

MAINE STATE LEGISLATURE

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REPORT B
JUDICIARY

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
130TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "B" to H.P. 1450, L.D. 1945, "An Act To Regulate the Use of Biometric Identifiers"

Amend the bill by striking out everything after the enacting clause and inserting the following:

PART A

Sec. A-1. 10 MRSA c. 1057 is enacted to read:

CHAPTER 1057

PRIVACY OF BIOMETRIC IDENTIFIERS

§9601. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Affirmative written consent. "Affirmative written consent" means:

A. A specific, unambiguous and informed written consent given by an individual who is not under duress or undue influence at the time the consent is given; or

B. In the context of employment, a release signed by an employee as a condition of employment.

2. Biometric identifier. "Biometric identifier" means information generated by measurements of an individual's unique biological characteristics, including a voiceprint or imagery of the iris, retina, fingerprint, face or hand, that can be used to identify that individual. "Biometric identifier" does not include:

A. A writing sample or written signature;

B. A photograph or video, except for measurable biological characteristics that can be generated or captured from a photograph or video;

1 C. A biological sample used for valid scientific testing or screening;

2 D. Demographic information;

3 E. A tattoo description or a physical description, such as height, weight, hair color or
4 eye color;

5 F. A donated organ, tissue or other body part, blood or serum stored on behalf of a
6 recipient or potential recipient of a living or cadaveric transplant and obtained or stored
7 by a federally designated organ procurement organization;

8 G. Health care information, as defined in Title 22, section 1711-C, subsection 1,
9 paragraph E, obtained for health care, as defined in Title 22, section 1711-C, subsection
10 1, paragraph C;

11 H. An x-ray, computed tomography, magnetic resonance imaging, positron emission
12 tomography, mammography or other image or film of the human anatomy used to
13 diagnose or treat an illness or other medical condition or to further validate scientific
14 testing or screening; or

15 I. Information collected, used or disclosed for human subject research.

16 **3. Human subject research.** "Human subject research" means a systematic
17 investigation, including research development, testing and evaluation, designed to develop
18 or contribute to generalized knowledge and that is conducted in accordance with the federal
19 policy for the protection of human subjects, 45 Code of Federal Regulations, Part 46,
20 protection of human subjects under 21 Code of Federal Regulations, Parts 50 and 56 or
21 security and privacy under 45 Code of Federal Regulations, Part 164, or other similar
22 research ethics laws, or with the good clinical practice guidelines issued by the International
23 Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human
24 Use.

25 **4. Personal information.** "Personal information" means information that identifies,
26 relates to, describes, is reasonably capable of being associated with or could reasonably be
27 linked, directly or indirectly, with a particular individual, household or electronic device.

28 **5. Private entity.** "Private entity" means an individual, partnership, corporation,
29 limited liability company, association or other group, however organized. "Private entity"
30 does not include:

31 A. A state or local government agency;

32 B. A state court judge, justice or clerk of the court; or

33 C. An entity acting as a processor for another entity.

34 **6. Processor.** "Processor" means a private entity that collects, processes, stores or
35 otherwise uses biometric identifiers on behalf of another private entity.

36 **§9602. Applicability**

37 This chapter does not apply to:

38 **1. Admission or discovery of biometric identifier.** The admission or discovery of a
39 biometric identifier in any action of any kind in any court or before any government
40 tribunal, board or agency;

1 **2. Personal health information subject to HIPAA.** Personal health information
2 subject to the federal Health Insurance Portability and Accountability Act of 1996, Public
3 Law 104-191, and applicable regulations;

4 **3. Government contractor, subcontractor or agent.** A contractor, subcontractor or
5 agent of a state agency or local unit of government when working for that state agency or
6 local unit of government; or

7 **4. Personal information pursuant to Gramm-Leach-Bliley Act.** Personal
8 information collected, processed, sold or disclosed pursuant to the federal Gramm-Leach-
9 Bliley Act, Public Law 106-102, and implementing regulations.

10 **§9603. Biometric identifier policy requirements**

11 **1. Development of policy.** Except as provided by subsection 3, a private entity in
12 possession of biometric identifiers shall develop and make available to the public a written
13 policy that establishes a retention schedule and guidelines for permanently destroying a
14 biometric identifier of an individual on the earliest of:

15 A. The date on which the initial purpose for obtaining the biometric identifier has been
16 satisfied;

17 B. One year after the individual's last intentional interaction with the private entity in
18 possession of the biometric identifier; and

19 C. Thirty days after receiving a verified request to destroy the biometric identifier
20 submitted by the individual.

21 **2. Adherence to policy.** A private entity shall comply with the policy developed by
22 the private entity under subsection 1, except for an action taken in response to a state or
23 federal law, municipal ordinance or compulsory request or demand issued in an
24 investigation conducted pursuant to state or federal law or taken to comply with a valid
25 warrant, subpoena or other order issued by a court of competent jurisdiction.

26 **3. Exception.** A private entity is not required to make available to the public a written
27 policy that:

28 A. Applies only to the employees of the private entity; and

29 B. Is used solely within the private entity for the operation of the private entity.

30 **§9604. Storage, transmission and protection**

31 **1. Standards.** A private entity that collects or possesses a biometric identifier shall
32 store, transmit and protect from disclosure that biometric identifier in a manner that is:

33 A. Consistent with the reasonable standard of care used in the private entity's industry;
34 and

35 B. As protective or more protective than the manner in which the private entity stores,
36 transmits and protects from disclosure other confidential and sensitive information.

37 **2. Confidential and sensitive information.** For purposes of this section, "confidential
38 and sensitive information" means personal information that can be used to identify an
39 individual or an individual's account or property, including:

40 A. Genetic testing information;

1 B. A unique or personal identification number;

2 C. An account number;

3 D. A pass code;

4 E. A driver's license number; and

5 F. A social security number.

6 **§9605. Required disclosure**

7 **1. Disclosure required.** On the request of an individual, a private entity that collects
8 or possesses a biometric identifier shall disclose to that individual, free of charge, any
9 biometric identifier associated with that individual and the information required by
10 subsection 2.

11 **2. Required information.** The information disclosed as required by subsection 1 must
12 include all the relevant information for the period beginning 12 months before the biometric
13 identifier was collected by or entered into the possession of the private entity and ending
14 on the date of disclosure under this section, including:

15 A. The type of biometric identifier;

16 B. All personal information related to the biometric identifier;

17 C. The types of sources from which the private entity obtained the biometric identifier
18 and personal information linked to the biometric identifier;

19 D. The use of the biometric identifier and personal information linked to the biometric
20 identifier;

21 E. The type of 3rd party with which the private entity has shared the biometric
22 identifier; and

23 F. The type of personal information linked to the biometric identifier that the private
24 entity has disclosed to a 3rd party.

25 **§9606. Prohibitions**

26 **1. Collection or dissemination without consent.** A private entity may not collect,
27 purchase, receive through trade or otherwise obtain, use, disclose, transfer or otherwise
28 disseminate an individual's biometric identifier unless the private entity first:

29 A. Informs the individual in writing that a biometric identifier is being collected,
30 purchased, received through trade or otherwise obtained, used, disclosed, transferred
31 or otherwise disseminated;

32 B. Informs the individual in writing of the specific purpose and length of time for
33 which a biometric identifier is being collected, purchased, received through trade or
34 otherwise obtained, used, disclosed, transferred or otherwise disseminated; and

35 C. Receives affirmative written consent from the individual. Affirmative written
36 consent may be given by electronic means.

37 This subsection does not apply to a disclosure of a biometric identifier if the disclosure
38 completes a financial transaction requested or authorized by the individual, is required by
39 state or federal law or municipal ordinance, is required pursuant to a valid warrant or

1 subpoena issued by a court of competent jurisdiction or is in response to a compulsory
2 request or demand issued in an investigation conducted pursuant to state or federal law.

3 **2. Sale, lease or trade prohibited.** A private entity that collects a biometric identifier
4 may not sell, lease, trade or otherwise profit from that biometric identifier.

5 **3. Discrimination.** A private entity may not:

6 A. Condition a sale of goods or the provision of a service on the collection, use,
7 disclosure, transfer, sale or processing of a biometric identifier unless the use of a
8 biometric identifier is strictly necessary to the sale of the goods or the provision of the
9 service;

10 B. Charge a different price or rate for goods or the provision of a service to a customer
11 that does not provide affirmative written consent to providing a biometric identifier; or

12 C. Provide a different quality of goods or a service to a customer that does not provide
13 affirmative written consent to providing a biometric identifier.

14 **4. Processors.** A processor may not sell, lease or trade a biometric identifier. A
15 processor may not collect, store, process, use, disclose or conduct any action for profit or
16 otherwise on or with biometric identifiers, except as authorized by a contract with a private
17 entity that legally possesses the biometric identifiers.

18 A. A contract between the processor and the private entity described by this subsection
19 must expressly prohibit the processor from disclosing, retaining or using the biometric
20 identifiers outside of the direct contractual relationship with the private entity.

21 B. A private entity that contracts with a processor to process or store biometric
22 identifiers may not allow the processor to collect, store, process, use, disclose or
23 conduct any action for profit or otherwise on or with biometric identifiers except for
24 purposes for which the private entity received express affirmative written consent from
25 the individual.

26 **§9607. Remedies for violation**

27 **1. Private right of action.** An individual whose biometric identifier is the subject of
28 a violation of this chapter may bring an action against an offending private entity. If the
29 individual prevails in the action, the individual is entitled to:

30 A. For a violation of this chapter:

31 (1) As a result of negligence, actual damages or \$1,000 per violation, whichever
32 is greater; or

33 (2) As a result of recklessness or intentional misconduct, actual damages or \$5,000
34 per violation, whichever is greater;

35 B. Reasonable attorney's fees and court costs, including expert witness fees and other
36 litigation expenses; and

37 C. Other relief, including injunctive or equitable relief, as the court determines
38 appropriate.

39 **2. Unfair trade practice.** In addition to subsection 1, any violation of this chapter
40 constitutes prima facie evidence of a violation of the Maine Unfair Trade Practices Act.

41 **§9608. Effective date**

This chapter takes effect January 1, 2024.

Sec. A-2. Construction. This Part may not be construed to affect or be an indication of legislative intent regarding the definition of "personal information" used in any other law of this State.

PART B

Sec. B-1. Implementation commission established. The Biometric Identifiers Protection Implementation Commission, referred to in this Part as "the implementation commission," is established.

Sec. B-2. Implementation commission membership. The implementation commission consists of 7 members appointed as follows:

1. Three members of the Senate appointed by the President of the Senate, including members from each of the 2 parties holding the largest number of seats in the Legislature; and

2. Four members of the House of Representatives appointed by the Speaker of the House, including members from each of the 2 parties holding the largest number of seats in the Legislature.

Sec. B-3. Chairs. The first-named Senate member is the Senate chair and the first-named House of Representatives member is the House chair of the implementation commission.

Sec. B-4. Appointments; convening of implementation commission. All appointments must be made no later than 30 days following the effective date of this Part. The appointing authorities shall notify the Executive Director of the Legislative Council once all appointments have been completed. After appointment of all members, the chairs shall call and convene the first meeting of the implementation commission. If 30 days or more after the effective date of this Part a majority of but not all appointments have been made, the chairs may request authority and the Legislative Council may grant authority for the implementation commission to meet and conduct its business.

Sec. B-5. Duties. The implementation commission shall:

1. Review and evaluate the provisions of the Maine Revised Statutes, Title 10, chapter 1057;

2. Review biometric identifier protection laws in other jurisdictions to identify changes in law that may improve and assist in the implementation of the Maine Revised Statutes, Title 10, chapter 1057;

3. Review available enforcement mechanisms;

4. Gather relevant information by inviting presentations from identified stakeholders, which may include, but are not limited to, organizations focused on protecting private information; public and private entities that engage in the collection, storage, use, sale, security and destruction of biometric identifiers; experts in personal information privacy and biometric technology; representatives of industries that use biometric identifiers to verify the identity of those seeking services, including financial institutions and health care providers; federal and state agencies that enforce laws regulating biometric identifiers; and

any other source the implementation commission believes might provide useful information; and

5. Develop recommendations to improve and assist in the implementation of the Maine Revised Statutes, Title 10, chapter 1057.

Sec. B-6. Staff assistance. The Legislative Council shall provide necessary staffing services to the implementation commission, except that Legislative Council staff support is not authorized when the Legislature is in regular or special session.

Sec. B-7. Report. No later than November 2, 2022, the implementation commission shall submit a report that includes a summary of its activities and recommendations, including suggested legislation, to the joint standing committee of the Legislature having jurisdiction over judiciary matters and for presentation to the First Regular Session of the 131st Legislature. The joint standing committee may report out legislation related to the report to the 131st Legislature in 2023.'

Amend the bill by relettering or renumbering any nonconsecutive Part letter or section number to read consecutively.

SUMMARY

This amendment replaces the bill. It enacts the Maine Revised Statutes, Title 10, chapter 1057 as Part A and establishes an implementation commission in Part B. This amendment contains the following changes from the bill.

1. It clarifies that affirmative written consent may be given by electronic means.

2. It excludes from the definition of "biometric identifier" health care information obtained for health care as both of those terms are defined in the Maine Revised Statutes, Title 22, section 1711-C.

3. It excludes from the definition of "biometric identifier" information gathered for human research purposes that is subject to specific federal regulations as well as information that is used in clinical trials and other biomedical research.

4. It revises the term "private entity" to remove the requirement that a private entity conduct business and clarifies that "private entity" does not include an entity acting as a processor for another entity.

5. It adds a definition of "research" consistent with the existing health industry standards by referencing the definition in the federal policy for the protection of human subjects, which includes clinical trials and research activities to improve public health.

6. It removes language about the chapter's applicability to processors.

7. It excludes from application of the chapter personal information collected, processed, sold or disclosed pursuant to the federal Gramm-Leach-Bliley Act and its implementing regulations.

8. It excludes from application of the chapter information collected, used or disclosed for human subject research.

9. It requires a private entity in possession of biometric identifiers to develop and make available to the public a policy on the permanent destruction of biometric identifiers and requires the policy to include a potential destruction date of within 30 days after the private

1 entity receives a verified request from an individual to destroy that individual's biometric
2 identifiers.

3 10. It requires that a private entity must comply with the policy it has adopted, except
4 for an action taken in response to a state or federal law or municipal ordinance or a
5 compulsory request or demand issued in an investigation conducted pursuant to state or
6 federal law or taken to comply with a valid warrant, subpoena or other order issued by a
7 court of competent jurisdiction.

8 11. It explicitly prohibits a private entity that collects or a processor that receives an
9 individual's biometric identifier from selling, leasing, trading or otherwise profiting from
10 that biometric identifier.

11 12. It clarifies that a processor may act only pursuant to a contract with a private entity
12 that legally possesses the biometric identifiers and that the contract must prohibit the
13 processor from disclosing, retaining or using biometric identifiers outside of the direct
14 contractual relationship under the contract.

15 13. It prohibits a private entity that contracts with a processor to process or store
16 biometric identifiers from allowing the processor to collect, store, process, use, disclose or
17 conduct any action for profit or otherwise on or with the biometric identifiers except for
18 purposes for which the private entity received express written consent from the individual.

19 14. It authorizes a private right of action against the processor as well as the private
20 entity for alleged violations of the chapter. It also states a violation of the chapter is prima
21 facie evidence of a violation of the Maine Unfair Trade Practices Act.

22 15. It adds an effective date of January 1, 2024 for the chapter.

23 16. It includes a construction provision to direct that Part A of this legislation may not
24 be construed to affect or be an indication of legislative intent regarding the definition of
25 "personal information" used in any other law of this State.

26 Part B establishes the Biometric Identifiers Protection Implementation Commission
27 consisting of 3 Senators and 4 members of the House of Representatives. The
28 implementation commission is required to review the Maine Revised Statutes, Title 10,
29 chapter 1057 to determine if amendments are necessary to improve and assist in the
30 implementation of that chapter. The implementation commission is required to invite
31 various stakeholders to provide information to assist the implementation commission in
32 developing recommendations for amending that chapter. The joint standing committee of
33 the Legislature having jurisdiction over judiciary matters may submit legislation to the
34 131st Legislature in 2023.

35 **FISCAL NOTE REQUIRED**

36 (See attached)



Approved: 03/31/22 *MAC*

130th MAINE LEGISLATURE

LD 1945

LR 2477(03)

An Act To Regulate the Use of Biometric Identifiers

Fiscal Note for Bill as Amended by Committee Amendment *BCH-1018)*

Committee: Judiciary

Fiscal Note Required: Yes

Fiscal Note

Legislative Cost/Study

Correctional and Judicial Impact Statements

This bill may increase the number of civil suits filed in the court system. The additional workload associated with the minimal number of new cases filed in the court system does not require additional funding at this time. The collection of additional filing fees may increase General Fund revenue by minor amounts.

Legislative Cost/Study

The general operating expenses of this study are projected to be \$3,750 in fiscal year 2022-23. The Legislature's budget for the 2022-2023 biennium includes an estimated \$6,108 in fiscal year 2021-22 and \$10,000 in fiscal year 2022-23 for the costs of legislative studies, as well as \$31,260 of balances carried over from prior years for this purpose. Whether these amounts are sufficient to fund all studies will depend on the number of studies authorized by the Legislative Council and the Legislature. The additional costs of providing staffing assistance to the study during the interim can be absorbed utilizing existing budgeted staff resources.