

Amendment - 1st Reading/2nd House-blue - Requested by: Daniel Zolnikov - (H) Energy, Technology and Federal Relations

- 2023

68th Legislature 2023

Drafter: Trevor Graff, 406-444-4975

SB0384.002.001

1 SENATE BILL NO. 384
2 INTRODUCED BY D. ZOLNIKOV, K. REGIER, E. BOLDMAN, S. MORIGEAU, K. BOGNER, K. SULLIVAN, K.
3 ZOLNIKOV, D. EMRICH
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE CONSUMER DATA PRIVACY ACT;
6 PROVIDING DEFINITIONS; ESTABLISHING APPLICABILITY; PROVIDING FOR CONSUMER RIGHTS TO
7 PERSONAL DATA; ESTABLISHING REQUIREMENTS AND LIMITATIONS FOR A CONTROLLER OF
8 PERSONAL DATA; ESTABLISHING REQUIREMENTS AND LIMITATIONS FOR A PROCESSOR OF
9 PERSONAL DATA; PROVIDING FOR DATA PROTECTION ASSESSMENTS; PROVIDING EXEMPTIONS
10 AND COMPLIANCE REQUIREMENTS; PROVIDING FOR ENFORCEMENT; AND PROVIDING EFFECTIVE
11 DATES A DELAYED EFFECTIVE DATE."

12
13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
14

15 NEW SECTION. Section 1. Short title. [Sections 1 through 12] may be cited as the "Consumer Data
16 Privacy Act".
17

18 NEW SECTION. Section 2. Definitions. As used in [sections 1 through 12], unless the context
19 clearly indicates otherwise, the following definitions apply:

20 (1) "Affiliate" means a legal entity that shares common branding with another legal entity or
21 controls, is controlled by, or is under common control with another legal entity.

22 (2) "Authenticate" means to use reasonable methods to determine that a request to exercise any
23 of the rights afforded under [section 5(1)(a) through (1)(e)] is being made by, or on behalf of, the consumer who
24 is entitled to exercise these consumer rights with respect to the personal data at issue.

25 (3) (a) "Biometric data" means data generated by automatic measurements of an individual's
26 biological characteristics, such as a fingerprint, a voiceprint, eye retinas, irises, or other unique biological
27 patterns or characteristics that are used to identify a specific individual.

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1 (b) The term does not include:
2 (i) a digital or physical photograph;
3 (ii) an audio or video recording; or
4 (iii) any data generated from a digital or physical photograph or an audio or video recording, unless
5 that data is generated to identify a specific individual.

6 (4) "Child" means an individual under 13 years of age.

7 (5) (a) "Consent" means a clear affirmative act signifying a consumer's freely given, specific,
8 informed, and unambiguous agreement to allow the processing of personal data relating to the consumer. The
9 term may include a written statement, a statement by electronic means, or any other unambiguous affirmative
10 action.

11 (b) The term does not include:

12 (i) acceptance of a general or broad term of use or similar document that contains descriptions of
13 personal data processing along with other unrelated information;

14 (ii) hovering over, muting, pausing, or closing a given piece of content; or

15 (iii) an agreement obtained using dark patterns.

16 (6) (a) "Consumer" means an individual who is a resident of this state.

17 (b) The term does not include an individual acting in a commercial or employment context or as an
18 employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, nonprofit, or
19 government agency whose communications or transactions with the controller occur solely within the context of
20 that individual's role with the company, partnership, sole proprietorship, nonprofit, or government agency.

21 (7) "Control" or "controlled" means:

22 (a) ownership of or the power to vote more than 50% of the outstanding shares of any class of
23 voting security of a company;

24 (b) control in any manner over the election of a majority of the directors or of individuals exercising
25 similar functions; or

26 (c) the power to exercise controlling influence over the management of a company.

27 (8) "Controller" means an individual who or legal entity that, alone or jointly with others, determines

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1 the purpose and means of processing personal data.

2 (9) "Dark pattern" means a user interface designed or manipulated with the effect of substantially
3 subverting or impairing user autonomy, decision-making, or choice.

4 (10) "Decisions that produce legal or similarly significant effects concerning the consumer" means
5 decisions made by the controller that result in the provision or denial by the controller of financial or lending
6 services, housing, insurance, education enrollment or opportunity, criminal justice, employment opportunities,
7 health care services, or access to necessities such as food and water.

8 (11) "Deidentified data" means data that cannot be used to reasonably infer information about or
9 otherwise be linked to an identified or identifiable individual or a device linked to the individual if the controller
10 that possesses the data:

11 (a) takes reasonable measures to ensure that the data cannot be associated with an individual;

12 (b) publicly commits to process the data in a deidentified fashion only and to not attempt to
13 reidentify the data; and

14 (c) contractually obligates any recipients of the data to satisfy the criteria set forth in subsections
15 (11)(a) and (11)(b).

16 (12) "Identified or identifiable individual" means an individual who can be readily identified, directly
17 or indirectly, ~~in particular by reference to an identifier such as a name, an identification number, specific~~
18 ~~geolocation data, or an online identifier.~~

19 (13) "Institution of higher education" means any individual who or school, board, association, limited
20 liability company, or corporation that is licensed or accredited to offer one or more programs of higher learning
21 leading to one or more degrees.

22 (14) "Nonprofit organization" means any organization that is exempt from taxation under section
23 501(c)(3), 501(c)(4), 501(c)(6) or 501(c)(12) of the Internal Revenue Code of 1986 or any subsequent
24 corresponding internal revenue code of the United States as amended from time to time.

25 (15) (a) "Personal data" means any information that is linked or reasonably linkable to an identified
26 or identifiable individual.

27 (b) The term does not include deidentified data or publicly available information.

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- 2023

68th Legislature 2023

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SB0384.002.001

1 (16) (a) "Precise geolocation data" means information derived from technology, including but not
2 limited to global positioning system level latitude and longitude coordinates or other mechanisms, that directly
3 identifies the specific location of an individual with precision and accuracy within a radius of 1,750 feet.

4 (b) The term does not include the content of communications, or any data generated by or
5 connected to advanced utility metering infrastructure systems or equipment for use by a utility.

6 (17) "Process" or "processing" means any operation or set of operations performed, whether by
7 manual or automated means, on personal data or on sets of personal data, such as the collection, use, storage,
8 disclosure, analysis, deletion, or modification of personal data.

9 (18) "Processor" means an individual who or legal entity that processes personal data on behalf of a
10 controller.

11 (19) "Profiling" means any form of automated processing performed on personal data solely to
12 evaluate, analyze, or predict personal aspects related to an identified or identifiable individual's economic
13 situation, health, personal preferences, interests, reliability, behavior, location, or movements.

14 (20) "Protected health information" has the same meaning as provided in the privacy regulations of
15 the federal Health Insurance Portability and Accountability Act of 1996.

16 (21) "Pseudonymous data" means personal data that cannot be attributed to a specific individual
17 without the use of additional information, provided the additional information is kept separately and is subject to
18 appropriate technical and organizational measures to ensure that the personal data is not attributed to an
19 identified or identifiable individual.

20 (22) "Publicly available information" means information that:

21 (a) is lawfully made available through federal, state, or municipal government records or widely
22 distributed media; ~~and~~ OR

23 (b) a controller has a reasonable basis to believe a consumer has lawfully made available to the
24 public.

25 (23) (a) "Sale of personal data" means the exchange of personal data for monetary or other
26 valuable consideration by the controller to a third party.

27 (b) The term does not include:

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SB0384.002.001

- 1 (i) the disclosure of personal data to a processor that processes the personal data on behalf of
2 the controller;
- 3 (ii) the disclosure of personal data to a third party for the purposes of providing a product or
4 service requested by the consumer;
- 5 (iii) the disclosure or transfer of personal data to an affiliate of the controller;
- 6 (iv) the disclosure of personal data in which the consumer directs the controller to disclose the
7 personal data or intentionally uses the controller to interact with a third party;
- 8 (v) the disclosure of personal data that the consumer:
9 (A) intentionally made available to the public via a channel of mass media; and
10 (B) did not restrict to a specific audience; or
- 11 (vi) the disclosure or transfer of personal data to a third party as an asset that is part of a merger,
12 acquisition, bankruptcy, or other transaction, or a proposed merger, acquisition, bankruptcy, or other
13 transaction in which the third party assumes control of all or part of the controller's assets.
- 14 (24) "Sensitive data" means personal data that includes:
15 (a) data revealing racial or ethnic origin, religious beliefs, a mental or physical health condition or
16 diagnosis, information about a person's sex life, sexual orientation, or citizenship or immigration status;
17 (b) the processing of genetic or biometric data for the purpose of uniquely identifying an individual;
18 (c) personal data collected from a known child; or
19 (d) precise geolocation data.
- 20 (25) (a) "Targeted advertising" means displaying advertisements to a consumer in which the
21 advertisement is selected based on personal data obtained or inferred from that consumer's activities over time
22 and across nonaffiliated internet websites or online applications to predict the consumer's preferences or
23 interests.
- 24 (b) The term does not include:
25 (i) advertisements based on activities within a controller's own internet websites or online
26 applications;
27 (ii) advertisements based on the context of a consumer's current search query or visit to an

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- 2023

68th Legislature 2023

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SB0384.002.001

1 internet website or online application;

2 (iii) advertisements directed to a consumer in response to the consumer's request for information
3 or feedback; or

4 (iv) processing personal data solely to measure or report advertising frequency, performance, or
5 reach.

6 (26) "Third party" means an individual or legal entity, such as a public authority, agency, or body,
7 other than the consumer, controller, or processor or an affiliate of the controller or processor.

8 (27) "TRADE SECRET" HAS THE SAME MEANING AS PROVIDED IN 30-14-402.

9
10 NEW SECTION. Section 3. Applicability. The provisions of [sections 1 through 12] apply to persons
11 that conduct business in this state or persons that produce products or services that are targeted to residents of
12 this state and:

13 (1) control or process the personal data of not less than 100,000 consumers, excluding personal
14 data controlled or processed solely for the purpose of completing a payment transaction; or

15 (2) control or process the personal data of not less than 25,000 consumers and derive more than
16 25% of gross revenue from the sale of personal data.

17
18 NEW SECTION. Section 4. Exemptions. (1) [Sections 1 through 12] do not apply to any:

19 (a) body, authority, board, bureau, commission, district, or agency of this state or any political
20 subdivision of this state;

21 (b) nonprofit organization;

22 (c) institution of higher education;

23 (d) national securities association that is registered under 15 U.S.C. 78o-3 of the federal Securities
24 Exchange Act of 1934, as amended;

25 (e) ~~financial institution or data subject to Title V of the Financial Services Modernization Act of~~
26 ~~1999, 15 U.S.C. 6801, et seq. financial institution or an affiliate of a financial institution governed by, or personal~~
27 ~~data collected, processed, sold, or disclosed in accordance with, Title V of the Gramm-Leach-Bliley Act, 15~~

Amendment - 1st Reading/2nd House-blue - Requested by: Daniel Zolnikov - (H) Energy, Technology and Federal Relations

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SB0384.002.001

1 U.S.C. 6801, et seq.; or

2 (f) covered entity or business associate as defined in the privacy regulations of the federal Health
3 Insurance Portability and Accountability Act of 1996, 45 CFR 160.103.

4 (2) Information and data exempt from [sections 1 through 12] include:

5 (a) protected health information under the privacy regulations of the federal Health Insurance
6 Portability and Accountability Act of 1996;

7 (b) patient-identifying information for the purposes of 42 U.S.C. 290dd-2;

8 (c) identifiable private information for the purposes of the federal policy for the protection of human
9 subjects of 1991, 45 CFR, part 46;

10 (d) identifiable private information that is otherwise information collected as part of human subjects
11 research pursuant to the good clinical practice guidelines issued by the international council for harmonisation
12 of technical requirements for pharmaceuticals for human use;

13 (e) the protection of human subjects under 21 CFR, parts 6, 50, and 56, or personal data used or
14 shared in research as defined in the federal Health Insurance Portability and Accountability Act of 1996, 45
15 CFR 164.501, that is conducted in accordance with the standards set forth in this subsection (2)(e), or other
16 research conducted in accordance with applicable law;

17 (f) information and documents created for the purposes of the Health Care Quality Improvement
18 Act of 1986, 42 U.S.C. 11101, et seq.;

19 (g) patient safety work products for the purposes of the Patient Safety and Quality Improvement
20 Act of 2005, 42 U.S.C. 299b-21, et seq., as amended;

21 (h) information derived from any of the health care-related information listed in this subsection (2)
22 that is:

23 (i) deidentified in accordance with the requirements for deidentification pursuant to the privacy
24 regulations of the federal Health Insurance Portability and Accountability Act of 1996; or

25 (ii) included in a limited data set as described in 45 CFR 164.514(e), to the extent that the
26 information is used, disclosed, and maintained in a manner specified in 45 CFR 164.514(e).

27 (i) information originating from and intermingled to be indistinguishable with or information treated

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68th Legislature 2023

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SB0384.002.001

1 in the same manner as information exempt under this subsection (2) that is maintained by a covered entity or
2 business associate as defined in the privacy regulations of the federal Health Insurance Portability and
3 Accountability Act of 1996, 45 CFR 160.103, or a program or qualified service organization, as specified in 42
4 U.S.C. 290dd-2, as amended;

5 (j) information used for public health activities and purposes as authorized by the federal Health
6 Insurance Portability and Accountability Act of 1996, community health activities, and population health
7 activities;

8 (k) the collection, maintenance, disclosure, sale, communication, or use of any personal
9 information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general
10 reputation, personal characteristics, or mode of living by a consumer reporting agency, furnisher, or user that
11 provides information for use in a consumer report and by a user of a consumer report, but only to the extent
12 that the activity is regulated by and authorized under the Fair Credit Reporting Act, 15 U.S.C. 1681, as
13 amended;

14 (l) personal data collected, processed, sold, or disclosed in compliance with the Driver's Privacy
15 Protection Act of 1994, 18 U.S.C. 2721, et seq., as amended;

16 (m) personal data regulated by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.
17 1232g, et seq., as amended;

18 (n) personal data collected, processed, sold, or disclosed in compliance with the Farm Credit Act
19 of 1993, 12 U.S.C. 2001, et seq., as amended;

20 (o) data processed or maintained:

21 (i) by an individual applying to, employed by, or acting as an agent or independent contractor of a
22 controller, processor, or third party to the extent that the data is collected and used within the context of that
23 role;

24 (ii) as the emergency contact information of an individual under [sections 1 through 12] and used
25 for emergency contact purposes; or

26 (iii) that is necessary to retain to administer benefits for another individual relating to the individual
27 who is the subject of the information under subsection (2)(a) and is used for the purposes of administering the

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- 2023

68th Legislature 2023

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SB0384.002.001

1 benefits; and

2 (p) personal data collected, processed, sold, or disclosed in relation to price, route, or service, as
3 these terms are used in the Airline Deregulation Act of 1978, 49 U.S.C. 40101, et seq., as amended, by an air
4 carrier subject to the Airline Deregulation Act of 1978, to the extent [sections 1 through 12] are preempted by
5 the Airline Deregulation Act of 1978, 49 U.S.C. 41713, as amended.

6 (3) Controllers and processors that comply with the verifiable parental consent requirements of the
7 Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501, et seq., shall be considered compliant with
8 any obligation to obtain parental consent pursuant to [sections 1 through 12].

9
10 **NEW SECTION. Section 5. Consumer personal data -- opt-out -- compliance -- appeals.** (1) A
11 consumer must have the right to:

12 (a) confirm whether a controller is processing the consumer's personal data and access the
13 consumer's personal data, UNLESS SUCH CONFIRMATION OR ACCESS WOULD REQUIRE THE CONTROLLER TO REVEAL A
14 TRADE SECRET;

15 (b) correct inaccuracies in the consumer's personal data, considering the nature of the personal
16 data and the purposes of the processing of the consumer's personal data;

17 (c) delete personal data about the consumer;

18 (d) obtain a copy of the consumer's personal data previously provided by the consumer to the
19 controller in a portable and, to the extent technically feasible, readily usable format that allows the consumer to
20 transmit the personal data to another controller without hindrance when the processing is carried out by
21 automated means, provided the controller is not required to reveal any trade secret; and

22 (e) opt out of the processing of the consumer's personal data for the purposes of:

23 (i) targeted advertising;

24 (ii) the sale of the consumer's personal data, except as provided in [section 7(2)]; or

25 (iii) profiling in furtherance of automated decisions that produce legal or similarly significant effects
26 concerning the consumer.

27 (2) A consumer may exercise rights under this section by a secure and reliable means established