

House Bill 2134

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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 **as introduced**.

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; amending ORS 41.910, 133.724, 133.726, 133.735 and
3 165.535.

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 sex crime as defined in ORS 181.594 that is punishable as a felony;

19 (C) A crime punishable as a felony under ORS **166.720**, 475.840, 475.846 to 475.894 or [*475.906*]
20 **475.904 to 475.910** or as a misdemeanor under ORS 167.007[.]; or

21 (D) Any conspiracy to commit any of the foregoing crimes;

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

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

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

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

30 (h) A full and complete statement as to whether or not other investigative procedures have been
31 tried and failed or why [*they*] **other investigative procedures** reasonably appear to be unlikely to

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 succeed if tried or are likely to be too dangerous;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42 (5) [No] **An** order entered pursuant to this section [shall] **may not** authorize or approve the
 43 interception of any wire, electronic or oral communication for any period longer than is necessary
 44 to achieve the objective of authorization[, nor in any] **and in no** event **for** longer than 30 days.
 45 Extensions of any order may be granted, but only when application for an extension is made in ac-

1 cordance with subsection (1)(k) of this section and the court makes the findings required by sub-
 2 section (3) of this section. The period of extension shall be no longer than the authorizing judge
 3 deems necessary to achieve the purpose for which it is granted and in no event for longer than 30
 4 days. Every order and extension [*thereof*] **of that order** shall contain a provision that the authori-
 5 zation to intercept [*shall*] **must** be executed as soon as practicable, [*shall*] **must** be conducted in
 6 such a way as to minimize the interception of communications not otherwise subject to interception,
 7 and must terminate upon attainment of the authorized objective, or in any event in 30 days.

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

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

13 133.726. (1) Notwithstanding ORS 133.724, under the circumstances described in this section, a
 14 law enforcement officer is authorized to intercept an oral communication to which the officer or
 15 [*someone*] **a person** under the direct supervision of the officer is a party, without obtaining an order
 16 for the interception of a wire, electronic or oral communication under ORS 133.724.

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

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

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

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

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

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

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

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

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

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

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

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

- 1 (c) The agency authorized under the order to intercept the oral communication;
- 2 (d) The name and office of the applicant and the signature and title of the issuing judge;
- 3 (e) A period of time after which the order shall expire; and

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

7 (7) An order under ORS 133.724 or this section is not required when a law enforcement officer
 8 intercepts an oral communication to which the officer or *[someone]* **a person** under the direct
 9 supervision of the officer is a party **if:**

10 (a) *[If]* The oral communication is made by a person whom the officer has probable cause to
 11 believe has committed, is engaged in committing or is about to commit:

12 *[(a)]* (A) A crime punishable as a felony under ORS **166.720**, 475.840, 475.846 to 475.894 or
 13 *[475.906]* **475.904 to 475.910** or as a misdemeanor under ORS 167.007; or

14 *[(b)]* (B) Any other crime punishable as a felony if the circumstances at the time the oral com-
 15 munication is intercepted are of such exigency that it would be unreasonable to obtain a court order
 16 under ORS 133.724 or this section~~[,]~~; **or**

17 **(b) At the time the oral communication is intercepted, the law enforcement officer rea-**
 18 **sonably believes that the circumstances present a substantial risk of death, serious injury**
 19 **or sexual assault to the officer, to the person under the direct supervision of the officer or**
 20 **to any other person and the interception is necessary to protect the safety of the person who**
 21 **may be endangered.**

22 **(8) An order under this section or ORS 133.724 is not required when a law enforcement**
 23 **officer intercepts a face-to-face oral communication to which the officer is a party and the**
 24 **officer is in uniform, displays a badge or otherwise discloses to all participants that the of-**
 25 **ficer is a law enforcement officer on official duty.**

26 *[(8)]* (9) A law enforcement officer who intercepts an oral communication pursuant to this sec-
 27 tion may not intentionally fail to record and preserve the oral communication in its entirety. A law
 28 enforcement officer, or a person under the direct supervision of the officer, who is authorized under
 29 this section to intercept an oral communication is not required to exclude from the interception an
 30 oral communication made by a person for whom probable cause does not exist if the officer or **the**
 31 person under the officer’s direct supervision is a party to the oral communication.

32 *[(9)]* (10) A law enforcement officer may not divulge the contents of an oral communication in-
 33 tercepted under this section before a preliminary hearing or trial in which an oral communication
 34 is going to be introduced as evidence against a person except:

- 35 (a) To a superior officer or other official with whom the law enforcement officer is cooperating
- 36 in the enforcement of the criminal laws of this state or the United States;
- 37 (b) To a magistrate;
- 38 (c) In a presentation to a federal or state grand jury; or
- 39 (d) In compliance with a court order.

40 *[(10)]* (11) A law enforcement officer may intercept an oral communication under this section
 41 only when acting within the scope of the officer’s employment and as a part of assigned duties.

42 *[(11)]* (12) As used in this section, “law enforcement officer” means an officer employed by the
 43 United States, this state or a municipal government within this state, or a political subdivision,
 44 agency, department or bureau of those governments, to enforce criminal laws.

45 *[(12)]* (13) Violation of subsection *[(9)]* (10) of this section is a Class A misdemeanor.

1 **SECTION 3.** ORS 133.735 is amended to read:

2 133.735. (1) Any aggrieved person in any trial, hearing or proceeding in or before any court,
 3 department, officer, agency, regulatory body or other authority of the state, or a political subdivision
 4 thereof, may move to suppress the contents of any wire, electronic or oral communication inter-
 5 cepted under ORS 133.724 **or 133.726**, or evidence derived **solely** therefrom, on the grounds that:

6 (a) The communication was unlawfully intercepted;

7 (b) The order of authorization or approval under which *[it]* **the communication** was intercepted
 8 is insufficient on its face; *[or]*

9 (c) The interception was not made in conformity with the order of authorization or approval[.];

10 **or**

11 **(d) The interception was made solely as described in ORS 133.726 (7)(b).**

12 (2) Such motion shall be made before the trial, hearing or proceeding unless there was no op-
 13 portunity to make such motion or the person was not aware of the grounds of the motion. If the
 14 motion is granted, the contents of the intercepted wire, electronic or oral communication, or evi-
 15 dence derived therefrom, shall be treated as having been unlawfully obtained. The judge, upon the
 16 filing of such motion by the aggrieved person, may in the judge's discretion make available *[to]* **for**
 17 **inspection by** the aggrieved person or the person's counsel *[for inspection such]* **the** portions of the
 18 intercepted communications or evidence derived therefrom as the judge determines to be in the in-
 19 terests of justice.

20 **(3) Notwithstanding subsections (1) and (2) of this section, unless exclusion is required**
 21 **by the United States Constitution or the Oregon Constitution, the court may not suppress:**

22 (a) **Testimony or statements that relate to or recount an observation or recollection of**
 23 **the contents of the communication, by any person who participated in the communication**
 24 **or who observed the communication with the participants' knowledge;**

25 (b) **The contents of the intercepted communication, on the ground that the communi-**
 26 **cation was intercepted solely pursuant to ORS 133.726 (7)(b), if this evidence is otherwise**
 27 **admissible and is offered in a criminal action in which the defendant is charged with a felony**
 28 **offense of violence or sexual assault allegedly committed while the communication was being**
 29 **intercepted; or**

30 (c) **The contents of the intercepted communication, on the ground that the communi-**
 31 **cation was intercepted unlawfully, if such evidence is offered in a criminal action and is**
 32 **otherwise admissible, and:**

33 (A) **The evidence is offered by the defendant and is exculpatory;**

34 (B) **The evidence is offered by the state and the court finds that the interception was**
 35 **made under circumstances demonstrating that the officer making the interception reason-**
 36 **ably believed at the time that the interception was lawful;**

37 (C) **The defendant was not a participant in the intercepted communication;**

38 (D) **The evidence is offered to impeach a witness whom the court determines made a**
 39 **materially false statement during testimony;**

40 (E) **The parties stipulate to the admission of the evidence; or**

41 (F) **The evidence is offered by a party who establishes that a participant in the commu-**
 42 **nication, or a person who observed the communication with the participants' knowledge, is**
 43 **unavailable to testify concerning the contents of the communication due to the wrongful**
 44 **conduct of the adverse party as provided in ORS 40.465 (3)(f) and (g).**

45 *[(3)]* (4) In addition to any other right to appeal, the state shall have the right to appeal from

1 an order granting a motion to suppress under subsection (1) of this section.

2 **SECTION 4.** ORS 165.535 is amended to read:

3 165.535. As used in ORS 41.910, 133.723, 133.724, 165.540 and 165.545:

4 (1) "Conversation" means the transmission between two or more persons of an oral communi-
5 cation, **as defined in ORS 133.721, that** *[which]* is not a telecommunication or a radio communi-
6 cation.

7 (2) "Person" means any person as defined in ORS 174.100 and includes public officials and law
8 enforcement officers of the state, county, municipal corporation or any other political subdivision
9 of the state.

10 (3) "Radio communication" means the transmission by radio or other wireless methods of writ-
11 ing, signs, signals, pictures and sounds of all kinds, including all instrumentalities, facilities, equip-
12 ment and services (including, among other things, the receipt, forwarding and delivering of
13 communications) incidental to such transmission.

14 (4) "Telecommunication" means the transmission of writing, signs, signals, pictures and sounds
15 of all kinds by aid of wire, cable or other similar connection between the points of origin and re-
16 ception of such transmission, including all instrumentalities, facilities, equipment and services (in-
17 cluding, among other things, the receipt, forwarding and delivering of communications) incidental
18 to such transmission.

19 **SECTION 5.** ORS 41.910 is amended to read:

20 41.910. **Except as provided in ORS 133.735 (3),** evidence of the contents of any wire or oral
21 communication intercepted:

22 (1) In violation of ORS 165.540 *[shall]* **is** not *[be]* admissible in any court of this state, except
23 as evidence of unlawful interception.

24 (2) Under ORS 165.540 (2)(a) *[shall]* **is** not *[be]* admissible in any court of this state unless:

25 (a) The communication was intercepted by a public official in charge of and at a jail, police
26 premises, sheriff's office, Department of Corrections institution or other penal or correctional insti-
27 tution; and

28 (b) The participant in the communication, against whom the evidence is being offered, had actual
29 notice that the communication was being monitored or recorded.

30
