

2SHB 1127 - S COMM AMD

By Committee on Ways & Means

ADOPTED AND ENGROSSED 04/10/2021

1 Strike everything after the enacting clause and insert the
2 following:

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

16 (2) The legislature finds that it is imperative to strike a
17 balance between supporting innovative tools that increase the public
18 health system's capacity while also providing equitable protections
19 for the privacy and security of individual's COVID-19 health data and
20 assuring individuals that collected data will not be used for law
21 enforcement or immigration purposes. Achieving this balance is
22 critical to reassure every Washingtonian, that any data collected by
23 digital tools will be used in a private, secure, and legitimate
24 manner and to support the use of all available tools to reduce the
25 spread of COVID-19, particularly among vulnerable populations, and
26 save lives in Washington.

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

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

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

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

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

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

18 (c) Affirmative express consent must be freely given and
19 nonconditioned.

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

22 (i) Based on an individual's unique biological characteristics,
23 such as a retina or iris scan, fingerprint, voiceprint, a scan of
24 hand or face geometry, or other unique biological patterns or
25 characteristics; and

26 (ii) Used to identify a specific individual.

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

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

32 (ii) Donated organ tissues or parts, or blood or serum stored on
33 behalf of recipients or potential recipients of living or cadaveric
34 transplants and obtained or stored by a federally designated organ
35 procurement agency;

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

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

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

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

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

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

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

21 (i) A health care provider;

22 (ii) A health care facility;

23 (iii) A public health agency;

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

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

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

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

35 (viii) A service provider;

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

38 (x) A person or entity that provides to a public health agency a
39 mobile application or mobile operating system feature that transmits
40 deidentified proximity data solely for the purpose of digitally

1 notifying an individual who may have become exposed to COVID-19. A
2 person or entity that provides such mobile application or mobile
3 operating system feature to any person or entity other than a public
4 health agency is a covered organization. A person or entity that
5 transmits or uses deidentified proximity data for any purpose other
6 than COVID-19 exposure notification is a covered organization.

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

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

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

13 (i) Information that reveals the past, present, or future
14 physical or behavioral health or condition of, or provision of health
15 care to, an individual;

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

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

21 (iv) Genetic data and biological samples;

22 (v) Biometric data;

23 (vi) Geolocation data;

24 (vii) Proximity data;

25 (viii) Demographic data; and

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

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

30 (i) Identifiable personal data collected and used for the
31 purposes of human subjects research conducted in accordance with: The
32 federal policy for the protection of human subjects, 45 C.F.R. Part
33 46; the good clinical practice guidelines issued by the international
34 council for harmonization; or the federal regulations on the
35 protection of human subjects under 21 C.F.R. Parts 50 and 56;

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

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

3 (7) "COVID-19 public health purpose" means a purpose that seeks
4 to support or evaluate public health activities related to COVID-19
5 including, but not limited to, preventing, detecting, and responding
6 to COVID-19; creating emergency response plans; identifying
7 population health trends; health surveillance; health assessments;
8 implementing educational programs; program evaluation; developing and
9 implementing policies; and determining needs for access to services
10 and administering services.

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

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

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

22 (11) "Federal immigration authority" means any officer, employee,
23 or person otherwise paid by or acting as an agent of the United
24 States department of homeland security, including but not limited to
25 its subagencies, immigration and customs enforcement and customs and
26 border protection, and any present or future divisions thereof,
27 charged with immigration enforcement.

28 (12) "Geolocation data" means data capable of determining the
29 past or present precise physical location of an individual at a
30 specific point in time, taking account of population densities,
31 including cell site location information, triangulation data derived
32 from nearby wireless or radio frequency networks, and global
33 positioning system data.

34 (13) "Health care facility" means a hospital, clinic, nursing
35 home, psychiatric hospital, ambulatory surgical center, pharmacy,
36 laboratory, testing site including a temporary or community-based
37 site and locations where related samples are collected, office, or
38 similar place where a health care provider provides health care to
39 patients.

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

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

7 (16) "Law enforcement officer" means a law enforcement officer as
8 defined in RCW 9.41.010 or a federal peace officer as defined in RCW
9 10.93.020.

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

12 (18) "Proximity data" means information that identifies or
13 estimates the past or present physical proximity of one individual or
14 device to another, including information derived from Bluetooth,
15 audio signatures, nearby wireless networks, and near-field
16 communications.

17 (19) "Public health agency" means an agency or authority of the
18 state, political subdivision of the state, or an Indian tribe that is
19 responsible for public health matters as part of its official
20 mandate, or a person or entity acting under a grant of authority from
21 or contract with such public agency. "Public health agency" includes
22 the department of health, the state board of health, local health
23 departments, local boards of health, health districts, and sovereign
24 tribal nations.

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

31 (b) "Service provider" excludes a person that develops or
32 operates a website, web application, mobile application, or smart
33 device application for the purpose of tracking, screening,
34 monitoring, contact tracing, mitigating, or otherwise responding to
35 COVID-19.

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

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

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

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

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

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

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

17 (iv) How an individual may exercise their rights under this
18 chapter.

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

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

28 (b) (a) of this subsection does not apply to the collection, use,
29 or disclosure of COVID-19 health data that is necessary solely to
30 notify an employee or consumer of their potential exposure to
31 COVID-19 while on a covered organization's premises or through an
32 interaction with an employee or person acting on behalf of a covered
33 organization.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (c) Segregating, discriminating in, or otherwise making
2 unavailable the goods, services, facilities, privileges, advantages,
3 or accommodations of any place of public accommodation, except as
4 authorized by a federal, state, or local government entity for a
5 COVID-19 public health purpose; and

6 (d) Disclosing COVID-19 health data to any law enforcement
7 officer or federal immigration authority or using COVID-19 health
8 data for any law enforcement or immigration purpose.

9 (3)(a) A general authority Washington law enforcement agency or
10 limited authority Washington law enforcement agency, as defined in
11 RCW 10.93.020, or a federal immigration authority may not collect,
12 use, or disclose COVID-19 health data for the purpose of enforcing
13 criminal or civil law.

14 (b) The Washington state department of social and health services
15 is exempt from (a) of this subsection.

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

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

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

33 (2) A covered organization may not disclose identifiable COVID-19
34 health data to a third party unless that third party is contractually
35 bound to the covered organization to meet the same data security
36 obligations as the covered organization.

37 NEW SECTION. **Sec. 6.** (1) A covered organization that collects,
38 uses, or discloses COVID-19 health data of at least 30,000

1 individuals over 60 calendar days shall issue a public report at
2 least once every 90 days. The public report must:

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

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

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

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

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

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

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

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

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

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

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

36 (a) A public health agency;

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

1 (c) An institution of higher education, as defined in RCW
2 28B.92.030.

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

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

10 (5) Nothing in this act prohibits the medicaid fraud division of
11 Washington attorney general's office from collecting, using, or
12 disclosing, as legally permitted, COVID-19 health data for the
13 enforcement of criminal and/or civil law. Furthermore, nothing in
14 this act prevents or prohibits covered entities from providing
15 COVID-19 health data to the medicaid fraud control division of
16 Washington attorney general's office for the enforcement of criminal
17 or civil law.

18 NEW SECTION. **Sec. 8.** (1) The legislature finds that the
19 practices covered by this chapter are matters vitally affecting the
20 public interest for the purpose of applying the consumer protection
21 act, chapter 19.86 RCW. A violation of this chapter is not reasonable
22 in relation to the development and preservation of business and is an
23 unfair or deceptive act in trade or commerce and an unfair method of
24 competition for the purpose of applying the consumer protection act,
25 chapter 19.86 RCW.

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

28 **Sec. 9.** RCW 42.56.360 and 2020 c 323 s 2 are each amended to
29 read as follows:

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

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

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

37 (c) Information and documents created specifically for, and
38 collected and maintained by a quality improvement committee under RCW

1 43.70.510, 70.230.080, or 70.41.200, or by a peer review committee
2 under RCW 4.24.250, or by a quality assurance committee pursuant to
3 RCW 74.42.640 or 18.20.390, or by a hospital, as defined in RCW
4 43.70.056, for reporting of health care-associated infections under
5 RCW 43.70.056, a notification of an incident under RCW 70.56.040(5),
6 and reports regarding adverse events under RCW 70.56.020(2)(b),
7 regardless of which agency is in possession of the information and
8 documents;

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

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

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

26 (e) Records of the entity obtained in an action under RCW
27 18.71.300 through 18.71.340;

28 (f) Complaints filed under chapter 18.130 RCW after July 27,
29 1997, to the extent provided in RCW 18.130.095(1);

30 (g) Information obtained by the department of health under
31 chapter 70.225 RCW;

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

34 (i) Cardiac and stroke system performance data submitted to
35 national, state, or local data collection systems under RCW
36 70.168.150(2)(b);

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

1 (k) Data and information exempt from disclosure under RCW
2 43.371.040; and

3 (1) Medical information contained in files and records of members
4 of retirement plans administered by the department of retirement
5 systems or the law enforcement officers' and firefighters' plan 2
6 retirement board, as provided to the department of retirement systems
7 under RCW 41.04.830.

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

10 (3) (a) Documents related to infant mortality reviews conducted
11 pursuant to RCW 70.05.170 are exempt from disclosure as provided for
12 in RCW 70.05.170(3).

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

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

22 (4) Information and documents related to maternal mortality
23 reviews conducted pursuant to RCW 70.54.450 are confidential and
24 exempt from public inspection and copying.

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

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

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

30 NEW SECTION. Sec. 12. This act is necessary for the immediate
31 preservation of the public peace, health, or safety, or support of
32 the state government and its existing public institutions, and takes
33 effect immediately."

2SHB 1127 - S COMM AMD
By Committee on Ways & Means

ADOPTED 04/10/2021

1 On page 1, line 3 of the title, after "facilities;" strike the
2 remainder of the title and insert "amending RCW 42.56.360; adding a
3 new chapter to Title 70 RCW; providing an expiration date; and
4 declaring an emergency."

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