

ACCESS TO PROPERTY

What is the law in Washington State?



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Constitutional Provisions

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Washington Constitution, Art. I, § 7

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

Constitutional Rights Apply to Administrative Searches

- Fourth Amendment and Art. I, § 7 apply to administrative searches; *Camara v. Municipal Court of the City & Cy. of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); *City of Seattle v. McCready*, 123 Wn.2d 260 (1994)
- An administrative search can be part of a routine inspection program or be an investigation in response to a specific complaint

Article I, § 7 Analysis

- Did a **state actor** disturb one's **private affairs**?
- Is there **authority of law** to justify the intrusion?

Who is a state actor?

A state actor is a “. . . person who functions as an agent or instrumentality of the state”

City of Seattle housing inspectors are “state actors” –
City of Seattle v. McCready, 123 Wn.2d 260 (1994)

But, a private inspector accompanying a landlord is not a “state actor” – *City of Pasco v. Shaw*, 161 Wn.2d 450 (2007)

What is a “private affair” in WA?

Examples include:

- Homes and businesses
- Individual banking records
- Motel registry
- Garbage (at curb)
- Unpublished telephone listing
- Long distance telephone records
- GPS placed on vehicle

What is a “private affair” con’t.

Residential Property vs Commercial Property

Commercial property may have less privacy protection
(*Centimark v. Labor & Indus*, 129 Wn. App. 368 (2005))

But a statutory inspection scheme for commercial property must provide “a constitutionally adequate substitute for the Fourth Amendment’s warrant requirement.” (*Seymour v. Dep’t of Health*, 152 Wn. App. 156 (2009))

What constitutes authority of law?

- A **warrant**, OR
- One of the “jealously guarded exceptions” to the warrant requirement
 - Consent
 - Pervasively Regulated Business
 - Open Fields/Open View
 - Community Caretaking (emergency aid or routine health and safety inspection)
 - Exigent Circumstances

What constitutes authority of law?

But wait! We have this great statute:

The department or its duly appointed agent shall have the right to enter at all reasonable times in or upon any property, public or private, for the purpose of inspecting and investigating conditions relating to the pollution of or the possible pollution of any of the waters of this state. RCW 90.48.090

In Washington, without warrant authority, this statute is not sufficient

What makes Washington so special in the world of search and seizure?

A warrantless search is per se unreasonable. *State v. Morse*, 156 Wn.2d 1 (2005).

Under Art. I § 7 there must be a statute explicitly authorizing the government entity to seek an administrative warrant AND a statute (or court rule) explicitly authorizing the court to issue the warrant.

City of Seattle v. McCready, 123 Wn.2d 260 (1994) (*McCready I*)

City of Seattle v. McCready, 124 Wn.2d 300 (1994) (*McCready II*)

City of Seattle v. McCready, 131 Wn.2d 266 (1997) (*McCready III*)

Warrants: Authority of Law (cont.)

- *Bosteder v. City of Renton*, 155 Wn.2d 18 (2005): Warrant issued without authority of law is “void from inception” and resulting search is “warrantless under any constitution”
- Absent exception to warrant requirement, such a search violates 4th Amendment and, therefore, may trigger § 1983 liability based on “(1) the application for the warrant that could not be validly issued by reason of lack of authority and (2) the search made pursuant to the invalid warrant”
- Court must have explicit authority to issue warrant regardless of agency “right of entry” statute

What does warrant language look like?

The director of agriculture may enter at all reasonable times in or upon dairy farms for the purpose of inspecting and investigating conditions relating to the pollution of any waters of the state.

If the director of agriculture or the director's duly appointed agent is denied access to a dairy farm, **he or she may apply to a court of competent jurisdiction for a search warrant authorizing access** to the property and facilities at a reasonable time for purposes of conducting tests and inspections, taking samples, and examining records. To show that access is denied, the director of agriculture shall file with the court an affidavit or declarations containing a description of his or her attempts to notify and locate the owner or the owner's agent and to secure consent. **Upon application, the court may issue a search warrant** for the purposes requested.

RCW 90.64.200 (2009 c 143 § 1)

Probable cause for administrative search lower than for criminal search

- An administrative search need not rely on the same type of probable cause required in criminal investigations.
Camara v. Municipal Court, 387 U.S. 523 (1967)
- Probable cause for administrative search if: (1) specific evidence of existing violation; or (2) general inspection program based on reasonable legislative or administrative standards derived from neutral sources
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)

Limits of Warrant Authority

- Warrant authority is based on statute - must consider the circumstances specified in the statute that allows the agency to seek a warrant
- *U.S. v. Jones*, 565 U.S. 400 (2012) - warrants valid only for time, place, and circumstances specified

Warrant Exception: Consent

- Consent to administrative search is subject to lower standard than consent to criminal search (*U.S. v. Thriftmart*, 429 F.2d 1006 (9th Cir. 1970); *Cranwell v. Mesec*, 77 Wn. App. 90 (1995))
- Still consent must be voluntary, must be granted by person with authority to consent, and the area searched must be limited in scope to the consent given
- “Mere acquiescence” is not consent (*State v. Schultz*, 170 Wn.2d 746 (2011))

Warrant Exception: Pervasively Regulated Business

- Owner engaging in certain types of business “has voluntarily chosen to subject himself to a full arsenal of governmental regulation” (*Marshall v. Barlow's*, 436 U.S. 307, 313 (1978))
- Washington courts have applied it to fishing and hunting and massage parlors, but not to forest practices
- Supreme court noted that exception has not yet been recognized under Article I, Section 7 (*State v. Miles*, 160 Wn.2d 236, 250-51 (2007))

Warrant Exception: Open Fields

Not a blanket exception. In some instances, the Washington Constitution protects “open fields” from searches. Applying this exception requires a fact specific analysis

- *State v. Johnson*, 75 Wn. App. 692 (1994) (entry onto private property was unreasonable where “no trespassing” and “private property” signs were posted and property was enclosed with chain link fence and closed gate).
- *State v. Crandall*, 39 Wn. App. 849, 854 (1985) (no unconstitutional search where property was not posted with “no trespassing” sign and property was frequented by hunters).

Warrant Exception: Plain View

“When a law enforcement officer is able to detect something by utilization of one or more of his senses while **lawfully present** at the vantage point where those senses are used, that detection does not constitute a search.”
State v. Bobic, 140 Wn.2d 250, 259 (2000).

“An open view is not a true search because the observation takes place from a non-intrusive vantage point.” *State v. Thorson*, 98 Wn. App. 528, 532 (1999).

Airplane flyovers? Aerial photographs? Drones?

A Warrantless Search May Result In:

- Exclusion of evidence. *State v. Gaines*, 154 Wn.2d 711, 716 (2005) (evidence seized during, and evidence derived from, an illegal search is subject to suppression).
- A federal 42 U.S.C. § 1983 claim (lawsuit against government official for violating an established federal constitutional or statutory right)
- Trespass claim under state law
- Police involvement

Conclusion

- Art. I, § 7 applies **WHEN** state actor disturbs “private affairs”
- The “authority of law” that justifies the intrusion by a state actor (**WHO**) is a warrant or a well recognized warrant exception
- Statutory authority is **WHAT** is required to obtain a valid warrant – both for the agency and for the court
- Possibility of § 1983 liability one reason **WHY** this is important in the context of administrative searches