

Proposed Second Substitute HB 1850 (H-2752.2/22)
By Representative Hansen

An Act Relating to protecting and enforcing the foundational data privacy rights of Washingtonians.

The Proposed Second Substitute (H-2752.2/22) as compared to SHB 1850:

(1) Removes provisions that are addressed in the striking amendment S-4439.4 to 2SSB 5062 (referred to as "2SSB 5062" in this summary) and that:

- ◆ Establish consumer personal data rights of access, correction, deletion, data portability, and opt-out of the processing of personal data for specified purposes;
- ◆ Define obligations for controllers and processors of personal data who are legal entities that meet specified thresholds;
- ◆ Identify controller responsibilities, including transparency, purpose specification, data minimization, security, and nondiscrimination; and
- ◆ Provide that violations are enforceable by the Attorney General under the Consumer Protection Act.

(2) Retains provisions related to the Washington State Consumer Data Privacy Commission and vests the Commission with the authority to implement and enforce 2SSB 5062 rather than SHB 1850. Retains provisions related to the private right of action and annual fee on controllers and processors. Modifies these provisions as follows:

Washington State Consumer Data Privacy Commission:

- ◆ Staggers the 5-year terms of the Commissioners;
- ◆ Removes the specific subjects on which the Commission is required to promulgate rules and instead provides that the Commission must adopt suitable rules to carry out the purposes of the administrative enforcement and annual fee provisions, as well as 2SSB 5062;
- ◆ Removes the requirements that the Commission: establish data protection mechanisms; conduct data protection audits of controllers and processors; and encourage the formation of codes of conduct by controllers and processors;
- ◆ Requires the Commission to cooperate with other jurisdictions with similar consumer data privacy laws;
- ◆ Requires the Commission to conduct an analysis of any global privacy control mechanism for the purposes of opting out of certain processing of personal data;
- ◆ Requires the Commission to establish and maintain a publicly accessible website with the information provided by controllers pursuant to the annual registration requirement in 2SSB 5062; and
- ◆ Permits the Commission to consult with the Office of Privacy and Data Protection.

Private right of action:

- ◆ Provides that the consumer may bring an action under the Consumer Protection Act (CPA) only after the Commission determines in an administrative hearing under the Administrative Procedure Act that a violation has occurred;
- ◆ Requires the Commission to determine that the consumer suffered actual damages before the consumer may proceed with a CPA action;

Committee: House Appropriations Committee
Staff: Yelena Baker, Office of Program Research
Draft: H-2752.2/22

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- ◆ Authorizes a consumer to bring a CPA action if the Commission's cease and desist order is not being complied with and the consumer suffers actual damages due to noncompliance; and
- ◆ Defines "actual damages" as demonstrable economic loss or physical harm to the consumer as a result of the violation.

Annual fee on controllers and processors:

- ◆ Replaces an unspecified annual fee with the requirement that every controller and processor that meets the jurisdictional thresholds in 2SSB 5062 pay to the Commission a fee equal to 0.1% of intrastate gross operating revenue;
- ◆ Provides that the Commission may by rule set fees that do not exceed \$10 million annually, establish tiers of entities based on intrastate annual gross revenue and specific rate for each tier, and waive any or all of the minimum fees established;
- ◆ Provides that percentage rates of gross operating revenue to be paid in any year may be decreased by the Commission by general order entered before March 1st of such year; and
- ◆ Sets forth penalties for late payments of the annual fee.

(3) Contains a contingent effective date and provides that the act takes effect only if 2SSB 5062 becomes law by July 1, 2022.

Committee: House Appropriations Committee
Staff: Yelena Baker, Office of Program Research
Draft: H-2752.2/22

BILL REQUEST - CODE REVISER'S OFFICE

BILL REQ. #: H-2752.2/22 2nd draft

ATTY/TYPIST: ML:jlb

BRIEF DESCRIPTION: Protecting and enforcing the foundational data
privacy rights of Washingtonians.

1 AN ACT Relating to protecting and enforcing the foundational data
2 privacy rights of Washingtonians; adding a new chapter to Title 19
3 RCW; prescribing penalties; and providing a contingent effective
4 date.

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

6 NEW SECTION. **Sec. 1.** WASHINGTON STATE CONSUMER DATA PRIVACY
7 COMMISSION. (1) The Washington state consumer data privacy commission
8 is created and vested with administrative powers and rule-making and
9 administrative enforcement authority to implement and enforce chapter
10 19.--- RCW (the new chapter created in section 20, chapter . . .
11 (Engrossed Second Substitute Senate Bill No. 5062 (S- . . . /22)),
12 Laws of 2022) and the rules adopted by the commission.

13 (2)(a) The commission is composed of three commissioners
14 appointed by the governor, with the consent of the senate. The
15 commission has the authority and duties set forth in this chapter.

16 (b) Of the persons initially appointed to the commission by the
17 governor, one must be appointed to serve three years, one to serve
18 five years, and one to serve seven years. Upon expiration of the
19 original terms, subsequent appointments are for five-year terms. Any
20 vacancies occurring in the membership of the commission must be
21 filled for the remainder of the unexpired term in the same manner as

1 the original appointments. A commissioner is eligible for
2 reappointment. The governor shall designate one of the commissioners
3 to be chair of the commission during the term of the governor.

4 (3) Each commissioner shall:

5 (a) Have qualifications, experience, and skills, in particular in
6 the areas of privacy and technology, required to perform the duties
7 of the commission and exercise its powers and authority;

8 (b) Maintain the confidentiality of information that has come to
9 their knowledge in the course of the performance of their tasks or
10 exercise of their powers, except to the extent that disclosure is
11 required by chapter 42.56 RCW;

12 (c) Remain free from external influence, whether direct or
13 indirect, and neither seek nor take instructions from another;

14 (d) Refrain from any action incompatible with their duties or
15 engage in any incompatible occupation, whether gainful or not, during
16 their term;

17 (e) Have the right of access to all information made available by
18 the commission to the chair of the commission;

19 (f) Be precluded, for a period of one year after leaving office,
20 from accepting employment with a controller or processor that was
21 subject to an enforcement action or civil action under this chapter
22 during the member's tenure or during the five-year period preceding
23 the member's appointment; and

24 (g) Be precluded for a period of two years after leaving office
25 from acting, for compensation, as an agent or attorney for, or
26 otherwise representing, any other person in a matter pending before
27 the commission if the purpose is to influence an action of the
28 commission.

29 (4) Each commissioner must receive a salary as may be fixed by
30 the governor in accordance with the provisions of RCW 43.03.040.

31 (5) The commission must appoint an executive director and set,
32 within the limits established by the office of financial management
33 under RCW 43.03.028, the executive director's compensation. The
34 executive director shall perform such duties and have such powers as
35 the commission may prescribe and delegate to implement and enforce
36 this chapter efficiently and effectively. The commission may not
37 delegate its authority to:

38 (a) Adopt, amend, or rescind rules;

39 (b) Determine that a violation of chapter 19.--- RCW (the new
40 chapter created in section 20, chapter . . . (Engrossed Second

1 Substitute Senate Bill No. 5062 (S- /22)), Laws of 2022) has
2 occurred; or

3 (c) Assess penalties for violations.

4 (6) The commission may employ technical, administrative, and
5 other staff as necessary to carry out the commission's duties and
6 powers as prescribed in this chapter. The Washington utilities and
7 transportation commission shall provide all administrative staff
8 support for the Washington state consumer data privacy commission,
9 which shall otherwise retain its independence in exercising its
10 powers, functions, and duties and its supervisory control over
11 nonadministrative staff.

12 NEW SECTION. **Sec. 2.** COMMISSION—DUTIES, POWERS, AND RULE
13 MAKING. (1) The Washington state consumer data privacy commission
14 must:

15 (a) Review and investigate consumer complaints, or complaints
16 initiated on its own, of alleged violations of chapter 19.--- RCW
17 (the new chapter created in section 20, chapter . . . (Engrossed
18 Second Substitute Senate Bill No. 5062 (S- /22)), Laws of
19 2022) pursuant to section 3 of this act;

20 (b) Adopt, amend, and rescind suitable rules under chapter 34.05
21 RCW, the administrative procedure act, to carry out the purposes and
22 provisions of sections 3 and 5 of this act and chapter 19.--- RCW
23 (the new chapter created in section 20, chapter . . . (Engrossed
24 Second Substitute Senate Bill No. 5062 (S- /22)), Laws of
25 2022);

26 (c) Administer, implement, and enforce through administrative
27 actions chapter 19.--- RCW (the new chapter created in section 20,
28 chapter . . . (Engrossed Second Substitute Senate Bill No. 5062
29 (S- /22)), Laws of 2022) and rules adopted by the commission;

30 (d) Develop guidance for consumers regarding their rights under
31 chapter 19.--- RCW (the new chapter created in section 20,
32 chapter . . . (Engrossed Second Substitute Senate Bill No. 5062
33 (S- /22)), Laws of 2022) and for controllers and processors
34 regarding their obligations under chapter 19.--- RCW (the new chapter
35 created in section 20, chapter . . . (Engrossed Second Substitute
36 Senate Bill No. 5062 (S- /22)), Laws of 2022);

37 (e) Provide technical assistance and advice to the legislature,
38 upon request, with respect to privacy-related legislation;

1 (f) Monitor relevant developments relating to the protection of
2 personal data, and in particular, the development of information and
3 communication technologies and commercial practices;

4 (g) Cooperate with other jurisdictions with similar consumer data
5 privacy laws to ensure consistent application of consumer data
6 privacy protections;

7 (h) Periodically review statutory definitions and make
8 recommendations to the legislature to update the definitions based on
9 changes in the industry;

10 (i) Conduct an analysis of any global privacy control mechanism
11 or any similar mechanism required by law or regulation in the United
12 States, including specifications for informing consumers about
13 available opt-out choices and authenticating consumer requests, or
14 requests made by a third party designated by a consumer, to opt out
15 of processing for the purpose of targeted advertising or the sale of
16 personal data pursuant to chapter 19.--- RCW (the new chapter created
17 in section 20, chapter . . . (Engrossed Second Substitute Senate Bill
18 No. 5062 (S- . . . /22)), Laws of 2022). Additional stakeholders
19 with relevant expertise may be consulted when conducting the
20 analysis. The commission shall provide this analysis and any findings
21 to the governor and the appropriate committees of the legislature by
22 December 1, 2023;

23 (j) Establish and collect an annual fee pursuant to section 5 of
24 this act;

25 (k) Perform all other acts necessary and appropriate in the
26 exercise of its power, authority, and jurisdiction to protect
27 consumer rights pursuant to chapter 19.--- RCW (the new chapter
28 created in section 20, chapter . . . (Engrossed Second Substitute
29 Senate Bill No. 5062 (S- . . . /22)), Laws of 2022) and seek to
30 balance the goals of strengthening protections for consumers'
31 fundamental right to privacy while giving attention to the impact on
32 controllers and processors; and

33 (1) Establish and maintain a page on its internet website where
34 the information provided by controllers under chapter 19.--- RCW (the
35 new chapter created in section 20, chapter . . . (Engrossed Second
36 Substitute Senate Bill No. 5062 (S- . . . /22)), Laws of 2022) is
37 accessible to the public.

38 (2) The commission may consult with the office of privacy and
39 data protection created in RCW 43.105.369 in the provisions of
40 subsection (1)(d) through (i) of this section.

1 (3) The commission may order a controller or processor to provide
2 any information the commission requires for the performance of its
3 duties pursuant to this chapter, including access to a controller's
4 or processor's premises and data processing equipment and means.

5 (4) The commission may subpoena witnesses, compel their
6 attendance, administer oaths, take the testimony of any person under
7 oath, and require by subpoena the production of any books, papers,
8 records, or other items material to the performance of the
9 commission's duties or exercise of its powers including, but not
10 limited to, its power to audit a controller's or processor's
11 compliance with chapter 19.--- RCW (the new chapter created in
12 section 20, chapter . . . (Engrossed Second Substitute Senate Bill
13 No. 5062 (S- . . . /22)), Laws of 2022) and any rules adopted by
14 the commission pursuant to subsection (1)(b) of this section.

15 NEW SECTION. **Sec. 3.** ADMINISTRATIVE ENFORCEMENT. (1) Upon the
16 complaint of a consumer or on its own initiative, the Washington
17 state consumer data privacy commission may investigate alleged
18 violations by a controller or processor of chapter 19.--- RCW (the
19 new chapter created in section 20, chapter . . . (Engrossed Second
20 Substitute Senate Bill No. 5062 (S- . . . /22)), Laws of 2022) or
21 any rules issued by the commission. The commission may decide not to
22 investigate a complaint. In making a decision not to investigate or
23 provide more time to cure, the commission may consider the following:

24 (a) Lack of intent to violate chapter 19.--- RCW (the new chapter
25 created in section 20, chapter . . . (Engrossed Second Substitute
26 Senate Bill No. 5062 (S- . . . /22)), Laws of 2022) or any rules
27 issued by the commission; and

28 (b) Voluntary efforts undertaken by the controller or processor
29 to cure the alleged violation prior to being notified by the
30 commission of the complaint.

31 (2) The commission shall provide written notification to the
32 consumer who made the complaint of the action, if any, the commission
33 has taken or plans to take on the complaint, together with the
34 reasons for that action or nonaction.

35 (3)(a) The commission may not make a finding that there is reason
36 to believe that a violation has occurred unless, at least 30 days
37 prior to the commission's consideration of the alleged violation, the
38 alleged violator is:

1 (i) Notified of the alleged violation by service of process or
2 registered mail with return receipt requested;

3 (ii) Provided with a summary of the evidence; and

4 (iii) Informed of their right to be present in person and
5 represented by counsel at any proceeding of the commission held for
6 the purpose of considering whether there is reason to believe that a
7 violation has occurred.

8 (b) Notice to the alleged violator is deemed made on the date of
9 service, the date the registered mail receipt is signed, or if the
10 registered mail receipt is not signed, the date returned by the post
11 office.

12 (c) A proceeding held for the purpose of considering whether
13 there is reason to believe that a violation has occurred is private
14 unless the alleged violator files with the commission a written
15 request that the proceeding be public.

16 (4)(a) If the commission determines there is reason to believe
17 that chapter 19.--- RCW (the new chapter created in section 20,
18 chapter . . . (Engrossed Second Substitute Senate Bill No. 5062
19 (S- . . . /22)), Laws of 2022) or a rule adopted by the commission
20 has been violated, prior to holding a hearing pursuant to subsection
21 (5) of this section, the commission shall issue to the controller or
22 processor a warning letter identifying specific provisions of chapter
23 19.--- RCW (the new chapter created in section 20, chapter . . .
24 (Engrossed Second Substitute Senate Bill No. 5062 (S- . . . /22)),
25 Laws of 2022) the commission believes have been or are being
26 violated.

27 (b) Within 30 days of the issuance of the warning letter, the
28 controller or processor shall provide the commission with a written
29 response to explain that the alleged violation has not been committed
30 or to summarize how the violation has been cured.

31 (c) Upon the receipt of the controller's or processor's response,
32 the commission shall make a written finding as to whether a violation
33 has been committed and whether the violation has been cured. If the
34 commission finds that no violation has been committed, the commission
35 shall close the matter. If the commission finds the violation has not
36 been cured, the commission may proceed with the administrative
37 hearing pursuant to subsection (5) of this section.

38 (5)(a) When the commission determines there is reason to believe
39 that chapter 19.--- RCW (the new chapter created in section 20,
40 chapter . . . (Engrossed Second Substitute Senate Bill No. 5062

1 (S- /22)), Laws of 2022) or a rule adopted by the commission
2 has been violated and that the violation has not been cured pursuant
3 to subsection (4) of this section, it shall hold a hearing to
4 determine if a violation has occurred. Notice must be given and the
5 hearing conducted in accordance with chapter 34.05 RCW, the
6 administrative procedure act. The commission shall have all the
7 powers granted by that chapter.

8 (b) (i) If the commission determines on the basis of the hearing
9 conducted pursuant to (a) of this subsection that a violation has
10 occurred, the commission shall issue an order that may require the
11 violator to do all or any of the following:

12 (A) Cease and desist the violation; or

13 (B) Pay an administrative fine of up to \$2,500 for each
14 violation, or up to \$7,500 for each intentional violation and each
15 violation involving the personal data of a child.

16 (ii) In addition to any other remedies provided by law, the
17 commission's order issued pursuant to this subsection (5) (b) may be
18 enforced in accordance with chapter 34.05 RCW.

19 (c) (i) If the commission determines on the basis of the hearing
20 conducted pursuant to (a) of this subsection that a violation has
21 occurred, the commission shall then determine if that consumer
22 suffered actual damages as a result of the violation. If the
23 commission determines, pursuant to this subsection, the consumer
24 suffered actual damages as a result of the violation, that consumer
25 may bring a civil action under the consumer protection act, chapter
26 19.86 RCW, to obtain injunctive relief and for recovery of those
27 actual damages and reasonable attorneys' fees.

28 (ii) For the purposes of this subsection (5) (c), "actual damages"
29 means demonstrable economic loss or physical harm to the consumer as
30 a result of the violation.

31 (d) (i) After the commission issues a cease and desist order
32 pursuant to (b) (i) of this subsection, on its own initiative or upon
33 the complaint of a consumer who initiated the complaint from which
34 that order originated, the commission may determine whether or not a
35 violator has complied with that order. If the commission determines
36 that the violator has not complied with that order and the consumer
37 suffered actual damages due to noncompliance, then that consumer may
38 bring a civil action under the consumer protection act, chapter 19.86
39 RCW, to obtain only injunctive relief and for recovery of those
40 actual damages and reasonable attorneys' fees.

1 (ii) For the purposes of this subsection (5)(d), "actual damages"
2 means demonstrable economic loss or physical harm to the consumer as
3 a result of the violation.

4 (e) All receipts from the imposition of administrative fines
5 under this section must be deposited into the consumer privacy
6 account created in RCW 19.---.--- (section 16, chapter . . .
7 (Engrossed Second Substitute Senate Bill No. 5062 (S- /22)),
8 Laws of 2022).

9 (f) When the commission determines that no violation has
10 occurred, it shall publish a declaration so stating.

11 (6) Any decision of the commission with respect to a complaint or
12 administrative fine is subject to judicial review in an action
13 brought by a party to the complaint or administrative fine and is
14 subject to an abuse of discretion standard.

15 (7) Upon reviewing a complaint, the commission may refer the
16 complaint to the attorney general for civil enforcement under the
17 consumer protection act, chapter 19.86 RCW. The commission and the
18 attorney general may consult prior to referral to determine the
19 appropriate enforcement mechanism.

20 NEW SECTION. **Sec. 4.** PRIVATE RIGHT OF ACTION. Except as
21 provided in section 3(5) (c) and (d) of this act, nothing in this
22 chapter creates an independent cause of action, except for the
23 actions brought by the attorney general to enforce chapter 19.--- RCW
24 (the new chapter created in section 20, chapter . . . (Engrossed
25 Second Substitute Senate Bill No. 5062 (S- /22)), Laws of
26 2022). Except as provided in section 3(5) (c) and (d) of this act, no
27 person, except for the attorney general, may enforce the rights and
28 protections created by chapter 19.--- RCW (the new chapter created in
29 section 20, chapter . . . (Engrossed Second Substitute Senate Bill
30 No. 5062 (S- /22)), Laws of 2022) in any action. However,
31 nothing in this chapter limits any other independent causes of action
32 enjoyed by any person, including any constitutional, statutory,
33 administrative, or common law rights or causes of action. The rights
34 and protections in this chapter are not exclusive, and to the extent
35 that a person has the rights and protections in this chapter because
36 of another law other than this chapter, the person continues to have
37 those rights and protections notwithstanding the existence of this
38 chapter.

