

PROPOSED SUBSTITUTE HOUSE BILL 1031

By Representative Morris

Original bill: Requires that a person selling, issuing, or distributing an electronic communication device (ECD) must post a notice and label the device. Allows a consumer to request access to any personal information gathered through an ECD and to contest, amend, or seek to remove the information. Prohibits a person from combining or linking a consumer's personal information with information gathered from an ECD. Prohibits disclosure to third parties of information gathered by an ECD. Creates civil and criminal penalties.

Summary of Substitute bill:

- **Notice/Labeling:** Requires a person that sells or issues an electronic communication device (ECD) to notify the consumer of the presence of the ECD unless the ECD is disabled, deactivated, or removed at the point of sale or issuance. Notice can be provided through a sign at the point of sale or issuance, or through information given to the consumer.
- **Labeling:** Requires that an ECD must be labeled, unless the electronic communication device has been deactivated, disabled, or removed at the point of sale or issuance. The label must be affixed to the electronic communication device or its packaging and must be clear and conspicuous.
- **Removal/Deactivation:** Requires that a consumer be notified of the methods by which the consumer can seek removal or deactivation of the ECD, if technically feasible.
- **Security Measures:** Requires a person that sells or issues an ECD to use industry accepted best standards to secure the ECD. Requires that adequate security measures be implemented if a person retains personal information gathered through an ECD.
- **Unauthorized Use:** Prohibits a person from remotely scanning or reading an ECD to identify a consumer without obtaining consent from the consumer. Scanning or reading an ECD is permissible if done to comply with other federal law or regulations, or other state law.
- **Remedies:** Allows the Attorney General (AG) to enforce the provisions of the bill. The AG can bring an action against a person who violates any of the provisions of the bill and seek damages of up to \$10,000 per violation. Allows the court to award triple damages, costs, and attorneys' fees if the defendant has engaged in a pattern or practice of violating the provisions of the bill.
- **Electronic Communication Device (ECD):** Defines an ECD as a device that passively or actively uses radio frequency identification (RFID) technology in the 902-928 frequency range or the 2.4 GHz frequency authorized by the Federal Communications Commission (FCC), or other subsequent frequencies authorized for RFID by the FCC by rule consistent with the purposes of this bill.

Committee: House Technology, Energy & Communications Committee
Staff: Kara Durbin (786-7133), Office of Program Research
Date: February 22, 2007

1 AN ACT Relating to electronic communication devices; adding a new
2 chapter to Title 19 RCW; creating a new section; and prescribing
3 penalties.

4

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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7 NEW SECTION. **Sec. 1.** The legislature finds that Washington
8 state, from its inception, has recognized the importance of
9 maintaining individual privacy. The legislature further finds that
10 protecting the confidentiality and privacy of an individual's
11 personal information, especially when collected from the individual
12 without his or her knowledge or consent, is critical to maintaining
13 the safety and well-being of its citizens.

14 The legislature recognizes that inclusion of technologies like
15 radio frequency identification or other electronic communication
16 devices that broadcast data or enable data or information to be
17 collected or scanned secretly and/or remotely will greatly magnify
18 the potential risk to individual privacy, safety, and economic well-
19 being that can occur from unauthorized interception and use of

1 personal information. The legislature further recognizes that
2 inclusion of electronic communication devices will also make it
3 possible for a person or entity with access to a reader or other
4 scanning device to engage in the tracking of the citizens of
5 Washington state without their knowledge or consent.

6 Therefore, it is the intent of the legislature to establish
7 individual privacy rights in an era of innovation of new
8 technologies. It is further the intent of the legislature to
9 establish such rights so that manufacturers and sellers of new,
10 innovative technologies have a predictable set of known, individual
11 rights to be aware of before offering their technology for sale or
12 use in the state of Washington.

13 It is the further intent of the legislature that all consumers
14 have the following fundamental rights with respect to the sale or
15 issuance of electronic communications devices:

16 (1) The right to receive notice prior to a person selling or
17 issuing an electronic communication device;

18 (2) The right to expect that a person selling or issuing an
19 electronic communication device will label the device in a clear and
20 conspicuous manner;

21 (3) The right to expect that a person selling or issuing an
22 electronic communication device will implement security measures to
23 ensure that any personal information stored about their consumers is
24 secure; and

25 (4) The right to seek private remedies if a person fails to
26 comply with any of the principles outlined in subsections (1) through
27 (3) of this section.

28

29 NEW SECTION. **Sec. 2.** The definitions in this section apply
30 throughout sections 2 through 9 of this act unless the context
31 clearly requires otherwise.

32 (1) "Clear and conspicuous" means that the notice is reasonably
33 understandable and designed to call attention to the nature and
34 significance of the information contained in the notice.

1 (2) "Consent acknowledgment" is an electronic or written record,
2 form, statement, or writing used to obtain consent from a consumer in
3 order for a person to collect, maintain, and disclose information
4 gathered by an electronic communication device. This acknowledgment
5 must, at a minimum, specify in a clear and conspicuous manner the
6 person's privacy policy and the manner in which information
7 pertaining to the consumer will be collected and disseminated.

8 (3) "Consumer" means an individual who purchases or is issued an
9 electronic communication device for use in Washington.

10 (4) "Electronic communication device" means a device that
11 passively or actively uses radio frequency identification technology
12 in the 902-928 MHz frequency range or the 2.4 GHz frequency
13 authorized by the federal communications commission, or any
14 subsequent frequency range authorized by the federal communications
15 commission for radio frequency identification technology as may be
16 provided by the federal communications commission by rule, consistent
17 with the purposes of this act.

18 (5) "Identify" means to establish the name, identification
19 number, or other identifying characteristic of an individual,
20 including information linking an individual to previous transactions
21 or activities.

22 (6) "Manifest assent" is a deliberate act whereby a consumer
23 volunteers to be identified with the use of information gathered by,
24 or contained within, an electronic communication device. The
25 permission granted by an act of manifest assent for purposes of this
26 chapter shall not apply to more than one specific instance unless
27 permission is secured in the form of a written contract. Manifest
28 assent may refer to the act of a consumer who voluntarily submits his
29 or her electronic communication device in order that it might be
30 scanned or read for the purpose of completing a wholesale or retail
31 transaction.

32 (7) "Person" means a government, government subdivision, agency
33 or instrumentality, person, or a legal or commercial entity licensed
34 to do business in the state.

35 (8) "Personal information" includes any of the following data

1 elements to the extent they are used alone or in conjunction with any
2 other information to identify a consumer: (a) First or last name;
3 (b) social security number; (c) driver's license number or Washington
4 state identification card number; (d) bank, credit card, or other
5 financial institution account number; (e) credit or debit card
6 number; (f) automated or electronic signature; (g) unique biometric
7 data; (h) an unlisted telephone number; (i) medical information; (j)
8 address; (k) date of birth; (l) ethnicity or nationality; (m)
9 religion; (n) political affiliation; (o) sexual orientation; or (p) a
10 private group affiliation not available in the public domain.

11 (9) "Radio frequency identification" means technologies that use
12 radio waves to identify individual items.

13 (10) "Universally accepted symbol" means a graphical system
14 designed to provide a standard way to show the presence of an RFID
15 transponder, its frequency, and its data structure.

16

17 NEW SECTION. **Sec. 3.** Any person that sells or issues an
18 electronic communication device to a consumer that is not disabled,
19 deactivated, or removed at the point of sale or issuance must clearly
20 and conspicuously label the electronic communication device. The
21 label must contain a universally accepted symbol for radio frequency
22 identification technology. The label shall be affixed to the
23 electronic communication device or its packaging and must be clear
24 and conspicuous.

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26 NEW SECTION. **Sec. 4.**

27 (1) Any person that sells or issues an electronic communication
28 device to a consumer that is not disabled, deactivated, or removed at
29 the point of sale or issuance shall:

30 (a) post signs providing information to the consumer about the
31 existence of a universally accepted symbol for identifying an
32 electronic communication device; or

33 (b) distribute information to the consumer, which explains the
34 meaning of the universally accepted symbol.

1 (2) The signs shall be posted in prominent areas near the point
2 of sale or issuance. The signs and lettering shall be clearly
3 visible to consumers. The sign shall display the following
4 information:

5 (a) An explanation of the universally accepted symbol or emblem,
6 which indicates that the person is selling or issuing an electronic
7 communication device;

8 (b) An explanation of how an electronic communication device may
9 send, gather, or transmit information about the consumer, which could
10 be read by an unauthorized third party; and

11 (c) Instructions on whether it is technically feasible to
12 deactivate or remove the electronic communication device, and if
13 technically feasible, instructions on (i) the specific location of
14 the electronic communication device and (ii) how the consumer may
15 seek deactivation or removal of the electronic communication device.
16

17 NEW SECTION. **Sec. 5.**

18 If an electronic communication device does transmit personal
19 information about a consumer, a person must, prior to sale or
20 issuance of the device, notify the consumer as specified in section 4
21 of this act and secure a consent acknowledgment or manifest assent
22 from the consumer.
23

24 NEW SECTION. **Sec. 6.** (1) If the consumer consents to the use of

25 the electronic communication device, either through a consent
26 acknowledgment or manifest assent, but later requests removal or
27 deactivation of the electronic communication device, the consumer may
28 be held responsible for any costs associated with deactivation or
29 removal.

30 (2) A consumer shall not be coerced into keeping an electronic
31 communication device active in order for the consumer to be able to
32 exchange, return, repair, or service an item.

33 (3) Once an electronic communication device has been deactivated,
34 it shall not be reactivated without the manifest assent of the

1 consumer identified with the electronic communication device.

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3 NEW SECTION. **Sec. 7.**

4 (1) Any person who sells or issues an electronic communication
5 device that has not been disabled, deactivated, or removed at the
6 point of sale or issuance must use industry accepted best standards
7 to secure the electronic communication device.

8 (2) Any person who retains personal information gathered through
9 an electronic communication device must implement adequate security
10 measures. The security measures should be consistent with industry
11 standards that are commensurate with the amount and sensitivity of
12 the information being stored on the system.

13

14 NEW SECTION. **Sec. 8.**

15 (1) It is a violation of this act for a person to remotely scan
16 or read or attempt to scan or read an electronic communication device
17 to identify a consumer without obtaining a consent acknowledgment or
18 manifest assent from the consumer.

19 (2) This section shall not apply to the following:

20 (a) Scanning or reading an electronic communication device, or
21 using information gathered through an electronic communication
22 device, in order to comply with federal law or regulations, or state
23 law;

24 (b) Scanning or reading an electronic communication device, or
25 using information gathered through an electronic communication
26 device, in order to comply with properly authorized civil, criminal,
27 administrative, or regulatory investigation or subpoena or summons by
28 federal, state, or local authorities; or

29 (c) Scanning or reading an electronic communication device, or
30 using information gathered through an electronic communication
31 device, in order to respond to judicial process or government
32 regulatory authorities having jurisdiction over the person for
33 examination, compliance, or other purposes as authorized by law.

34

1 NEW SECTION. **Sec. 9.**

2 (1) The attorney general may bring an action against a person who
3 violates sections 3 through 7 of this act to enjoin further
4 violations and to recover the greater of:

5 (a) Actual damages; or

6 (b) Ten thousand dollars for each separate violation of sections
7 3 through 7 of this act.

8 (2) For purposes of subsection (1) of this section, multiple
9 violations of sections 3 through 7 of this act resulting from any
10 single action or conduct shall constitute one violation.

11 (3) In an action under subsection (1) of this section, a court
12 may:

13 (a) Increase the damages up to three times the damages allowed by
14 subsection (1) of this section where the defendant has engaged in a
15 pattern and practice of violating sections 3 through 7 of this act;
16 and

17 (b) Award costs and reasonable attorneys' fees to a prevailing
18 party.

19
20 NEW SECTION. **Sec. 10.**

21 Sections 3 through 8 of this act do not apply to the resale of an
22 electronic communication device by a consumer.

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24 NEW SECTION. **Sec. 11.** If any provision of this act or its
25 application to any person or circumstance is held invalid, the
26 remainder of the act or the application of the provision to other
27 persons or circumstances is not affected.

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29 NEW SECTION. **Sec. 12.** Sections 2 through 11 of this act
30 constitute a new chapter in Title 19 RCW.