



Legislative Testimony

Oregon Criminal Defense Lawyers Association

May 8, 2013

The Honorable Floyd Prozanski, Chair
The Honorable Betsy Close, Vice-Chair
Senate Judiciary Committee, Members

RE: House Bill 2710

Dear Chair Prozanski and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments regarding the regulation of drones, HB 2710 and its various amendments.

Attributes of an ideal statute regulating government's use of drones.

World history has shown that, once obtained, governments do not consensually surrender powers back to its citizenry. With this in mind, OCDLA believes it is critical at the outset to assert maximal privacy protections against government's use of drones over Oregon territory.

Toward this end, OCDLA contends that the following provisions should be in place in any bill purporting to regulate the government's use of drones:

1.) General prohibition on government use:

Ideally there should be an initial expressed declaration that use of drones by government agencies is prohibited except in narrow prescribed circumstances. HB 2710 does not contain such a declaration with the clarity OCDLA would prefer. The phraseology in Section 1 Subsection 2 permitting use of a drone "for the purpose of surveillance of a person" is confusing, as "surveillance" is more a term of art than of exactitude. Further, HB 2710 describes instances when a law enforcement agency may use a drone, but there is no expressed declaration when it may not, leaving open its possible use for random enhanced patrols when not otherwise focused on the "surveillance" of a particular individual.

OCDLA prefers the general prohibition set forth in the Dash 9 Amendment to SB 71:

“Except as otherwise provided . . . a public body may not operate a drone, acquire information through the operation of a drone or disclose information acquired through the operation of a drone.”

2.) Exceptions to general prohibition:

Unless government use of drones is to be entirely prohibited, an ideal statute would clearly delineate the narrow circumstances under which its use is permitted. The following exceptions ought to be considered:

a.) Warrant based on probable cause

HB 2710 requires a warrant, but only in instances when a drone is used “for the purpose of surveillance *of a person*.” It does not speak to the use of a drone for the purpose of observing *places*, or their use for general enhanced random patrols.

The Dash 2 Amendment requires a warrant only when a drone is used to surveil the interior of a residence or other place in which an individual has a “*reasonable expectation of privacy*.” OCDLA strongly discourages the use of the phrase “*reasonable expectation of privacy*” as that standard of protection, while adequate under the Fourth Amendment to the U.S. Constitution, has been disavowed by Oregon courts as adequate under Oregon’s search and seizure clause in Article I Section 9. *See State v. Caraher*, 293 Or 741 (1982); *State v. Tanner*, 304 Or 312 (1987).

OCDLA submits that a more clear warrant exception can be found in the Dash 9 Amendment to SB 71.

b.) Limitations on images obtained beyond scope of warrant

A lawful warrant under Article I Section 9 needs to “*particularly describe the place to be searched, and person or thing to be seized*.” Warrants may not allow general rummaging of a person’s papers and effects, but must give clear guidance to officers executing the warrant that constrains their search to the evidence for which they have probable cause.

In this respect, an ideal bill will require law enforcement to narrow the scope of images obtained through the lawful use of a drone. HB 2710 contains such a limitation in Section 1 Subsection 4, although OCDLA believes it could be more clearly stated. OCDLA prefers an expressed requirement that operation of a drone must avoid collection of information or images beyond that authorized by the warrant, and further prohibit use of that extraneously-obtained evidence to further establish reasonable suspicion or probable cause. Toward that end the Dash 9 Amendment to SB 71 contains good language.

c.) Exclusion of evidence obtained in violation of permitted use

Oregon law is clear that the Legislature must clearly express its intent to exclude evidence for violation of a statutory provision. See ORS 136.432.

The Dash 1 Amendment to HB 2710 clearly expresses this intent. The Dash 2 Amendment is not so clear. Section 4 Subsection 5 phraseology: “*Any evidence acquired with the use of a drone in violation of this section is subject to a motion to suppress under ORS 133.673*” is inadequate. Any evidence can be “subject to” a motion to suppress, but that doesn’t dictate how the court should rule on the motion. A more clear expression of legislative intent to require exclusion is needed.

d.) Exceptions to the warrant requirement

There are recognized exceptions to the warrant requirement, such as consent, exigent circumstances and emergency aid. It is appropriate that these exceptions be expressly set forth in a bill. In this regard, the Dash 9 Amendment to SB 71 catalogues most recognized exceptions.

3.) Accountability, transparency and oversight

Perhaps the most critical aspect of asserting maximal privacy protections on government’s use of drones is requiring accountability, transparency and oversight of its practices. OCDLA highly recommends the provisions set forth in Sections 10 and 11 the Dash 9 Amendment to SB 71 which requires government agencies to have written policies controlling their use of drones, to create written documentation for each use, and a yearly audit by the Department of Aviation of that documentation. OCDLA also supports the provision in Subsection 8 of HB 2710 which requires a government agency of a local government to obtain approval from its government body of local government before acquiring a drone.

OCDLA appreciates and supports the Legislature’s work in addressing the regulation and use of this emergent technology. We hope to be of assistance in any way we can, now and in the future, to optimize its use within the confines of a free society.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

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