
SECOND SUBSTITUTE HOUSE BILL 1127

State of Washington

67th Legislature

2021 Regular Session

By House Appropriations (originally sponsored by Representatives Slatter, Boehnke, Valdez, Kloba, Graham, Macri, and Pollet)

READ FIRST TIME 02/22/21.

1 AN ACT Relating to protecting the privacy and security of
2 COVID-19 health data collected by entities other than public health
3 agencies, health care providers, and health care facilities; amending
4 RCW 42.56.360; adding a new chapter to Title 70 RCW; providing an
5 expiration date; and declaring an emergency.

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

7 NEW SECTION. **Sec. 1.** (1) The legislature finds that the public
8 health system must use all available and effective tools to prevent
9 the spread of the novel coronavirus COVID-19 and save lives in
10 Washington. Public health case investigation, testing, and contact
11 tracing are traditional, trusted public health tools used to control
12 the spread of communicable diseases and are subject to laws and
13 policies protecting health information privacy. As the economy
14 reopens, the staggering number of COVID-19 cases continue to test
15 capacity of the public health system's ability to control COVID-19.
16 In an effort to increase the system's capacity, academic institutions
17 and technology companies have recently developed digital tools,
18 including web and mobile applications, to assist local and state
19 public health agencies with contact tracing efforts.

20 (2) The legislature finds that it is imperative to strike a
21 balance between supporting innovative tools that increase the public

1 health system's capacity while also providing equitable protections
2 for the privacy and security of individual's COVID-19 health data and
3 assuring individuals that collected data will not be used for law
4 enforcement or immigration purposes. Achieving this balance is
5 critical to reassure every Washingtonian, that any data collected by
6 digital tools will be used in a private, secure, and legitimate
7 manner and to support the use of all available tools to reduce the
8 spread of COVID-19, particularly among vulnerable populations, and
9 save lives in Washington.

10 (3) Therefore, the legislature intends to establish privacy and
11 security standards for these digital tools to provide protections for
12 all Washingtonian's COVID-19 health data.

13 NEW SECTION. **Sec. 2.** The definitions in this section apply
14 throughout this chapter unless the context clearly requires
15 otherwise.

16 (1) (a) "Affirmative express consent" means an affirmative act by
17 an individual that clearly and conspicuously communicates the
18 individual's authorization of an act or practice and is:

19 (i) Made in the absence of any mechanism in the user interface
20 that has the purpose or substantial effect of obscuring, subverting,
21 or impairing decision making or choice to obtain consent; and

22 (ii) Taken after the individual has been presented with a clear
23 and conspicuous disclosure that is separate from other options or
24 acceptance of general terms and that includes a concise and easy-to-
25 understand description of each act or practice for which the
26 individual's consent is sought.

27 (b) For purposes of (a) of this subsection, affirmative express
28 consent may not be inferred from the inaction of an individual or the
29 individual's continued use of a service or product.

30 (c) Affirmative express consent must be freely given and
31 nonconditioned.

32 (2) (a) "Biometric data" means any information, regardless of how
33 it is captured, converted, or stored, that is:

34 (i) Based on an individual's unique biological characteristics,
35 such as a retina or iris scan, fingerprint, voiceprint, a scan of
36 hand or face geometry, or other unique biological patterns or
37 characteristics; and

38 (ii) Used to identify a specific individual.

39 (b) "Biometric data" does not include:

1 (i) Writing samples, written signatures, photographs, human
2 biological samples used for valid scientific testing or screening,
3 demographic data, tattoo descriptions, thermal images, or physical
4 descriptions such as height, weight, hair color, or eye color;

5 (ii) Donated organ tissues or parts, or blood or serum stored on
6 behalf of recipients or potential recipients of living or cadaveric
7 transplants and obtained or stored by a federally designated organ
8 procurement agency;

9 (iii) Information captured from a patient in a health care
10 setting or information collected, used, or stored for health care
11 treatment, payment, or operations under the federal health insurance
12 portability and accountability act of 1996; or

13 (iv) X-ray, roentgen process, computed tomography, magnetic
14 resonance imaging, positron emission tomography scan, mammography, or
15 other image or film of the human anatomy used to diagnose, develop a
16 prognosis for, or treat an illness or other medical condition or to
17 further validate scientific testing or screening.

18 (3) "Collect" means buying, renting, gathering, obtaining,
19 receiving, accessing, or otherwise acquiring COVID-19 health data in
20 any manner by a covered organization, including by passively or
21 actively observing the behavior of an individual.

22 (4) (a) "Covered organization" means any person, including a
23 government entity, that:

24 (i) Collects, uses, or discloses COVID-19 health data of
25 Washington residents electronically or through communication by wire
26 or radio for a COVID-19 public health purpose; or

27 (ii) Develops or operates a website, web application, mobile
28 application, mobile operating system feature, or smart device
29 application for the purpose of tracking, screening, monitoring,
30 contact tracing, mitigating, or otherwise responding to COVID-19 or
31 the related public health response.

32 (b) "Covered organization" does not include:

33 (i) A health care provider;

34 (ii) A health care facility;

35 (iii) A public health agency;

36 (iv) The department of labor and industries and an employer that
37 is self-insured under Title 51 RCW, if the department of labor and
38 industries or employer is collecting data protected by RCW 51.28.070;

39 (v) The department of labor and industries for purposes of
40 administering chapter 49.17 RCW;

1 (vi) The state long-term care ombuds program;

2 (vii) A person or entity acting as a "covered entity" or
3 "business associate," as those terms are defined in Title 45 C.F.R.,
4 established pursuant to the federal health insurance portability and
5 accountability act of 1996 or a person or entity acting in a similar
6 capacity under chapter 70.02 RCW;

7 (viii) A service provider;

8 (ix) A person acting in their individual or household capacity;

9 or

10 (x) A person or entity that provides to a public health agency a
11 mobile application or mobile operating system feature that transmits
12 deidentified proximity data solely for the purpose of digitally
13 notifying an individual who may have become exposed to COVID-19. A
14 person or entity that provides such mobile application or mobile
15 operating system feature to any person or entity other than a public
16 health agency is a covered organization. A person or entity that
17 transmits or uses deidentified proximity data for any purpose other
18 than COVID-19 exposure notification is a covered organization.

19 (5) "COVID-19" means a respiratory disease caused by the severe
20 acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

21 (6) (a) "COVID-19 health data" means data that is collected, used,
22 or disclosed in connection with COVID-19 or the related public health
23 response and that is linked to an individual or device.

24 (b) "COVID-19 health data" includes, but is not limited to:

25 (i) Information that reveals the past, present, or future
26 physical or behavioral health or condition of, or provision of health
27 care to, an individual;

28 (ii) Data derived from the testing or examination of a body or
29 bodily substance, or a request for such testing;

30 (iii) Information as to whether or not an individual has
31 contracted or been tested for, or an estimate of the likelihood that
32 a particular individual may contract, a disease or disorder;

33 (iv) Genetic data and biological samples;

34 (v) Biometric data;

35 (vi) Geolocation data;

36 (vii) Proximity data;

37 (viii) Demographic data; and

38 (ix) Contact information for identifiable individuals or a
39 history of the individual's contacts over a period of time, such as
40 an address book or call log.

1 (c) "COVID-19 health data" does not include:

2 (i) Identifiable personal data collected and used for the
3 purposes of human subjects research conducted in accordance with: The
4 federal policy for the protection of human subjects, 45 C.F.R. Part
5 46; the good clinical practice guidelines issued by the international
6 council for harmonization; or the federal regulations on the
7 protection of human subjects under 21 C.F.R. Parts 50 and 56;

8 (ii) Data that is deidentified in accordance with the
9 deidentification requirements set forth in 45 C.F.R. Sec. 164.514 and
10 that is derived from protected health information data subject to one
11 of the standards set forth in (c)(i) of this subsection; or

12 (iii) Information used only for public health activities and
13 purposes as described in 45 C.F.R. Sec. 164.512.

14 (7) "COVID-19 public health purpose" means a purpose that seeks
15 to support or evaluate public health activities related to COVID-19
16 including, but not limited to, preventing, detecting, and responding
17 to COVID-19; creating emergency response plans; identifying
18 population health trends; health surveillance; health assessments;
19 implementing educational programs; program evaluation; developing and
20 implementing policies; and determining needs for access to services
21 and administering services.

22 (8) "Demographic data" means information relating to the actual
23 or perceived race, color, ethnicity, national origin, religion, sex,
24 gender, gender identity, sexual orientation, age, tribal affiliation,
25 disability, domicile, employment status, familial status, immigration
26 status, or veteran status of an individual or group of individuals.

27 (9) "Device" means any electronic equipment that is primarily
28 designed for or marketed to consumers.

29 (10) "Disclose" or "disclosure" means the releasing,
30 transferring, selling, providing access to, licensing, or divulging
31 in any manner of COVID-19 health data by a covered organization to a
32 third party.

33 (11) "Federal immigration authority" means any officer, employee,
34 or person otherwise paid by or acting as an agent of the United
35 States department of homeland security, including but not limited to
36 its subagencies, immigration and customs enforcement and customs and
37 border protection, and any present or future divisions thereof,
38 charged with immigration enforcement.

39 (12) "Geolocation data" means data capable of determining the
40 past or present precise physical location of an individual at a

1 specific point in time, taking account of population densities,
2 including cell site location information, triangulation data derived
3 from nearby wireless or radio frequency networks, and global
4 positioning system data.

5 (13) "Health care facility" means a hospital, clinic, nursing
6 home, psychiatric hospital, ambulatory surgical center, pharmacy,
7 laboratory, testing site including a temporary or community-based
8 site and locations where related samples are collected, office, or
9 similar place where a health care provider provides health care to
10 patients.

11 (14) "Health care provider" means a person who is licensed,
12 certified, registered, or otherwise authorized by state law to
13 provide health care in the ordinary course of business or practice of
14 a profession.

15 (15) "Individual" means a natural person who is a Washington
16 resident.

17 (16) "Law enforcement officer" means a law enforcement officer as
18 defined in RCW 9.41.010 or a federal peace officer as defined in RCW
19 10.93.020.

20 (17) "Person" means a natural or legal person, or any legal,
21 commercial, or governmental entity of any kind or nature.

22 (18) "Proximity data" means information that identifies or
23 estimates the past or present physical proximity of one individual or
24 device to another, including information derived from Bluetooth,
25 audio signatures, nearby wireless networks, and near-field
26 communications.

27 (19) "Public health agency" means an agency or authority of the
28 state, political subdivision of the state, or an Indian tribe that is
29 responsible for public health matters as part of its official
30 mandate, or a person or entity acting under a grant of authority from
31 or contract with such public agency. "Public health agency" includes
32 the department of health, the state board of health, local health
33 departments, local boards of health, health districts, and sovereign
34 tribal nations.

35 (20)(a) "Service provider" means a person that collects, uses, or
36 discloses COVID-19 health data for the purpose of performing a
37 service or function on behalf of, for the benefit of, under
38 instruction of, and under contractual agreement with a covered
39 organization, but only to the extent that the collection, use, or
40 disclosure relates to the performance of such service or function.

1 (b) "Service provider" excludes a person that develops or
2 operates a website, web application, mobile application, or smart
3 device application for the purpose of tracking, screening,
4 monitoring, contact tracing, mitigating, or otherwise responding to
5 COVID-19.

6 (21)(a) "Third party" means a person to whom a covered
7 organization discloses COVID-19 health data, or a corporate affiliate
8 or a related party of a covered organization that does not have a
9 direct relationship with an individual with whom the COVID-19 health
10 data is linked or is reasonably linkable.

11 (b) "Third party" excludes a public health agency, the state
12 long-term care ombuds program, or a service provider of a covered
13 organization.

14 (22) "Use" means the processing, employment, application,
15 utilization, examination, or analysis of COVID-19 health data by a
16 covered organization.

17 NEW SECTION. **Sec. 3.** (1)(a) A covered organization shall
18 provide to an individual a privacy policy that describes, at a
19 minimum:

20 (i) The covered organization's data retention and data security
21 policies and practices for COVID-19 health data;

22 (ii) How and for what purposes the covered organization collects,
23 uses, and discloses COVID-19 health data;

24 (iii) The recipients to whom the covered organization discloses
25 COVID-19 health data and the purpose of disclosure for each
26 recipient; and

27 (iv) How an individual may exercise their rights under this
28 chapter.

29 (b) A privacy policy required under (a) of this subsection must
30 be disclosed to an individual in a clear and conspicuous manner, in
31 the language in which the individual typically interacts with the
32 covered organization, and prior to or at the point of the collection
33 of COVID-19 health data.

34 (2)(a) A covered organization may not collect, use, or disclose
35 COVID-19 health data unless the individual to whom the data pertains
36 has given affirmative express consent to the collection, use, or
37 disclosure.

38 (b) (a) of this subsection does not apply to the collection, use,
39 or disclosure of COVID-19 health data that is necessary solely to

1 notify an employee or consumer of their potential exposure to
2 COVID-19 while on a covered organization's premises or through an
3 interaction with an employee or person acting on behalf of a covered
4 organization.

5 (3) An affirmative express consent must be as easy to withdraw as
6 it is to give. A covered organization shall provide an effective
7 mechanism for an individual to revoke consent after it is given.
8 After an individual revokes consent, the covered organization shall:

9 (a) Stop collecting, using, or disclosing the individual's
10 COVID-19 health data no later than seven days after the receipt of
11 the individual's revocation of consent;

12 (b) Destroy or render unlinkable the individual's COVID-19 health
13 data under the same procedures as in section 4(4) of this act; and

14 (c) Notify the individual if and for what purposes the covered
15 organization collected, used, or disclosed the individual's COVID-19
16 health data before honoring the individual's revocation of consent.

17 NEW SECTION. **Sec. 4.** (1) A covered organization shall:

18 (a) Collect, use, or disclose only COVID-19 health data that is
19 necessary, proportionate, and limited for a good-faith COVID-19
20 public health purpose, including a service or feature to support a
21 good-faith COVID-19 public health purpose;

22 (b) Limit the collection, use, or disclosure of COVID-19 health
23 data to the minimum level of identifiability and the amount of data
24 necessary for a good-faith COVID-19 public health purpose;

25 (c) Take reasonable measures to ensure the accuracy of COVID-19
26 health data, provide an easily accessible and effective mechanism for
27 an individual to correct inaccurate information, and comply with an
28 individual's request to correct COVID-19 health data no later than 30
29 days after receiving the request;

30 (d) Adopt reasonable safeguards to prevent unlawful
31 discrimination on the basis of COVID-19 health data; and

32 (e) Only disclose COVID-19 health data to a government entity
33 when the disclosure is to a public health agency and is made solely
34 for good-faith COVID-19 public health purposes, unless the
35 information disclosed is protected under a state or federal privacy
36 law that restricts redisclosure.

37 (2) A covered organization may not collect, use, or disclose
38 COVID-19 health data for any purpose not authorized in this act,
39 including:

1 (a) Commercial advertising, recommendation for e-commerce, or the
2 training of machine-learning algorithms related to, or subsequently
3 for use in, commercial advertising or e-commerce;

4 (b) Soliciting, offering, selling, leasing, licensing, renting,
5 advertising, marketing, or otherwise commercially contracting for
6 employment, finance, credit, insurance, housing, or education
7 opportunities in a manner that discriminates or otherwise makes
8 opportunities unavailable on the basis of COVID-19 health data;

9 (c) Segregating, discriminating in, or otherwise making
10 unavailable the goods, services, facilities, privileges, advantages,
11 or accommodations of any place of public accommodation, except as
12 authorized by a federal or state government entity for a COVID-19
13 public health purpose; and

14 (d) Disclosing COVID-19 health data to any law enforcement
15 officer or federal immigration authority or using COVID-19 health
16 data for any law enforcement or immigration purpose.

17 (3) A law enforcement officer or a federal immigration authority
18 may not collect or use COVID-19 health data when acting in their
19 official, rather than individual or household, capacity.

20 (4) No later than 30 days after collection, COVID-19 health data
21 must be destroyed or rendered unlinkable in such a manner that it is
22 impossible or demonstrably impracticable to identify any individual
23 from the COVID-19 health data, unless data retention beyond 30 days
24 is required by state or federal law. All COVID-19 health data
25 retained beyond 30 days must be maintained in a confidential and
26 secure manner and may not be redisclosed except as required by state
27 or federal law.

28 (5) A covered organization may not disclose identifiable COVID-19
29 health data to a service provider or a third party unless that
30 service provider or third party is contractually bound to the covered
31 organization to meet the same data privacy obligations as the covered
32 organization.

33 NEW SECTION. **Sec. 5.** (1) A covered organization or service
34 provider shall establish and implement reasonable data security
35 policies, practices, and procedures to protect the security and
36 confidentiality of COVID-19 health data.

37 (2) A covered organization may not disclose identifiable COVID-19
38 health data to a third party unless that third party is contractually

1 bound to the covered organization to meet the same data security
2 obligations as the covered organization.

3 NEW SECTION. **Sec. 6.** (1) A covered organization that collects,
4 uses, or discloses COVID-19 health data of at least 30,000
5 individuals over 60 calendar days shall issue a public report at
6 least once every 90 days. The public report must:

7 (a) State in aggregate terms the number of individuals whose
8 COVID-19 health data the covered organization collected, used, or
9 disclosed to the extent practicable;

10 (b) Describe the categories of COVID-19 health data collected,
11 used, or disclosed and the purposes for which each category of
12 COVID-19 health data was collected, used, or disclosed;

13 (c) Describe the categories of recipients to whom COVID-19 health
14 data was disclosed and list specific recipients of COVID-19 health
15 data within each category.

16 (2) The public report required under subsection (1) of this
17 section may not contain any information that is linked or reasonably
18 linkable to a specific individual or device or that may be used to
19 identify or reidentify a specific individual or device.

20 (3) A covered organization subject to the public report
21 requirement under subsection (1) of this section shall provide a copy
22 of the public report to the department of health. The department of
23 health shall publish all received reports on its public website.

24 (4) Nothing in this section requires a covered organization to:

25 (a) Take an action that would convert data that is not COVID-19
26 health data into COVID-19 health data;

27 (b) Collect or maintain COVID-19 health data that the covered
28 organization would otherwise not maintain; or

29 (c) Maintain COVID-19 health data longer than the covered
30 organization would otherwise maintain such data.

31 NEW SECTION. **Sec. 7.** (1) Nothing in this act limits or
32 prohibits a public health agency from administering programs or
33 activities to identify individuals who have contracted, or may have
34 been exposed to, COVID-19 through interviews, outreach, case
35 investigation, and other recognized investigatory measures by a
36 public health agency or its designated agent intended to monitor and
37 mitigate the transmission of a disease or disorder.

1 (2) Nothing in this act limits or prohibits public health or
2 scientific research conducted for COVID-19 public health purposes by:

3 (a) A public health agency;

4 (b) A nonprofit corporation or a public benefit nonprofit
5 corporation, as defined in RCW 24.03.005; or

6 (c) An institution of higher education, as defined in RCW
7 28B.92.030.

8 (3) Nothing in this chapter limits or prohibits research,
9 development, manufacture, or distribution of a drug, biological
10 product, or vaccine that relates to a disease or disorder that is
11 associated or potentially associated with COVID-19.

12 (4) Nothing in this act prohibits a good faith response to, or
13 compliance with, otherwise valid subpoenas, court orders, or other
14 legal processes.

15 NEW SECTION.

Sec. 8.

(1) The legislature finds that the
16 practices covered by this chapter are matters vitally affecting the
17 public interest for the purpose of applying the consumer protection
18 act, chapter 19.86 RCW. A violation of this chapter is not reasonable
19 in relation to the development and preservation of business and is an
20 unfair or deceptive act in trade or commerce and an unfair method of
21 competition for the purpose of applying the consumer protection act,
22 chapter 19.86 RCW.

23 (2) This chapter may be enforced solely by the attorney general
24 under the consumer protection act, chapter 19.86 RCW.

25 **Sec. 9.**

RCW 42.56.360 and 2020 c 323 s 2 are each amended to
26 read as follows:

27 (1) The following health care information is exempt from
28 disclosure under this chapter:

29 (a) Information obtained by the pharmacy quality assurance
30 commission as provided in RCW 69.45.090;

31 (b) Information obtained by the pharmacy quality assurance
32 commission or the department of health and its representatives as
33 provided in RCW 69.41.044, 69.41.280, and 18.64.420;

34 (c) Information and documents created specifically for, and
35 collected and maintained by a quality improvement committee under RCW
36 43.70.510, 70.230.080, or 70.41.200, or by a peer review committee
37 under RCW 4.24.250, or by a quality assurance committee pursuant to
38 RCW 74.42.640 or 18.20.390, or by a hospital, as defined in RCW

1 43.70.056, for reporting of health care-associated infections under
2 RCW 43.70.056, a notification of an incident under RCW 70.56.040(5),
3 and reports regarding adverse events under RCW 70.56.020(2)(b),
4 regardless of which agency is in possession of the information and
5 documents;

6 (d)(i) Proprietary financial and commercial information that the
7 submitting entity, with review by the department of health,
8 specifically identifies at the time it is submitted and that is
9 provided to or obtained by the department of health in connection
10 with an application for, or the supervision of, an antitrust
11 exemption sought by the submitting entity under RCW 43.72.310;

12 (ii) If a request for such information is received, the
13 submitting entity must be notified of the request. Within ten
14 business days of receipt of the notice, the submitting entity shall
15 provide a written statement of the continuing need for
16 confidentiality, which shall be provided to the requester. Upon
17 receipt of such notice, the department of health shall continue to
18 treat information designated under this subsection (1)(d) as exempt
19 from disclosure;

20 (iii) If the requester initiates an action to compel disclosure
21 under this chapter, the submitting entity must be joined as a party
22 to demonstrate the continuing need for confidentiality;

23 (e) Records of the entity obtained in an action under RCW
24 18.71.300 through 18.71.340;

25 (f) Complaints filed under chapter 18.130 RCW after July 27,
26 1997, to the extent provided in RCW 18.130.095(1);

27 (g) Information obtained by the department of health under
28 chapter 70.225 RCW;

29 (h) Information collected by the department of health under
30 chapter 70.245 RCW except as provided in RCW 70.245.150;

31 (i) Cardiac and stroke system performance data submitted to
32 national, state, or local data collection systems under RCW
33 70.168.150(2)(b);

34 (j) All documents, including completed forms, received pursuant
35 to a wellness program under RCW 41.04.362, but not statistical
36 reports that do not identify an individual;

37 (k) Data and information exempt from disclosure under RCW
38 43.371.040; and

39 (l) Medical information contained in files and records of members
40 of retirement plans administered by the department of retirement

1 systems or the law enforcement officers' and firefighters' plan 2
2 retirement board, as provided to the department of retirement systems
3 under RCW 41.04.830.

4 (2) Chapter 70.02 RCW applies to public inspection and copying of
5 health care information of patients.

6 (3) (a) Documents related to infant mortality reviews conducted
7 pursuant to RCW 70.05.170 are exempt from disclosure as provided for
8 in RCW 70.05.170(3).

9 (b) (i) If an agency provides copies of public records to another
10 agency that are exempt from public disclosure under this subsection
11 (3), those records remain exempt to the same extent the records were
12 exempt in the possession of the originating entity.

13 (ii) For notice purposes only, agencies providing exempt records
14 under this subsection (3) to other agencies may mark any exempt
15 records as "exempt" so that the receiving agency is aware of the
16 exemption, however whether or not a record is marked exempt does not
17 affect whether the record is actually exempt from disclosure.

18 (4) Information and documents related to maternal mortality
19 reviews conducted pursuant to RCW 70.54.450 are confidential and
20 exempt from public inspection and copying.

21 (5) COVID-19 health data, as defined in section 2 of this act, is
22 exempt from disclosure under this chapter.

23 NEW SECTION. Sec. 10. Sections 1 through 8 of this act
24 constitute a new chapter in Title 70 RCW.

25 NEW SECTION. Sec. 11. This act expires December 31, 2022.

26 NEW SECTION. Sec. 12. This act is necessary for the immediate
27 preservation of the public peace, health, or safety, or support of
28 the state government and its existing public institutions, and takes
29 effect immediately.

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