report for the
12 previous calendar year by March 1st, beginning in 2015.

13 (b) In the case of state agencies with no governing body other than
14 the legislature, the annual reports must be filed electronically with
15 the office of financial management, who must compile the results and
16 submit them electronically to the legislature by September 1st of each
17 year, beginning in 2015.

18 NEW SECTION. **Sec. 14.** Sections 2 through 13 of this act are each
19 added to chapter 9.73 RCW and codified with the subchapter heading of
20 "extraordinary sensing devices."

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

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