

A-Engrossed
House Bill 2134

Ordered by the House April 20
Including House Amendments dated April 20

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Expands permissible bases for interception of wire, electronic or oral communications. [*Limits grounds for suppression of intercepted communications.*]

A BILL FOR AN ACT

1
2 Relating to interception of communications; creating new provisions; and amending ORS 133.724 and
3 133.726.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 133.724 is amended to read:

6 133.724. (1) An ex parte order for the interception of wire, electronic or oral communications
7 may be issued by any circuit court judge upon written application made upon oath or affirmation
8 of the individual who is the district attorney or a deputy district attorney authorized by the district
9 attorney for the county in which the order is sought. The application shall include:

10 (a) The name of the district attorney or the deputy district attorney making the application and
11 the authority of the district attorney or the deputy district attorney to make the application;

12 (b) The identity of the investigative or law enforcement officer making the application and the
13 officer authorizing the application;

14 (c) A statement demonstrating that there is probable cause to believe that an individual is
15 committing, has committed or is about to commit[,];

16 (A) A particular felony of murder, kidnapping, arson, robbery, bribery, extortion or other crime
17 dangerous to life and punishable as a felony[, or];

18 (B) A crime punishable as a felony under ORS **166.720**, 475.840, 475.846 to 475.894 or [~~475.906~~]
19 **475.904 to 475.910** or as a misdemeanor under ORS 167.007[,]; or

20 (C) Any conspiracy to commit any of the foregoing crimes;

21 (d) A statement of the details, if known, of the particular crime alleged under paragraph (c) of
22 this subsection;

23 (e) A particular description of the nature and location of the facilities from which or the place
24 where the wire, electronic or oral communication is to be intercepted, if known;

25 (f) A particular description of the type of wire, electronic or oral communication sought to be
26 intercepted;

27 (g) The identity of the person, if known, suspected of committing the crime and whose wire,
28 electronic or oral communications are to be intercepted;

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 (h) A full and complete statement as to whether or not other investigative procedures have been
2 tried and failed or why *[they]* **other investigative procedures** reasonably appear to be unlikely to
3 succeed if tried or are likely to be too dangerous;

4 (i) A statement of the period of time for which the interception is required to be maintained. If
5 the nature of the investigation is such that the authorization for interception should not automat-
6 ically terminate when the described type of wire, electronic or oral communication has been first
7 obtained, a description of facts establishing probable cause to believe that additional communi-
8 cations of the same type will occur thereafter;

9 (j) A statement as to whether any prior application has been made to intercept wire, electronic
10 or oral communications from the same person and, if such prior application exists, a statement of
11 the current status of that application; and

12 (k) Where the application is for the extension of an existing order, a statement setting forth the
13 results thus far obtained from the interception, or a reasonable explanation of the failure to obtain
14 such results.

15 (2) The judge may require the applicant to furnish further testimony or documentary evidence
16 in support of the application.

17 (3) Upon examination of such application and evidence the judge may enter an ex parte order,
18 as requested or as modified, authorizing or approving interception of wire, electronic or oral com-
19 munications within the state if the judge determines on the basis of the facts submitted by the ap-
20 plicant that:

21 (a) There is probable cause for belief that an individual is committing, has committed or is about
22 to commit a particular crime described in subsection (1)(c) of this section;

23 (b) There is probable cause for belief that particular communications concerning that crime will
24 be obtained through such interception;

25 (c) Normal investigative procedures have been tried and have failed or reasonably appear to be
26 unlikely to succeed if tried or are likely to be too dangerous; and

27 (d) There is probable cause for belief that the facilities from which, or the place where, the wire,
28 electronic or oral communications to be intercepted are being used, or are about to be used, in
29 connection with the **planning or the** commission of that crime are **open to the public or are**
30 **owned by**, leased to, listed in the name of, or commonly used by the individual suspected.

31 (4) Each order authorizing or approving the interception of any wire, electronic or oral com-
32 munication shall specify:

33 (a) The identity of the person, if known, whose communications are to be intercepted;

34 (b) The nature and location of the communications facilities as to which, or the place where,
35 authority to intercept is granted;

36 (c) A particular description of the type of communication sought to be intercepted, and a state-
37 ment of the particular crime to which it relates;

38 (d) The identity of the agency authorized to intercept the communications and of the person
39 authorizing the application;

40 (e) The period of time during which such interception is authorized, including a statement as to
41 whether or not the interception shall automatically terminate when the described communication
42 has been first obtained; and

43 (f) The name of the applicant, date of issuance, and the signature and title of the issuing judge.

44 (5) *[No]* **An** order entered pursuant to this section *[shall]* **may not** authorize or approve the
45 interception of any wire, electronic or oral communication for any period longer than is necessary

1 to achieve the objective of authorization[, *nor in any*] **and in no event for** longer than 30 days.
 2 Extensions of any order may be granted, but only when application for an extension is made in ac-
 3 cordance with subsection (1)(k) of this section and the court makes the findings required by sub-
 4 section (3) of this section. The period of extension shall be no longer than the authorizing judge
 5 deems necessary to achieve the purpose for which it is granted and in no event for longer than 30
 6 days. Every order and extension [*thereof*] **of that order** shall contain a provision that the authori-
 7 zation to intercept [*shall*] **must** be executed as soon as practicable, [*shall*] **must** be conducted in
 8 such a way as to minimize the interception of communications not otherwise subject to interception,
 9 and must terminate upon attainment of the authorized objective, or in any event in 30 days.

10 (6) Whenever an order authorizing interception is entered pursuant to this section, the order
 11 may require reports to be made to the judge who issued the order showing what progress has been
 12 made toward achievement of the authorized objective and the need for continued interception. Such
 13 reports shall be made at such intervals as the judge may require.

14 **SECTION 2.** ORS 133.726 is amended to read:

15 133.726. (1) Notwithstanding ORS 133.724, under the circumstances described in this section, a
 16 law enforcement officer is authorized to intercept an oral communication to which the officer or
 17 [*someone*] **a person** under the direct supervision of the officer is a party, without obtaining an order
 18 for the interception of a wire, electronic or oral communication under ORS 133.724.

19 (2) For purposes of this section and ORS 133.736, a person is a party to an oral communication
 20 if the oral communication is made in the person's immediate presence and is audible to the person
 21 regardless of whether the communication is specifically directed to the person.

22 (3) An ex parte order for intercepting an oral communication in any county of this state under
 23 this section may be issued by any judge as defined in ORS 133.525 upon written application made
 24 upon oath or affirmation of the district attorney or a deputy district attorney authorized by the
 25 district attorney for the county in which the order is sought or upon the oath or affirmation of any
 26 peace officer as defined in ORS 133.005. The application shall include:

27 (a) The name of the applicant and the applicant's authority to make the application;

28 [*(b) A statement demonstrating that there is probable cause to believe that a person whose oral*
 29 *communication is to be intercepted is engaged in committing, has committed or is about to commit a*
 30 *particular felony, or a misdemeanor under ORS 167.007, and that intercepting the oral communication*
 31 *will yield evidence thereof; and]*

32 **(b) A statement demonstrating that:**

33 **(A) There is probable cause to believe that a person whose oral communication is to be**
 34 **intercepted is engaged in committing, has committed or is about to commit a particular fel-**
 35 **ony, or a misdemeanor under ORS 167.007, and that intercepting the oral communication will**
 36 **yield evidence thereof; or**

37 **(B)(i) There is reasonable suspicion to believe that a person whose oral communication**
 38 **is to be intercepted is engaged in committing, has committed or is about to commit a crime;**

39 **(ii) There is reasonable suspicion to believe that the circumstances in which the oral**
 40 **communication is to be intercepted present a substantial risk of death, serious physical in-**
 41 **jury or sexual assault to a law enforcement officer or a person under the direct supervision**
 42 **of the officer;**

43 **(iii) Interception of the oral communication is necessary to protect the safety of the**
 44 **person who may be endangered; and**

45 **(iv) Other investigative procedures have been tried and have failed or reasonably appear**

1 **to be unlikely to succeed if tried or are likely to be too dangerous; and**

2 (c) The identity of the person, if known, suspected of committing the crime and whose oral
3 communication is to be intercepted.

4 (4) The judge may require the applicant to furnish further testimony or documentary evidence
5 in support of the application.

6 (5) Upon examination of the application and evidence, the judge may enter an ex parte order,
7 as requested or as modified, authorizing or approving the interception of an oral communication
8 within the state if the judge determines on the basis of the facts submitted by the applicant that:

9 *[(a) There is probable cause to believe that a person is engaged in committing, has committed or*
10 *is about to commit a particular felony, or a misdemeanor under ORS 167.007; and]*

11 *[(b) There is probable cause to believe that the oral communication to be obtained will contain ev-*
12 *idence concerning that crime.]*

13 **(a)(A) There is probable cause to believe that a person is engaged in committing, has**
14 **committed or is about to commit a particular felony, or a misdemeanor under ORS 167.007;**
15 **and**

16 **(B) There is probable cause to believe that the oral communication to be obtained will**
17 **contain evidence concerning that crime; or**

18 **(b)(A) There is reasonable suspicion to believe that a person whose oral communication**
19 **is to be intercepted is engaged in committing, has committed or is about to commit a crime;**

20 **(B) There is reasonable suspicion to believe that the circumstances in which the oral**
21 **communication is to be intercepted present a substantial risk of death, serious physical in-**
22 **jury or sexual assault to a law enforcement officer or a person under the direct supervision**
23 **of the officer;**

24 **(C) Interception of the oral communication is necessary to protect the safety of the**
25 **person who may be endangered; and**

26 **(D) Other investigative procedures have been tried and have failed or reasonably appear**
27 **to be unlikely to succeed if tried or are likely to be too dangerous.**

28 (6) An order authorizing or approving the interception of an oral communication under this
29 section must specify:

30 (a) The identity of the person, if known, whose oral communication is to be intercepted;

31 (b) A statement identifying the particular crime to which the oral communication is expected
32 to relate;

33 (c) The agency authorized under the order to intercept the oral communication;

34 (d) The name and office of the applicant and the signature and title of the issuing judge;

35 (e) A period of time after which the order shall expire; and

36 (f) A statement that the order authorizes only the interception of an oral communication to
37 which a law enforcement officer or *[someone]* **a person** under the direct supervision of a law
38 enforcement officer is a party.

39 (7) An order under ORS 133.724 or this section is not required when a law enforcement officer
40 intercepts an oral communication to which the officer or *[someone]* **a person** under the direct
41 supervision of the officer is a party if the oral communication is made by a person whom the officer
42 has probable cause to believe has committed, is engaged in committing or is about to commit:

43 (a) A crime punishable as a felony under ORS 475.840, 475.846 to 475.894 or *[475.906]* **475.904**
44 **to 475.910** or as a misdemeanor under ORS 167.007; or

45 (b) Any other crime punishable as a felony if the circumstances at the time the oral communi-

1 cation is intercepted are of such exigency that it would be unreasonable to obtain a court order
2 under ORS 133.724 or this section.

3 (8) A law enforcement officer who intercepts an oral communication pursuant to this section
4 may not intentionally fail to record and preserve the oral communication in its entirety. A law
5 enforcement officer, or a person under the direct supervision of the officer, who is authorized under
6 this section to intercept an oral communication is not required to exclude from the interception an
7 oral communication made by a person for whom probable cause does not exist if the officer or **the**
8 person under the officer's direct supervision is a party to the oral communication.

9 (9) A law enforcement officer may not divulge the contents of an oral communication intercepted
10 under this section before a preliminary hearing or trial in which an oral communication is going to
11 be introduced as evidence against a person except:

12 (a) To a superior officer or other official with whom the law enforcement officer is cooperating
13 in the enforcement of the criminal laws of this state or the United States;

14 (b) To a magistrate;

15 (c) In a presentation to a federal or state grand jury; or

16 (d) In compliance with a court order.

17 (10) A law enforcement officer may intercept an oral communication under this section only
18 when acting within the scope of the officer's employment and as a part of assigned duties.

19 (11) As used in this section, "law enforcement officer" means an officer employed by the United
20 States, this state or a municipal government within this state, or a political subdivision, agency,
21 department or bureau of those governments, to enforce criminal laws.

22 (12) Violation of subsection (9) of this section is a Class A misdemeanor.

23 **SECTION 3.** ORS 133.726, as amended by section 2 of this 2007 Act, is amended to read:

24 133.726. (1) Notwithstanding ORS 133.724, under the circumstances described in this section, a
25 law enforcement officer is authorized to intercept an oral communication to which the officer or a
26 person under the direct supervision of the officer is a party, without obtaining an order for the in-
27 terception of a wire, electronic or oral communication under ORS 133.724.

28 (2) For purposes of this section and ORS 133.736, a person is a party to an oral communication
29 if the oral communication is made in the person's immediate presence and is audible to the person
30 regardless of whether the communication is specifically directed to the person.

31 (3) An ex parte order for intercepting an oral communication in any county of this state under
32 this section may be issued by any judge as defined in ORS 133.525 upon written application made
33 upon oath or affirmation of the district attorney or a deputy district attorney authorized by the
34 district attorney for the county in which the order is sought or upon the oath or affirmation of any
35 peace officer as defined in ORS 133.005. The application shall include:

36 (a) The name of the applicant and the applicant's authority to make the application;

37 [(b) A statement demonstrating that:]

38 [(A) There is probable cause to believe that a person whose oral communication is to be intercepted
39 is engaged in committing, has committed or is about to commit a particular felony, or a misdemeanor
40 under ORS 167.007, and that intercepting the oral communication will yield evidence thereof; or]

41 [(B)(i) There is reasonable suspicion to believe that a person whose oral communication is to be
42 intercepted is engaged in committing, has committed or is about to commit a crime;]

43 [(ii) There is reasonable suspicion to believe that the circumstances in which the oral communi-
44 cation is to be intercepted present a substantial risk of death, serious physical injury or sexual assault
45 to a law enforcement officer or a person under the direct supervision of the officer;]

1 *[(iii) Interception of the oral communication is necessary to protect the safety of the person who*
2 *may be endangered; and]*

3 *[(iv) Other investigative procedures have been tried and have failed or reasonably appear to be*
4 *unlikely to succeed if tried or are likely to be too dangerous; and]*

5 **(b) A statement demonstrating that there is probable cause to believe that a person**
6 **whose oral communication is to be intercepted is engaged in committing, has committed or**
7 **is about to commit a particular felony, or a misdemeanor under ORS 167.007, and that in-**
8 **tercepting the oral communication will yield evidence thereof; and**

9 (c) The identity of the person, if known, suspected of committing the crime and whose oral
10 communication is to be intercepted.

11 (4) The judge may require the applicant to furnish further testimony or documentary evidence
12 in support of the application.

13 (5) Upon examination of the application and evidence, the judge may enter an ex parte order,
14 as requested or as modified, authorizing or approving the interception of an oral communication
15 within the state if the judge determines on the basis of the facts submitted by the applicant that:

16 *[(a)(A) There is probable cause to believe that a person is engaged in committing, has committed*
17 *or is about to commit a particular felony, or a misdemeanor under ORS 167.007; and]*

18 *[(B) There is probable cause to believe that the oral communication to be obtained will contain*
19 *evidence concerning that crime; or]*

20 *[(b)(A) There is reasonable suspicion to believe that a person whose oral communication is to be*
21 *intercepted is engaged in committing, has committed or is about to commit a crime;]*

22 *[(B) There is reasonable suspicion to believe that the circumstances in which the oral communi-*
23 *cation is to be intercepted present a substantial risk of death, serious physical injury or sexual assault*
24 *to a law enforcement officer or a person under the direct supervision of the officer;]*

25 *[(C) Interception of the oral communication is necessary to protect the safety of the person who may*
26 *be endangered; and]*

27 *[(D) Other investigative procedures have been tried and have failed or reasonably appear to be*
28 *unlikely to succeed if tried or are likely to be too dangerous.]*

29 **(a) There is probable cause to believe that a person is engaged in committing, has com-**
30 **mitted or is about to commit a particular felony, or a misdemeanor under ORS 167.007; and**

31 **(b) There is probable cause to believe that the oral communication to be obtained will**
32 **contain evidence concerning that crime.**

33 (6) An order authorizing or approving the interception of an oral communication under this
34 section must specify:

35 (a) The identity of the person, if known, whose oral communication is to be intercepted;

36 (b) A statement identifying the particular crime to which the oral communication is expected
37 to relate;

38 (c) The agency authorized under the order to intercept the oral communication;

39 (d) The name and office of the applicant and the signature and title of the issuing judge;

40 (e) A period of time after which the order shall expire; and

41 (f) A statement that the order authorizes only the interception of an oral communication to
42 which a law enforcement officer or a person under the direct supervision of a law enforcement of-
43 ficer is a party.

44 (7) An order under ORS 133.724 or this section is not required when a law enforcement officer
45 intercepts an oral communication to which the officer or a person under the direct supervision of

1 the officer is a party if the oral communication is made by a person whom the officer has probable
2 cause to believe has committed, is engaged in committing or is about to commit:

3 (a) A crime punishable as a felony under ORS 475.840, 475.846 to 475.894 or [475.904 to
4 475.910] **475.906** or as a misdemeanor under ORS 167.007; or

5 (b) Any other crime punishable as a felony if the circumstances at the time the oral communi-
6 cation is intercepted are of such exigency that it would be unreasonable to obtain a court order
7 under ORS 133.724 or this section.

8 (8) A law enforcement officer who intercepts an oral communication pursuant to this section
9 may not intentionally fail to record and preserve the oral communication in its entirety. A law
10 enforcement officer, or a person under the direct supervision of the officer, who is authorized under
11 this section to intercept an oral communication is not required to exclude from the interception an
12 oral communication made by a person for whom probable cause does not exist if the officer or the
13 person under the officer's direct supervision is a party to the oral communication.

14 (9) A law enforcement officer may not divulge the contents of an oral communication intercepted
15 under this section before a preliminary hearing or trial in which an oral communication is going to
16 be introduced as evidence against a person except:

17 (a) To a superior officer or other official with whom the law enforcement officer is cooperating
18 in the enforcement of the criminal laws of this state or the United States;

19 (b) To a magistrate;

20 (c) In a presentation to a federal or state grand jury; or

21 (d) In compliance with a court order.

22 (10) A law enforcement officer may intercept an oral communication under this section only
23 when acting within the scope of the officer's employment and as a part of assigned duties.

24 (11) As used in this section, "law enforcement officer" means an officer employed by the United
25 States, this state or a municipal government within this state, or a political subdivision, agency,
26 department or bureau of those governments, to enforce criminal laws.

27 (12) Violation of subsection (9) of this section is a Class A misdemeanor.

28 **SECTION 4. The amendments to ORS 133.726 by section 3 of this 2007 Act become oper-**
29 **ative on January 2, 2012.**

30