SUBSTITUTE SENATE BILL 5116

State of Washington   **67th Legislature**   **2021 Regular Session**

By Senate State Government & Elections (originally sponsored by Senators Hasegawa, Hunt, Kuderer, and Wilson, C.)

READ FIRST TIME 02/08/21.

1   AN ACT Relating to establishing guidelines for government
2 procurement and use of automated decision systems in order to protect
3 consumers, improve transparency, and create more market
4 predictability; amending RCW 43.386.901; adding a new section to
5 chapter 49.60 RCW; adding a new chapter to Title 43 RCW; and
6 declaring an emergency.

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

8   NEW SECTION. **Sec. 1.** The legislature finds that:
9   (1) Washington is a technology leader on a national and global
10 level and holds a distinctive position in creating frameworks around
11 technology that enhance innovation while protecting consumers and
12 promoting fairness, accountability, and transparency for all
13 Washingtonians.
14   (2) Automated decision systems are rapidly being adopted to make
15 or assist in core decisions in a variety of government and business
16 functions, including criminal justice, health care, education,
17 employment, public benefits, insurance, and commerce.
18   (3) These automated decision systems are currently unregulated,
19 may be deployed without public notice, and vendors selling the
20 systems may require restrictive contractual provisions that undermine
21 government transparency and accountability.

(4) The average Washington resident is unlikely to understand processes used by these automated decision systems, yet these systems are increasingly used to make core government and business decisions impacting the civil rights and liberties of Washingtonians, raising significant concerns around due process, fairness, accountability, and transparency.

(5) A growing body of research shows that reliance on automated decision systems without adequate transparency, oversight, or safeguards can undermine market predictability, harm consumers, and deny historically disadvantaged or vulnerable groups the full measure of their civil rights and liberties.

(6) Research has shown that even the most innocent looking management tools often incorporate and compound the assumptions of institutional racism and other unfounded stereotypes. It is a matter of good governance to ensure that agencies consider whether the technologies they use improperly advantage or disadvantage Washington residents.

(7) In order to enhance innovation and ensure the use of these systems in ways that benefit Washington residents, the legislature intends to ensure the fair, transparent, and accountable use of automated decision systems.

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

(1) "Agency" or "public agency" means any entity meeting the definition of "public agency" as defined in RCW 42.30.020.

(2) "Algorithm" means a computerized procedure consisting of a set of steps to accomplish a determined task.

(3) "Algorithmic accountability report" means the report with content enumerated in section 5(6) of this act.

(4) "Algorithmic accountability review office" means:

(a) For a state agency, the office of the chief information officer; and

(b) For local municipal entities including, but not limited to, cities and counties, the chief information officer for the county in which the agency is located or such other department head as may be designated by the executive of that county.

(5) "Artificial intelligence-enabled profiling" means the automated or semiautomated process by which the external or internal

characteristics of an individual are analyzed to determine, infer, or
characterize an individual's state of mind, character, propensities,
protected class status, political affiliation, religious beliefs or
religious affiliation, immigration status, or employability.

(6)(a) "Automated decision system" means any algorithm, including
one incorporating machine learning or other artificial intelligence
techniques, that uses data-based analysis or calculations to make or
support government decisions, judgments, or conclusions that cause a
Washington resident to be treated differently than another Washington
resident in the nature or amount of governmental interaction with
that individual including, without limitation, benefits, protections,
required payments, penalties, regulations, timing, application, or
process requirements.

(b) "Automated decision system" does not include tools that do
not make or support governmental decisions, judgments, or conclusions
that cause a Washington resident to be treated differently than
another Washington resident in the nature or amount of government
interaction with that individual including, without limitation,
internal governmental computer server or electrical usage
optimization, antivirus programs, and internal governmental space
optimization programs.

(7) "Automated final decision system" means an automated decision
system that makes final decisions, judgments, or conclusions without
human intervention.

(8) "Automated support decision system" means an automated
decision system that provides information to inform the final
decision, judgment, or conclusion of a human decision maker.

(9) "Use" means to operate an automated decision system or to
contract with a third party to operate an automated decision system
to automate, aid, or replace any decision-making process that would
otherwise be made by an agency.

NEW SECTION. **Sec. 3.** By January 1, 2022, the Washington state
chief information officer shall adopt rules pursuant to chapter 34.05
RCW regarding the development, procurement, and use of automated
decision systems by a public agency. These rules must incorporate the
minimum standards and procedures set forth in sections 4 and 5 of
this act with respect to automated decision systems including, but
not limited to, a definition of systematic discrimination or less
favorable treatment as set forth in section 4(1) of this act. In

adopting the rules, the Washington state chief information officer
must consult with representatives of communities whose rights are
disproportionately impacted by automated decision systems as
demonstrated by current studies.

NEW SECTION. **Sec. 4.** The following provisions apply to a public
agency's development, procurement, or use of an automated decision
system:

(1) A public agency may not develop, procure, or use an automated
decision system that discriminates against an individual, or treats
an individual less favorably than another, in whole or in part, on
the basis of one or more factors enumerated in RCW 49.60.010. A
public agency may not develop, procure, or use an automated final
decision system to make a decision impacting the constitutional or
legal rights, duties, or privileges of any Washington resident, or to
deploy or trigger any weapon.

(2) A public agency may not operate, install, or commission the
operation or installation of equipment incorporating artificial
intelligence-enabled profiling in any place of public resort,
accommodation, assemblage, or amusement, as defined in RCW 49.60.040,
or use artificial intelligence-enabled profiling to make decisions
that produce legal effects or similarly significant effects
concerning individuals. Decisions that include legal effects or
similarly significant effects concerning consumers include, without
limitation, denial or degradation of consequential services or
support, such as financial or lending services, housing, insurance,
educational enrollment, criminal justice, employment opportunities,
health care services, and access to basic necessities, such as food
and water.

(3) A public agency shall develop, procure, or use an automated
decision system only after the public agency first completes an
algorithmic accountability report, provided that for automated
decision systems in use on the effective date of this section, a
public agency has until January 1, 2023, to complete an algorithmic
accountability report on such a system and to comply with the
requirements of subsection (4) of this section.

(4) A public agency that develops, procures, or uses an automated
decision system must follow any conditions set forth in the relevant
approved algorithmic accountability report. In addition, the public
agency must, at a minimum:

1   (a) Give clear notice in plain language to an individual impacted
2 by the automated decision system of the following:
3   (i) The fact that the system is in use;
4   (ii) The system's name, vendor, and version;
5   (iii) What decision or decisions it will be used to make or
6 support;
7   (iv) Whether it is an automated final decision system or
8 automated support decision system and whether and through what
9 process a human verifies or confirms decisions made by the automated
10 decision system;
11   (v) What policies and guidelines apply to its deployment; and
12   (vi) How an individual may contest any decision made involving
13 the automated decision system as required pursuant to this section;
14   (b) Ensure the automated decision system and the data used to
15 develop the system are made freely available by the vendor before,
16 during, and after deployment for agency or independent third-party
17 testing, auditing, or research to understand its impacts, including
18 potential bias, inaccuracy, or disparate impacts;
19   (c) Ensure that any decision made or informed by the automated
20 decision system is subject to appeal, immediate suspension if a legal
21 right, duty, or privilege is impacted by the decision, and potential
22 reversal by a human decision maker through a timely process not to
23 exceed 20 days, and clearly described and accessible to an individual
24 impacted by the decision; and
25   (d) Ensure the agency can explain the basis for its decision to
26 any impacted individual in terms understandable to a layperson
27 including, without limitation, by requiring the vendor to create such
28 an explanation.
29   (5) A procurement contract for an automated decision system
30 entered into by a public agency after the effective date of this
31 section must ensure that the minimum standards set forth in this
32 section are able to be effectuated without impairment, including
33 requiring the vendor to waive any legal claims that may impair these
34 minimum standards. Such a contract may not contain nondisclosure or
35 other provisions that prohibit or impair these minimum standards.

36   NEW SECTION. **Sec. 5.** (1) Agencies already using an automated
37 decision system as of the effective date of this section must comply
38 with all provisions and procedures set forth in this chapter by
39 January 1, 2023. If such an agency is not in compliance by that date,

1 the agency must immediately cease use of the automated decision
2 system until such time as compliance is achieved.

3 (2) A public agency intending to newly develop, procure, or use
4 an automated decision system between the effective date of this
5 section and January 1, 2024, must, at least one month prior to
6 procurement of, or if internally developed, implementation of, such a
7 system produce and file with the applicable algorithmic
8 accountability review office an algorithmic accountability report for
9 that system.

10 (3) An agency intending to develop, procure, or use an automated
11 decision system for implementation after January 1, 2024, must submit
12 an algorithmic accountability report to the applicable algorithmic
13 accountability review office and obtain approval or conditional
14 approval prior to any use of the automated decision system. The
15 algorithmic accountability review office must post the algorithmic
16 accountability report on the algorithmic accountability review
17 office's public website and invite public comment on the algorithmic
18 accountability report for a period of no less than 30 days.

19 (4) After receiving public comment, the algorithmic
20 accountability review office must determine whether the intended use
21 of the automated decision system meets the minimum standards set
22 forth in section 4 of this act. On the basis of that determination,
23 the algorithmic accountability review office may approve the use of
24 the automated decision system in accordance with rules and procedures
25 set forth in the algorithmic accountability report, deny it, or make
26 changes to rules and procedures set forth in the algorithmic
27 accountability report prior to approval.

28 (5) Except as provided in subsections (1) and (2) of this
29 section, no agency may develop, procure, or use an automated decision
30 system prior to obtaining the approval required in this section, and
31 after approval, such an agency may use the automated decision system
32 only in accordance with the policies and procedures set forth in the
33 approved algorithmic accountability report.

34 (6) Each algorithmic accountability report must include clear and
35 understandable statements of the following:

36 (a) The automated decision system's name, vendor, and version;

37 (b) A description of the automated decision system's general
38 capabilities, including reasonably foreseeable capabilities outside
39 the scope of the agency's proposed use and whether the automated

decision system is used or may be used to deploy or trigger any weapon;

(c)(i) The type or types of data inputs that the technology uses; (ii) how that data is generated, collected, and processed; and (iii) the type or types of data the system is reasonably likely to generate;

(d) Whether the automated decision system has been tested by an independent third party, has a known bias, or is untested for bias;

(e) A description of the purpose and proposed use of the automated decision system, including: What decision or decisions it will be used to make or support; whether it is an automated final decision system or automated support decision system; and its intended benefits, including any data or research demonstrating those benefits;

(f) A description of how the agency plans to comply with each requirement set forth in section 4 of this act;

(g) Whether the automated decision system makes decisions affecting the constitutional or legal rights, duties, or privileges of any Washington resident;

(h) A description of any potential impacts of the automated decision system on civil rights and liberties and potential disparate impacts on marginalized communities, and a mitigation plan;

(i) Whether any of the decision criteria are mandated by statute and, if so, which criteria and by what statutes;

(j) A clear use and data management policy, including specific protocols for the following:

(i) How and when the automated decision system will be deployed or used and by whom including, but not limited to: The factors that will be used to determine where, when, and how the technology is deployed; and other relevant information, such as whether the technology will be operated continuously or used only under specific circumstances. If the automated decision system will be operated or used by another entity on the agency's behalf, the algorithmic accountability report must explicitly include a description of the other entity's access and any applicable protocols;

(ii) Any additional rules that will govern use of the automated decision system and what processes will be required prior to each use of the automated decision system;

(iii) How automated decision system data will be securely stored and accessed, and whether an agency intends to share access to the

1 automated decision system or the data from that automated decision
2 system with any other entity, and why;

3   (iv) How the agency will ensure that all personnel who operate
4 the automated decision system or access its data are properly trained
5 and able to ensure compliance with the use and data management policy
6 prior to use of the automated decision system;

7   (v) A description of any public or community engagement held and
8 any future public or community engagement plans in connection with
9 the automated decision system; and

10   (vi) A description of the fiscal impact of the automated decision
11 system, including: Initial acquisition costs; ongoing operating costs
12 such as maintenance, licensing, personnel, legal compliance, use
13 auditing, data retention, and security costs; any cost savings that
14 would be achieved through the use of the technology; and any current
15 or potential sources of funding, including any subsidies, incentives,
16 or free products being offered by vendors or governmental entities.

17   NEW SECTION. **Sec. 6.** (1) Beginning December 1, 2021, and
18 updated not less than quarterly, each algorithmic accountability
19 review office shall make publicly available on its website an
20 inventory of all algorithmic accountability reports on automated
21 decision systems that have been proposed for or are being used,
22 developed, or procured by public agencies. Beginning January 1, 2022,
23 each algorithmic accountability review office shall make publicly
24 available on its website metrics on all approvals, conditional
25 approvals, or denials of agency proposals to develop, procure, or use
26 automated decision systems, including written explanations of each
27 decision.

28   (2)(a) For algorithmic accountability reports filed between the
29 effective date of this section and January 1, 2024, each algorithmic
30 accountability review office shall conduct selective audits of
31 automated decision systems for which an algorithmic accountability
32 report has been filed and shall take appropriate action, such as
33 approval, conditional approval, or denial with regard to the systems
34 so audited. The selective audits conducted must contain the elements
35 described in (b) of this subsection. In selecting which systems to
36 audit, the algorithmic accountability review office may take into
37 account:

38   (i) The number of persons affected by the automated decision
39 system, including systems in use by multiple jurisdictions;

1 (ii) The apparent likelihood that the system creates unintended,
2 erroneous, or discriminatory results;
3 (iii) The severity of the effects of an unintended, erroneous, or
4 discriminatory decision on the affected individual; and
5 (iv) Other criteria as the algorithmic accountability review
6 office deems appropriate to a selective audit.
7 (b) Beginning January 1, 2024, each algorithmic accountability
8 review office shall conduct an annual audit that includes the
9 following:
10 (i) Whether each agency that uses, develops, or procures an
11 automated decision system has complied with the terms of its approved
12 algorithmic accountability report;
13 (ii) Descriptions of any known or reasonably suspected violations
14 of any algorithmic accountability report policies;
15 (iii) Any systematic issues, such as bias, disproportionate
16 impacts on marginalized or vulnerable communities, raised by use of
17 automated decision systems;
18 (iv) Publishing recommendations, if any, relating to revision to
19 this chapter or to specific automated decision system algorithmic
20 accountability reports.
21 (c) By January 1, 2022, the Washington state chief information
22 officer shall establish guidelines for the number or percentage of
23 systems to be audited by each algorithmic accountability review
24 office pursuant to (a) of this subsection.
25 (d) The first annual audit must be made publicly available on the
26 algorithmic accountability review office's website by March 1, 2024,
27 and annually thereafter on or before March 1st.
28 (3) Beginning January 1, 2023, each agency using an automated
29 decision system must publish on its website annual metrics regarding
30 the number of requests for human review of a decision rendered by the
31 automated decision system it received and the outcome of the human
32 review.

33 NEW SECTION. **Sec. 7.** Any person who is injured by a material
34 violation of this chapter may institute proceedings against the
35 public agency deploying the automated decision system in a court of
36 competent jurisdiction for injunctive relief, including restoration
37 of the government benefit in question, declaratory relief, or a writ
38 of mandate to enforce this chapter. Actionable injuries under this
39 section include, but are not limited to, denial or interference with:

1 Any government benefit, direct or indirect financial harm, physical
2 harm or threats to persons or property, discrimination in goods,
3 services, or economic opportunity, interference with constitutional
4 or statutory rights or privileges, interference with the right to
5 vote or participate in free and fair elections, or other impacts on
6 human welfare; if any of the foregoing occur due to the use of an
7 automated decision system that does not meet the standards set forth
8 in this chapter.

9   NEW SECTION. **Sec. 8.** A new section is added to chapter 49.60
10 RCW to read as follows:
11   It is an unfair practice for any automated decision system to
12 discriminate against an individual, or to treat an individual less
13 favorably than another, in whole or in part, on the basis of one or
14 more factors enumerated in RCW 49.60.010. For the purposes of this
15 section, "automated decision system" has the same meaning as defined
16 in section 2 of this act.

17   NEW SECTION. **Sec. 9.** Sections 1 through 7 of this act
18 constitute a new chapter in Title 43 RCW.

19   **Sec. 10.** RCW 43.386.901 and 2020 c 257 s 14 are each amended to
20 read as follows:
21   Sections 1 through 9 and 11 through 13 of this act take effect
22 July 1, ((2021)) 2026.

23   NEW SECTION. **Sec. 11.** This act is necessary for the immediate
24 preservation of the public peace, health, or safety, or support of
25 the state government and its existing public institutions, and takes
26 effect immediately.

--- **END** ---