

Washington Privacy Laws Update

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I. INTRODUCTION

Who needs to know about the Privacy Act

Today's technology makes it easier than ever to intercept or record private conversations. Cordless phones, cell phones, video cameras, police scanners, radio transmitters, GPS technology, email, instant messaging services, voice mail all allow and may potentially involve the privacy act.

Facts that are recorded are considered more reliable and more believable than those that are based upon a persons' recollection. Having such information is crucial to finding people, or building a case, especially when there are just two people are present when the crime or other event occurs.

"An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory...." *United States v. White*, 401 U.S. 745, 753, 91 S. Ct. 1122, 1126, 28 L. Ed. 2d 453 (1971).

Prosecutors, defense attorneys, and family law attorneys are the people most likely to be faced with the need deal with evidence that might be obtained or might have been obtained with the interception of private communications.

A. General Observations About the Privacy Laws

Federal law sets the minimum rules regarding the recording of private conversations. In many areas, Washington is more restrictive. Washington has been described as having the most restrictive privacy laws in the nation.

The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967).

"The right of privacy under Const. art. I, § 7 is 'not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are

learning to expect diminished privacy in many aspects of their lives.”” *State v. Young*, 123 Wn.2d 173, 181-182, 867 P.2d 593 (1994), quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

Washington courts are very protective of citizens’ privacy. Privacy issues are often implicated when any person uses any form of electronic surveillance to record or intercept private communications. Washington’s all party consent rules and one party exceptions are among the most restrictive in the nation.

Most issues in this area (both legal and policy) involve the non-consensual acquisition of "private" communications. This is a highly sensitive area because it involves fear of "big brother", fundamental concerns of personal rights and privacy. See, *Live Tracking of Mobile Phones Prompts Court Fight on Privacy*, The New York Times, December 10, 2005.

II. GENERAL LEGAL FRAMEWORK

A. Fourth Amendment

No Fourth Amendment search occurs when one party to a private conversation consents to interception and recording of that conversation. *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971).

B. Washington Constitution, Article I, § 7

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Article I, § 7 is not offended by interception or disclosure of conversations where one party consents in advance because there is no constitutionally based expectation of privacy in the conversation. *State v. Corliss*, 123 Wn.2d 656, 663-664, 870 P.2d 317 (1994);

RCW 9.73 does not create a constitutional right. There is no constitutional expectation of privacy in a conversation that one person has consented to being recorded by police. *State v. Clark*, 129 Wn.2d

211, 916 P.2d 384 (1996)

C. Federal Statutes

1. 18 U.S.C. § 2510 et. seq.

Commonly known as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, or "Title III." Governs wiretaps and bugs. Later amended to include regulation of data and digital communications (called electronic communications) and including communications using fax machines and digital-display pagers.

D. Washington Statute, The Privacy Act, RCW Chapter 9.73

1. General Rule "All Party Consent"

RCW 9.73.030(1): It shall be unlawful for any person or the state to intercept or record:

- a. Any private communication transmitted by telephone, telegraph, radio or other device without first obtaining the consent of **all** the participants in the communication.
- b. Any private conversation without first obtaining the consent of all the participants in the conversation.

III. EXCEPTIONS TO ALL PARTY CONSENT

A. Not a private conversation.

1. Routine initial parts of a telephone call

Kadoranian v. Bellingham Police Department, 119 Wn.2d 178, 829 P.2d 1061 (1992), *reversed on other grounds*; *State v. Jimenez*, 128 Wn.2d 720, 911 P.2d 1337 (1996).

2. Messages left on an answering machine

In re Marriage of Farr, 87 Wn. App. 177, 940 P.2d 679 (1997), *review denied* 134 Wn.2d 1014 (1998).

3. Conversation with known police officers acting in furtherance of official duties

State v. Flora, 68 Wn. App. 802, 845 P.2d 1355 (1992)(arrest on a public street); *Lewis v. State Department of Licensing*, 125 Wn. App. 666, 105 P.2d 1029 (2005)(DUI arrest on public street); *Auburn v. Kelly*, 127 Wn. App. 54, 111 P.3d 1213 (2005)(DUI arrest on public street); *Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 488 (2005)..

4. Call to police station confessing crime

State v. Bonilla, 23 Wn. App. 869, 598 P.2d 783 (1979).

5. Calls to police demanding money from the city

State v. Forrester, 21 Wn. App. 855, 587 P.2d 179 (1978), review denied, 92 Wn.2d 1006 (1979).

6. Public meeting

State v. Slemmer, 48 Wn. App. 48, 738 P.2d 281 (1987); 1996 Attorney General Opinion No. 18. (public meeting of board of county commissioners).

B. Excluded By Statute or Court Decision

1. Telephone: Tipped receiver plus consent.

- a. Tipped receiver -- OK

State v. Corliss, 123 Wn.2d 656, 663-664, 870 P.2d 317 (1994)

- b. Speaker phone plus consent?

State v. Christensen, 153 Wn.2d 186, 102 P.2d 789 (2004).

- c. Extension phone plus consent -- Caution

State v. Bonilla, 23 Wn. App. 869, 598 P.2d 783 (1979)

questioned in *State v. Christensen*, 153 Wn.2d 186, 102 P.2d 789 (2005)

2. Building security system used to record conversations of criminal trespassers, burglars.
RCW 9.73.110
3. Custodial Interrogation
 - a. RCW 9.73.090(1)(b).
4. E-mail and “chat” or instant messenger type communications
State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002).
5. Implied consent of all parties
State v. Townsend, but see, *State v. Christensen* (no implied consent to protect minors)
6. Incoming calls to police and fire stations, licensed emergency medical providers, emergency communication centers, and poison centers

RCW 9.73.090(1)(a) and *State v. Johnson*, 104 Wn.2d 179, 703 P.2d 1052 (1985).
7. Uniformed police, combined sound and video recordings

RCW 9.73.090(1)(c). (private conversations)

Lewis v. State Department of Licensing, 125 Wn. App. 666, 105 P.2d 1029 (2005); *Auburn v. Kelly*, 127 Wn. App. 54, 111 P.3d 1213 (2005). (non private conversations)
8. Other exceptions

Can record with consent of one party to the communication, wire communications or conversations without a court order, per RCW 9.73.030(2), if the conversations and communications:

- a. Are of an emergency nature (i.e. 911 calls);
- b. Convey threats of extortion, blackmail, or bodily harm, or other similar requests or demands.
- c. Occur anonymously or repeatedly or at an extremely inconvenient hour (harassing telephone calls); or
- c. Are communications with a hostage holder or barricaded person.

C. Recordings Legal In State Where Made, Suspect Within Washington When Recordings Made

State v. Fowler, __ Wn. App. __, 111 P.3d 1264 (2005)

D. Prior Authorization obtained by Police Officer

- 1. Court Order; felony crime with consent of one party.
RCW 9.73.090(2), (4), and (5), and RCW 9.73.120, .130, and .140.
- 2. Police Approved; Drug felony above mere possession with consent of one party.
RCW 9.73.210 and .230. Statute contains detailed requirements for written authorization.
- 3. Wiretaps and bugs, court order.
Not admissible in evidence. RCW 9.73.050.
 - a. May use for intervention only. RCW 9.73.040.

IV. PENALTIES FOR VIOLATING RCW 9.73

A. Recording Not Admissible

- 1. RCW 9.73.050 - inadmissible in any civil or criminal case in

Washington.

- a. Inadmissible for any purpose, including impeachment. *State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996), *reconsideration denied*.
 - b. But see *State v. Baird*, 83 Wn. App. 477, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997)
2. Exceptions: With permission of person whose rights were violated, recording is admissible in 1) damage action under RCW 9.73; and 2) criminal case involving potential jeopardy to national security.
 3. Illegal recording does not prevent a witness from testifying about his/her independent recollection of facts learned before the illegal recording, even if same facts are discussed in the illegally recorded conversation. *State v. Johnson*, 40 Wn. App. 371, 699 P.2d 221 (1985) (where taped witness interview did not comply with RCW 9.73 requirements).
 4. *Fact* that illegal recording was made also excluded. *State v. Cramer*, 35 Wn. App. 462, 465, 667 P.2d 143 (1983).

B. Witness Recollection About Recorded Conversation Not Admissible

1. *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990).
2. Exception: an "innocent" participant who was not aware of the illegal interception or recording. See *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013 (1973), *review denied*, 83 Wn.2d 1003 (1973), *cert. denied*. 419 U.S. 849 (1974).

C. Witness Observations During Illegal Interception Not Admissible

1. *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990); *State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439, note 1 (1993).
2. Exception: an "innocent" participant who was not aware of the illegal interception or recording. See *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013 (1973), *review denied*, 83 Wn.2d

1003 (1973), *cert. denied*, 419 U.S. 849 (1974).

D. Automatic Standing

State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980); *State v. Porter*, 98 Wn. App. 631, 634, 990 P.2d 460 (1999), *review denied* 140 Wn.2d 1024 (2000).

E. Police May Not Exploit Illegal Civilian Interception

State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996), *reconsideration denied*, significantly expanded the scope of suppression for civilian violations of RCW 9.73. .

F. Civil Action For Damages And Attorney's Fees

Actual damages including mental pain and suffering, or liquidated damages of \$100 per day, not to exceed \$1,000, plus reasonable attorney's fees and other litigation costs. RCW 9.73.060.

G. Gross Misdemeanor

RCW 9.73.080.

V. ONE PARTY CONSENT

A. Statutory Requirements For Court Ordered Interception

RCW 9.73.090(2) allows court approved participant monitoring and evidentiary use of information obtained. Requirements spelled out in RCW 9.73.090(2), .120, .130, and .140. .

B. Police Administrative Authorization.

1. Circumstances where authorized

RCW 9.73.230

C. Officer Protection Interceptions In Major Drug Cases

RCW 9.73.210(4).

VI. E-MAIL AND INSTANT MESSAGING

A. Washington Law

1. No Washington cases discuss compelled disclosure of e-mail.
2. E-mail is a “communication” that is considered “private” within the meaning of RCW 9.73, but no court order under this statute is needed before the addressee-recipient can save and print the *received* messages, because the sender implicitly consented to recording of the sent message. The nature of e-mail is such that, to be useful, it must be recorded in the recipient computer’s memory. The sender also implicitly consents to recording of ‘chat’ or instant messaging communications where the software provider’s policy expressly warns users that their messages could be recorded or forwarded to others. *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002).

VII. VIDEOTAPING (WITHOUT SOUND)

“Hidden video surveillance is one of the most intrusive mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances.” *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000).

A. Washington Law

1. No statute

No state of Washington cases address hidden video surveillance, except to say that RCW 9.73 does not apply if there is no sound recording.
2. When video taken for sexual gratification, may be voyeurism in violation of RCW 9A.44.115 amended in response to upskirt photo decision in *State v. Glas*, 147 Wn.2d 410, 54 P.2d 147 (2002).

VIII. VOICE MAIL

A. Federal Law

1. Voice Mail is covered by the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2701, *et. seq.*

If a message is left on voice mail furnished by a telephone service provider, then the ECPA governs law enforcement's ability to get it from the service provider. The ECPA does not apply if law enforcement seeks to obtain the voice mail directly from the subscriber by consent.

B. Washington Law

1. RCW 9.73 is waived *In re Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679 (1997), *review denied* 134 Wn.2d 1014 (1998) ("Knowing that his messages were being recorded, Martin had no reasonable expectation of privacy."); *see also State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002).

IX. CONCLUSION

Since 1909, the privacy act has protected sealed messages, letters and telegrams from being opened or read by someone other than the intended recipient. The privacy laws have continued to be amended by the legislature in respond to new technology. In Washington State, the courts have consistently interpreted the privacy act strictly to protect a person's privacy interests.

The revolution in electronic communications and the ease of intercepting and recording conversations and information on conversations creates new issues for the courts. As new technologies develop, the courts appear inclined to take a deferential approach and wait for legislative amendments to respond to the new technology.