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S.289

Introduced by Senators Lyons, Sirotkin, and Ashe

Referred to Committee on Finance

Date: January 3, 2018

Subject: Telecommunications; broadband Internet access service; privacy

Statement of purpose of bill as introduced: This bill proposes to enact the

Vermont Broadband Internet Privacy Act.

~~An act relating to the Vermont Broadband Internet Privacy Act.~~

An act relating to protecting consumers and promoting an open Internet in Vermont.

It is hereby enacted by the General Assembly of the State of Vermont:

~~Sec. 1. 9 V.S.A. chapter 61A is added to read:~~

CHAPTER 61A. BROADBAND INTERNET PRIVACY

§ 2412. TITLE

This chapter shall be known as the Vermont Broadband Internet Privacy Act.

§ 2413. LEGISLATIVE INTENT

It is the intent of the General Assembly in enacting this chapter to incorporate into statute certain provisions of the Federal Communications Commission Report and Order “Protecting the Privacy of Customers of Broadband and Other Telecommunications Services” (FCC 16-148), which

1 ~~were revoked by Senate Joint Resolution 34 (Public Law 115-22), which~~
2 ~~became effective on April 3, 2017. In adopting the specified provisions~~
3 ~~incorporated into this act, it is the intent of the General Assembly to give~~
4 ~~consumers greater control over their personal information when accessing the~~
5 ~~Internet through a broadband Internet access service provider and thereby~~
6 ~~better protect their privacy and autonomy. It is also the intent of the General~~
7 ~~Assembly that the consumer protections set forth in this chapter be interpreted~~
8 ~~broadly and any exceptions interpreted narrowly, using the Federal~~
9 ~~Communications Commission Report and Order as persuasive guidance, in~~
10 ~~order to maximize individual privacy and autonomy.~~

11 § 2414. DEFINITIONS

12 As used in this chapter:

13 (1) “Aggregate customer information” means collective data that relates
14 to a group or category of customers, from which individual customer identities
15 and characteristics have been removed, that is not linked or reasonably
16 linkable to any individual person, household, or device. “Aggregate customer
17 information” does not mean one or more individual customer records that have
18 been de-identified.

19 (2) “Broadband Internet access service” or “BIAS” means a mass
20 market retail service by wire or radio in Vermont that provides the capability
21 to transmit data and to receive data from all or substantially all Internet

1 endpoints, including any capabilities that are incidental to, and enable the
2 operation of, the service, but excluding dial-up Internet access service. The
3 term also encompasses any service that provides a functional equivalent of the
4 service described in this subdivision or that is used to evade the protections set
5 forth in this chapter.

6 (3) "Broadband Internet access service provider" means a person
7 engaged in the provision of BIAS to a customer account located in Vermont.
8 "Broadband Internet access service provider" does not include a premises
9 operator, including a coffee shop, bookstore, airline, private end-user network,
10 or other business that acquires BIAS from a BIAS provider to enable patrons
11 to access the Internet from its respective establishment.

12 (4) "Customer" means either of the following:

13 (A) a current or former subscriber to BIAS in Vermont; or

14 (B) an applicant for BIAS in Vermont.

15 (5) "Customer proprietary information" means any of the following that
16 a BIAS provider acquires in connection with its provision of BIAS:

17 (A) individually identifiable customer proprietary network
18 information;

19 (B) personally identifiable information; or

20 (C) content of a communication.

21 (6)(A) "Customer proprietary network information" or "CPNI" means

1 information that relates to the quantity, technical configuration, type,
2 destination, location, and amount of use of a BIAS subscribed to by a customer
3 of a BIAS provider and that is made available to the BIAS provider by the
4 customer solely by virtue of the provider-customer relationship.

5 (B)(i) CPNI includes all of the following: broadband service plans,
6 geolocation data; Media Access Control (MAC) addresses and other device
7 identifiers; source and destination Internet Protocol (IP) addresses and domain
8 name information; other information in the network layer protocol headers;
9 traffic statistics, including both short-term and long-term measurements; port
10 information and other transport layer protocol header information; application
11 headers, including any information a BIAS provider injects into the application
12 header; application usage; application payload; customer premises equipment;
13 and other customer device information.

14 (ii) CPNI includes any information falling within a CPNI category
15 that the BIAS provider collects or accesses in connection with the provision of
16 BIAS.

17 (iii) CPNI includes information that a BIAS provider causes to be
18 collected or stored on a customer's device, including customer premises
19 equipment and mobile stations.

20 (7) "Material change" means any change that a customer, acting
21 reasonably under the circumstances, would consider important to his or her

1 decisions regarding his or her privacy.

2 (8) “Nonsensitive customer proprietary information” means customer
3 proprietary information that is not sensitive customer proprietary information.

4 (9) “Opt-in approval” means a method for obtaining customer consent
5 to use, disclose, or permit access to the customer’s proprietary information.

6 This approval method requires that the BIAS provider obtain from the
7 customer affirmative, express consent allowing the requested usage,
8 disclosure, or access to the customer proprietary information after the
9 customer is provided appropriate notification of the BIAS provider’s request,
10 consistent with the requirements of this chapter.

11 (10) “Opt-out approval” means a method for obtaining customer consent
12 to use, disclose, or permit access to the customer’s proprietary information.

13 Under this approval method, a customer is deemed to have consented to the
14 use or disclosure of, or access to, the customer’s proprietary information if the
15 customer has failed to object to that use, disclosure, or access after the
16 customer is provided appropriate notification of the BIAS provider’s request
17 for consent, consistent with the requirements of this chapter.

18 (11) “Personally identifiable information” means any information that is
19 linked or reasonably linkable to an individual or device. Information is linked
20 or reasonably linkable to an individual or device if it can reasonably be used
21 on its own, in context, or in combination to identify an individual or device, or

1 ~~to logically associate it with other information about a specific individual or~~
2 device. Personally identifiable information includes each of the following:
3 name; address; Social Security number; date of birth; mother's maiden name;
4 government-issued identifiers, including a driver's license number; physical
5 address; e-mail address or other online contact information; telephone
6 numbers; MAC addresses or other unique device identifiers; IP addresses; and
7 persistent online or unique advertising identifiers.

8 (12) "Sensitive customer proprietary information" includes all of the
9 following:

10 (A) Financial information.

11 (B) Health information.

12 (C) Information pertaining to children.

13 (D) Social Security numbers.

14 (E) Precise geolocation information.

15 (F) Content of communications.

16 (G) Internet website browsing history, application usage history, and
17 the functional equivalents of either. "Internet website browsing history" and
18 "application usage history" means information from network traffic related to
19 Internet website browsing or other applications, including the application layer
20 of that traffic, and information from network traffic indicating the Internet
21 website or party with which the customer is communicating, including a

1 domain or IP address

2 § 2415. CUSTOMER APPROVAL

3 (a) Except as described in subsection (b), a BIAS provider shall not use,
4 disclose, or permit access to customer proprietary information except with the
5 opt-out or opt-in approval of a customer as described in this section.

6 (b) A BIAS provider may use, disclose, or permit access to customer
7 proprietary information without customer approval for any of the following
8 purposes:

9 (1) in its provision of the BIAS service from which the information is
10 derived, or in its provision of services necessary to, or used in, the provision of
11 the service;

12 (2) to initiate, render, bill, and collect for BIAS;

13 (3) to protect the rights or property of the BIAS provider or to protect
14 users of the BIAS and other BIAS providers from fraudulent, abusive, or
15 unlawful use of the service;

16 (4) to provide any inbound marketing, referral, or administrative
17 services to the customer for the duration of a real-time interaction;

18 (5) to provide location information or nonsensitive customer proprietary
19 information to any of the following:

20 (A) a public safety answering point; emergency medical service
21 provider or emergency dispatch provider, public safety, fire service, or law

1 enforcement official; or hospital emergency or trauma care facility in order to

2 respond to the user's request for emergency services;

3 (B) the user's legal guardian or members of the user's immediate
4 family in an emergency situation that involves the risk of death or serious
5 physical harm; and

6 (C) providers of information or database management services solely
7 for purposes of assisting in the delivery of emergency services in response to
8 an emergency;

9 (6) to generate an aggregate customer information dataset using
10 customer personal information, or using, disclosing, or permitting access to the
11 aggregate customer information dataset it generated;

12 (7) for any other lawful purpose if the BIAS provider ensures the
13 customer proprietary information is not individually identifiable by doing all
14 of the following:

15 (A) determining that the information is not reasonably linkable to an
16 individual or device;

17 (B) publicly committing to maintain and use the data in a non-
18 individually identifiable fashion and to not attempt to re-identify the data; and

19 (C) contractually prohibiting any entity to which it discloses or
20 permits access to the de-identified data from attempting to re-identify the

21 data, and

1 (8) as otherwise required or authorized by law.

2 (c) Except as otherwise provided in this section, a BIAS provider shall
3 obtain opt-out approval from a customer to use, disclose, or permit access to
4 any of the customer's nonsensitive customer proprietary information. If it so
5 chooses, a BIAS provider may instead obtain opt-in approval from a customer
6 to use, disclose, or permit access to any of the customer's nonsensitive
7 customer proprietary information.

8 (d) Except as otherwise provided in this section, a BIAS provider shall
9 obtain opt-in approval from a customer to do either of the following:

10 (1) use, disclose, or permit access to any of the customer's sensitive
11 customer proprietary information; or

12 (2) make any material retroactive change, including a material change
13 that would result in a use, disclosure, or permission of access to any of the
14 customer's proprietary information previously collected by the BIAS provider
15 for which the customer did not previously grant approval, either through opt-in
16 or opt-out consent, as required by this subsection and subsection (c) of this
17 section.

18 (e)(1) Except as described in subsection (a) of this section, a BIAS
19 provider shall, at a minimum, solicit customer approval pursuant to subsection
20 (c) or (d) of this section, as applicable, at the point of sale and when making
21 one or more material changes to privacy policies.

1 (2) A provider's solicitation of customer approval shall be clear and
2 conspicuous and in language that is comprehensible and not misleading. The
3 solicitation shall disclose all of the following:

4 (A) the types of customer proprietary information that the BIAS
5 provider is seeking customer approval to use, disclose, or permit access to;

6 (B) the purposes for which the customer proprietary information will
7 be used; and

8 (C) the categories of entities to which the BIAS provider intends to
9 disclose or permit access to the customer proprietary information.

10 (3) A BIAS provider's solicitation of customer approval shall be
11 completely translated into a language other than English if the BIAS provider
12 transacts business with the customer in that language.

13 (f) A BIAS provider shall make available a simple, easy-to-use mechanism
14 for a customer to grant, deny, or withdraw opt-in approval and opt-out
15 approval at any time. The mechanism shall be clear and conspicuous, in
16 language that is comprehensible and not misleading, and made available at no
17 additional cost to the customer. The mechanism shall be persistently available
18 on or through the BIAS provider's home page on its Internet website, the
19 BIAS provider's application if it provides one for account management
20 purposes, and any functional equivalent to the BIAS provider's home page or
21 application. If the BIAS provider does not have a home page, it shall provide

1 ~~a persistently available mechanism by another means, such as a toll-free~~
2 telephone number. The customer's grant, denial, or withdrawal of approval
3 shall be given effect promptly and remain in effect until the customer revokes
4 or limits the grant, denial, or withdrawal of approval.

5 § 2416. BIAS OFFERS CONDITIONED ON WAIVER OF PRIVACY

6 RIGHTS

7 A BIAS provider shall not do either of the following:

8 (1) refuse to provide BIAS or in any way limit that service to a
9 customer who does not waive his or her privacy rights guaranteed by law or
10 regulation, including this chapter; or

11 (2) charge a customer a penalty, penalize a customer in any way, or
12 offer a customer a discount or another benefit, as a direct or indirect
13 consequence of a customer's decision to, or refusal to, waive his or her privacy
14 rights guaranteed by law or regulation, including this chapter.

15 § 2417. EFFECT ON OTHER LAWS

16 This chapter shall not limit the other statutory rights of a customer or the
17 statutory obligations of a BIAS provider under Vermont law.

18 § 2418. APPLICATION

19 The requirements of this chapter shall apply to BIAS providers operating
20 within Vermont when providing BIAS to their customers who are residents of
21 and physically located in Vermont. Any waiver by the customer of the

1 ~~provisions of this chapter shall be deemed contrary to public policy and shall~~
2 ~~be void and unenforceable.~~

3 § 2419. STATE AUTHORITY

4 Vermont adopts this chapter pursuant to all inherent state authority under
5 the Tenth Amendment of the U.S. Constitution and all relevant authority
6 granted and reserved to the states by Title 47 of the U.S. Code, including the
7 authority to impose requirements necessary to protect public safety and
8 welfare, safeguard the rights of consumers, manage public rights-of-way, and
9 regulate franchises.

10 Sec. 2. EFFECTIVE DATE

11 ~~This act shall take effect on January 1, 2019.~~

Sec. 1. 3 V.S.A. § 348 is added to read:

§ 348. CONTRACTS FOR INTERNET SERVICE; NET NEUTRALITY
COMPLIANCE

(a) The Secretary of Administration shall develop a process by which an
Internet service provider may certify that it is in compliance with the consumer
protection and net neutrality standards established in subsection (b) of this
section.

(b) An Internet service provider is in compliance with the consumer
protection and net neutrality standards of this section if it demonstrates and
the Secretary finds that the Internet service provider:

(1) Does not engage in any of the following practices in Vermont:

(A) blocking lawful content, applications, services, or nonharmful
devices, subject to reasonable network management practices that are
disclosed to its customers;

(B) impairing or degrading lawful Internet traffic on the basis of
Internet content, application, or service or the use of a nonharmful device,
subject to reasonable network management practices that are disclosed to its

customers;

(C) engaging in paid prioritization or providing preferential treatment of some Internet traffic to any Internet customer, unless these prohibitions are waived pursuant to subsection (c) of this section;

(D) unreasonably interfering with or unreasonably disadvantaging either:

(i) a customer's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the customer's choice; or

(ii) an edge provider's ability to make lawful content, applications, services, or devices available to a customer; or

(E) engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content to its customers.

(2) Publicly discloses accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and to enable entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website.

(c) The Secretary of Administration may waive the prohibition on paid prioritization and preferential treatment under subdivision (b)(1)(C) of this section if the Internet service provider demonstrates and the Secretary finds that the practice would serve a legitimate and significant public interest and would not harm the open nature of the Internet in Vermont.

(d) As used in this section:

(1) "Broadband Internet access service" means a mass-market retail service by wire or radio in Vermont that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. The term also encompasses any service in Vermont that the Secretary finds to be providing a functional equivalent of the service described in this subdivision, or that is used to evade the protections established in this chapter.

(2) "Edge provider" means any person in Vermont that provides any content, application, or service over the Internet and any person in Vermont that provides a device used for accessing any content, application, or service over the Internet.

(3) “Internet service provider” or “provider” means a business that provides broadband Internet access service to any person in Vermont.

(4) “Paid prioritization” means the management of an Internet service provider’s network to favor directly or indirectly some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either in exchange for consideration, monetary or otherwise, from a third party or to benefit an affiliated entity, or both.

(5) “Reasonable network management” means a practice that has a primarily technical network management justification but does not include other business practices and that is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

Sec. 2. 3 V.S.A. § 349 is added to read:

§ 349. STATE CONTRACTING; INTERNET SERVICE

The Secretary of Administration shall include in Administrative Bulletin 3.5 a requirement that State procurement contracts for broadband Internet access service, as defined in subdivision 348(d)(3) of this title, include terms and conditions requiring that the Internet service provider certify that it is in compliance with the consumer protection and net neutrality standards established in section 348 of this title.

Sec. 3. 22 V.S.A. § 901 is amended to read:

§ 901. ~~DEPARTMENT OF INFORMATION AND INNOVATION AGENCY OF DIGITAL SERVICES~~

(a) The ~~Department of Information and Innovation Agency of Digital Services~~, created in 3 V.S.A. § 2283b, shall have all the responsibilities assigned to it by law, including the following:

* * *

(15) To ensure that any State government contract for broadband Internet access service, as defined in 3 V.S.A. § 348(d)(3), contains terms and conditions requiring that the Internet service provider certify that it is in compliance with the consumer protection and net neutrality standards established in 3 V.S.A. § 348.

(b) As used in this section, “State government” means the agencies of the Executive Branch of State government.

Sec. 4. 2 V.S.A. § 754 is added to read:

§ 754. CONTRACTS FOR INTERNET SERVICE

Every contract for broadband Internet access service, as defined in 3 V.S.A. § 348(d)(3), for the Legislative Branch shall include terms and conditions requiring that the Internet service provider certify that it is in compliance with the consumer protection and net neutrality standards established in 3 V.S.A. § 348.

Sec. 5. 4 V.S.A. § 27a is added to read:

§ 27a. CONTRACTS FOR INTERNET SERVICE

Every contract to provide broadband Internet access service, as defined in 3 V.S.A. § 348(d)(3), for the Judicial Branch shall include terms and conditions requiring that the Internet service provider certify that it is in compliance with the consumer protection and net neutrality standards established in 3 V.S.A. § 348.

Sec. 6. APPLICATION

This act shall apply to all contracts for Internet service entered into or renewed on or after July 1, 2018.

Sec. 7. EFFECTIVE DATE

This act shall take effect on passage.