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## Health Care & Wellness Committee

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### HB 1127

**Brief Description:** Protecting the privacy and security of COVID-19 health data collected by entities other than public health agencies, health care providers, and health care facilities.

**Sponsors:** Representatives Slatter, Boehnke, Valdez, Kloba, Graham, Macri and Pollet.

#### Brief Summary of Bill

- Allows covered organizations to collect, use, or disclose Coronavirus Disease 2019 (COVID-19) health data with affirmative consent as necessary for and limited to a good faith COVID-19 public health purpose.
- Specifies prohibited purposes for collecting, using, or disclosing COVID-19 health data.
- Exempts COVID-19 health data from disclosure under the Public Records Act.

**Hearing Date:** 1/28/21

**Staff:** Kim Weidenaar (786-7120).

#### **Background:**

##### Traditional Contact Tracing.

Case investigation and contact tracing are core public health strategies used to reduce the spread of communicable diseases, such as Coronavirus Disease 2019 (COVID-19), a novel acute respiratory syndrome coronavirus. Case investigation is the identification and investigation of patients with confirmed and probable diagnoses of a disease, which involves working with the patient who has been diagnosed with the disease to identify other people who may have been infected through exposure to the patient. Contact tracing is the subsequent identification,

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monitoring, and support of those contacts who have been exposed to, and possibly infected with, the virus. In Washington, local health departments, with the support of the Department of Health (DOH), are responsible for performing case investigations and contact tracing.

#### Use of Digital Technologies in Public Health Response.

A range of digital data sources have been used to enhance and interpret epidemiological data gathered by public-health authorities for COVID-19. Digital tools have been developed to track symptoms, individual locations, and notify individuals of exposure. These tools reduce reliance on human recall and may facilitate a pandemic response without relying on the resource constraints of traditional contact tracing. In the COVID-19 pandemic, digital exposure notification apps and other digital health tools have been developed for use in several countries and states.

In December 2020, the DOH launched an exposure notification technology known as WA Notify. Google and Apple jointly developed this smartphone technology, which will anonymously notify a user who has been in close contact with another user who tests positive for COVID-19. The technology does not know or track the identity of an individual or where they go, instead it uses message keys, which are exchanged as random anonymous codes with no identification or global positioning system (GPS) location data.

#### Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair methods of competition or unfair or deceptive practices in the conduct of any trade or commerce. The Attorney General is authorized to investigate and prosecute claims under the CPA on behalf of the state or individuals in the state. A person injured by a violation of the CPA may bring a civil action for injunctive relief, recovery of actual damages, and reasonable attorneys' fees. The courts may increase awarded damages up to three times the actual damages sustained.

#### Uniform Health Care Information Act.

The state Uniform Health Care Information Act (UHCIA) governs the disclosure of health care information by health care providers and their agents or employees. The UHCIA provides that a health care provider may not disclose health care information about a patient unless there is a statutory exception or written authorization by the patient.

#### Disclosure of Public Records.

The Public Records Act (PRA) requires state and local agencies to make all public records available for public inspection and copying, unless a record falls within an exemption in the PRA or another statute that exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests, an agency must delete identifying details when it makes a public record available. A person's right to privacy is violated only if disclosure would be highly offensive to a reasonable person and is not of legitimate concern to the public. The PRA is liberally construed and its exemptions narrowly construed.

## **Summary of Bill:**

### Limitations on Collection, Use, and Disclosure.

A covered organization must only collect, use, or disclose Coronavirus Disease 2019 (COVID-19) health data that is necessary, proportionate, and limited for a good-faith COVID-19 public health purpose. A covered organization must limit the collection, use, or disclosure of COVID-19 health data to the minimum level of identifiability and the amount necessary for a good faith COVID-19 public health purpose. A covered organization may not collect, use, or disclose an individual's COVID-19 health data unless the individual has given affirmative express consent. Within 30 days of collecting COVID-19 health data, the data must be destroyed or rendered unlinkable in such a manner that is it impossible or demonstrably impracticable to identify any individual from the COVID-19 health data.

A covered organization must also take reasonable measures to ensure the accuracy of COVID-19 health data and provide an easily accessible mechanism for an individual to correct the data within 30 days of receiving a request.

A covered organization may not collect, use, or disclose COVID-19 health data for any unauthorized purpose, including:

- commercial advertising or recommendation for e-commerce;
- soliciting, selling, leasing, advertising, licensing, marketing, or otherwise commercially contracting for employment, finance, credit, insurance, housing, or education opportunities in a way that discriminates or makes opportunities unavailable on the basis of COVID-19 health data;
- segregating, discriminating, or otherwise making unavailable goods, services, facilities, privileges, or accommodations of any place of accommodation, except as authorized by the state or federal government for a COVID-19 public health purpose; and
- disclosing COVID-19 health data to any law enforcement or federal immigration authority or using COVID-19 health data for any law enforcement or immigration purpose.

A covered organization or service provider must establish and implement reasonable data security policies, practices, and procedures to protect the security and confidentiality of COVID-19 health data. A covered organization may not disclose COVID-19 health data to a service provider or a third party unless the service provider or third party is contractually bound to the same data privacy and security obligations as the covered organization.

### Privacy Policy.

A covered organization must provide an individual a privacy policy that describes:

- the covered organization's data retention and security policies and practices;
- how and for what purposes the covered organization collects, uses, and discloses COVID-19 health data;
- recipients of COVID-19 health data and the purpose of the disclosure for each recipient;
- and
- how an individual may exercise their rights under the act.

The privacy policy must be disclosed to the individual before collecting COVID-19 health data and in a clear and conspicuous manner that is in the language in which the individual typically interacts with the covered organization.

Affirmative consent must be as easy to withdraw as it is to give. After an individual revokes consent, the covered organization must:

- stop collecting, using, or disclosing the individual's COVID-19 health data no later than seven days after receiving the revocation of consent;
- destroy or render unlinkable the individual's COVID-19 health data; and
- notify the individual if and for what purposes the covered organization collected, used, or disclosed the individual's COVID-19 health data before honoring the individual's revocation of consent.

#### Report.

A covered organization that collects, uses, or discloses COVID-19 health data of at least 30,000 individuals over 60 days must issue a public report at least once every 90 days. The report must be provided to the Department of Health (DOH), who must publish the report on the DOH's website. The report must:

- list the number of individuals whose COVID-19 health data was collected, used, or disclosed;
- describe the categories of COVID-19 data collected, used, and disclosed and the purpose for each category;
- describe the categories of recipients of the data and specific recipients; and
- not include any information that is linked or reasonably linked to a specific individual or device.

#### Definitions.

"Affirmative express consent" means an affirmative act by an individual that clearly and conspicuously communicates the individual's authorization of an act or practice and is made in the absence of any mechanism in the user interface that has the purpose or substantial effect of obscuring, subverting, or impairing decision making or choice to obtain consent; and taken after the individual has been presented with a clear and conspicuous disclosure that is separate from other options or acceptance of general terms and that includes a concise and easy-to-understand description of each act or practice for which the individual's consent is sought.

"Covered organization" means any natural or legal person, or any legal, commercial, or governmental entity that:

- collects, uses, or discloses COVID-19 health data of Washington residents electronically or through communication by wire or radio; or
- develops or operates a website, web application, mobile application, mobile operating system feature, or smart device application for the purpose of tracking, screening, monitoring, contact tracing, mitigating, or otherwise responding to COVID-19 or the related public health response.

A "covered organization" does not include: a health care provider; a health care facility; a public health agency; a "covered entity" or "business associate," for purposes of the federal Health Insurance Portability and Accountability Act of 1996; a service provider; a person acting in their individual or household capacity; or person or entity that provides to a public health agency a mobile application or mobile operating system feature that transmits deidentified proximity data solely for the purpose of digitally notifying an individual who may have become exposed to COVID-19.

"COVID-19 health data" includes, but is not limited to:

- information that reveals the past, present, or future physical or behavioral health or condition of, or provision of health care to, an individual;
- data derived from the testing or examination of a body or bodily substance, or a request for such testing;
- information as to whether or not an individual has contracted or been tested for, or an estimate of the likelihood that a particular individual may contract, a disease or disorder;
- genetic data, biological samples, and biometric data;
- geolocation data and proximity data; and
- demographic data and contact information for identifiable individuals or a history of the individual's contacts over a period of time.

"COVID-19 public health purpose" means a purpose that seeks to support or evaluate public health activities related to COVID-19 including: preventing, detecting, and responding to COVID-19; creating emergency response plans; identifying population health trends; health surveillance; health assessments; implementing educational programs; program evaluation; developing and implementing policies; and determining needs for access to services and administering services.

Other.

A new chapter is created in Title 70 RCW. A violation of the chapter is considered an unfair or deceptive act in trade or commerce and an unfair method of competition for purposes of the Consumer Protection Act. The COVID-19 health data is exempt from public disclosure.

The act does not limit or prohibit a public health agency from administering contact tracing programs or activities, public health or scientific research conducted for a COVID-19 public health purpose, or research, development, manufacture, or distribution of a drug, biological product, of vaccine associated with COVID-19.

The act expires on December 31, 2022.

**Appropriation:** None.

**Fiscal Note:** Requested on January 19, 2021.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.