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RADIO FREQUENCY IDENTIFICATION

2011 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Wayne A. Harper

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Interception of Communications Act in the Utah Code of Criminal Procedure by adding offenses relating to intercepting personal information using radio frequency identification technology.

Highlighted Provisions:

This bill:

- ▶ provides criminal and civil penalties for requiring, coercing, or compelling a person to undergo the subcutaneous implanting of a radio frequency identification tag;
- ▶ prohibits intentionally or knowingly leaving a radio frequency identification tag in an article, good, or product that the person sells without rendering it inoperable and uses or intends to use the radio frequency identification tag or chip imbedded in the article, good, or product for direct or indirect commercial advantage or for private financial gain;
- ▶ prohibits intentionally or knowingly remotely reading, storing, or disclosing identifying information using radio frequency identification technology without the person's prior knowledge and consent; and
- ▶ provides definitions.

Money Appropriated in this Bill:

None

Other Special Clauses:



28 None

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **77-23a-3**, as last amended by Laws of Utah 1998, Chapter 282

32 **77-23a-4**, as last amended by Laws of Utah 2010, Chapter 324

33 ENACTS:

34 **77-23a-4.5**, Utah Code Annotated 1953



36 *Be it enacted by the Legislature of the state of Utah:*

37 Section 1. Section **77-23a-3** is amended to read:

38 **77-23a-3. Definitions.**

39 As used in this chapter:

40 (1) "Aggrieved person" means a person who was a party to any intercepted wire,
41 electronic, or oral communication, or a person against whom the interception was directed.

42 (2) "Aural transfer" means any transfer containing the human voice at any point
43 between and including the point of origin and the point of reception.

44 (3) "Communications common carrier" means any person engaged as a common carrier
45 for hire in intrastate, interstate, or foreign communication by wire or radio, including a provider
46 of electronic communication service. However, a person engaged in radio broadcasting is not,
47 when that person is so engaged, a communications common carrier.

48 (4) "Contents" when used with respect to any wire, electronic, or oral communication
49 includes any information concerning the substance, purport, or meaning of that
50 communication.

51 (5) "Electronic communication" means any transfer of signs, signals, writings, images,
52 sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio,
53 electromagnetic, photoelectronic, or photo-optical system, but does not include:

54 (a) the radio portion of a cordless telephone communication that is transmitted between
55 the cordless telephone handset and the base unit;

56 (b) any wire or oral communications;

57 (c) any communication made through a tone-only paging device; or

58 (d) any communication from an electronic or mechanical device that permits the

59 tracking of the movement of a person or object, except as provided in Subsection
60 77-23a-4(1)(b)(ii).

61 (6) "Electronic communications service" means any service that provides for users the
62 ability to send or receive wire or electronic communications.

63 (7) "Electronic communications system" means any wire, radio, electromagnetic,
64 photoelectronic, or photo-optical facilities for the transmission of electronic communications,
65 and any computer facilities or related electronic equipment for the electronic storage of the
66 communication.

67 (8) "Electronic, mechanical, or other device" means any device or apparatus that may
68 be used to intercept or remotely read a wire, electronic, or oral communication other than:

69 (a) any telephone or telegraph instrument, equipment or facility, or a component of any
70 of them:

71 (i) furnished by the provider of wire or electronic communications service or by the
72 subscriber or user, and being used by the subscriber or user in the ordinary course of its
73 business; or

74 (ii) being used by a provider of wire or electronic communications service in the
75 ordinary course of its business, or by an investigative or law enforcement officer in the ordinary
76 course of ~~his~~ the officer's duties; or

77 (b) a hearing aid or similar device being used to correct subnormal hearing to not better
78 than normal.

79 (9) "Electronic storage" means:

80 (a) any temporary intermediate storage of a wire or electronic communication incident
81 to the electronic transmission of it; and

82 (b) any storage of the communication by an electronic communications service for the
83 purposes of backup protection of the communication.

84 (10) "Intercept" means the acquisition of the contents of any wire, electronic, or oral
85 communication through the use of any electronic, mechanical, or other device.

86 (11) "Investigative or law enforcement officer" means any officer of the state or of a
87 political subdivision, who by law may conduct investigations of or make arrests for offenses
88 enumerated in this chapter, or any federal officer as defined in Section 53-13-106, and any
89 attorney authorized by law to prosecute or participate in the prosecution of these offenses.

90 (12) "Judge of competent jurisdiction" means a judge of a district court of the state.

91 (13) "Oral communication" means any oral communication uttered by a person
92 exhibiting an expectation that the communication is not subject to interception, under
93 circumstances justifying that expectation, but does not include any electronic communication.

94 (14) "Pen register" means a device that records or decodes electronic or other impulses
95 that identify the numbers dialed or otherwise transmitted on the telephone line to which the
96 device is attached. "Pen register" does not include any device used by a provider or customer
97 of a wire or electronic communication service for billing or recording as an incident to billing,
98 for communications services provided by the provider, or any device used by a provider or
99 customer of a wire communications service for cost accounting or other like purposes in the
100 ordinary course of its business.

101 (15) "Person" means any employee or agent of the state or a political subdivision, and
102 any individual, partnership, association, joint stock company, trust, or corporation.

103 (16) "Personal information" includes any of the following data elements to the extent
104 they are used alone or in conjunction with any other information used to identify an individual:

105 (a) first or last name;

106 (b) address;

107 (c) telephone number;

108 (d) email, Internet protocol, or website address;

109 (e) date of birth;

110 (f) any unique personal identifier, including:

111 (i) any number contained on a Utah driver license or identification card issued pursuant
112 to Title 53, Chapter 3, Uniform Driver License Act; or

113 (ii) those identifiers contained or encoded on a health insurance, health benefit, or
114 record issued in conjunction with any government-supported aid program;

115 (g) bank, credit card, or other financial institution account number;

116 (h) religion;

117 (i) ethnicity or nationality;

118 (j) photograph;

119 (k) unique biometric data of a person including fingerprints, facial scan identifiers,
120 voice print, retina image, or iris image; and

121 (l) Social Security number.

122 (17) "Radio frequency identification" means the use of electromagnetic radiating waves
123 or reactive field coupling in the radio frequency portion of the spectrum to communicate to or
124 from a tag or similar device or technology through a variety of modulation and encoding
125 schemes to read the identity of a radio frequency identification tag or other data stored on it.

126 ~~[(16)]~~ (18) "Readily accessible to the general public" means, regarding a radio
127 communication, that the communication is not:

128 (a) scrambled or encrypted;

129 (b) transmitted using modulation techniques with essential parameters that have been
130 withheld from the public with the intention of preserving the privacy of the communication;

131 (c) carried on a subcarrier or signal subsidiary to a radio transmission;

132 (d) transmitted over a communications system provided by a common carrier, unless
133 the communication is a tone-only paging system communication; or

134 (e) transmitted on frequencies allocated under Part 25, Subpart D, E, or F of Part 74, or
135 Part 94, Rules of the Federal Communications Commission unless, in the case of a
136 communication transmitted on a frequency allocated under Part 74 that is not exclusively
137 allocated to broadcast auxiliary services, the communication is a two-way voice
138 communication by radio.

139 (19) "Remotely read" means that no physical contact is required between the device
140 that is read and the device that captures the data.

141 (20) "Require, coerce, or compel" includes physical violence, threat, intimidation,
142 retaliation, the conditioning of any private or public benefit or care on consent to implantation,
143 including employment, promotion, or other employment benefit, or by any means that causes a
144 reasonable person of ordinary susceptibilities to acquiesce to implantation when that person
145 otherwise would not.

146 (21) "Subcutaneous" means existing, performed, or introduced under or on the skin.

147 (22) "Tag" means any radio frequency identification device, chip, item, application, or
148 product that contains personal or identifying information that is passively or actively capable of
149 being remotely read using radio frequency or other similar technology.

150 ~~[(17)]~~ (23) "Trap and trace device" means a device, process, or procedure that captures
151 the incoming electronic or other impulses that identify the originating number of an instrument

152 or device from which a wire or electronic communication is transmitted.

153 ~~[(18)]~~ (24) "User" means any person or entity who:

154 (a) uses an electronic communications service; and

155 (b) is authorized by the provider of the service to engage in the use.

156 ~~[(19)]~~ (25) (a) "Wire communication" means any aural transfer made in whole or in
157 part through the use of facilities for the transmission of communications by the aid of wire,
158 cable, or other like connection between the point of origin and the point of reception, including
159 the use of the connection in a switching station, furnished or operated by any person engaged as
160 a common carrier in providing or operating these facilities for the transmission of intrastate,
161 interstate, or foreign communications.

162 (b) "Wire communication" includes the electronic storage of the communication, but
163 does not include the radio portion of a cordless telephone communication that is transmitted
164 between the cordless telephone handset and the base unit.

165 Section 2. Section 77-23a-4 is amended to read:

166 **77-23a-4. Offenses -- Criminal and civil -- Lawful interception.**

167 (1) (a) Except as otherwise specifically provided in this chapter, any person who
168 violates Subsection (1)(b) is guilty of an offense and is subject to punishment under Subsection
169 (10), or when applicable, the person is subject to civil action under Subsection (11).

170 (b) A person commits a violation of this Subsection (1)(b) who:

171 (i) intentionally or knowingly intercepts, endeavors to intercept, or procures any other
172 person to intercept or endeavor to intercept any wire, electronic, or oral communication;

173 (ii) (A) intentionally or knowingly remotely reads, stores, or discloses, or endeavors to
174 read, store, or disclose identifying information from a tag that is attached to the person or to
175 any item the person lawfully possesses using radio frequency identification technology without
176 that person's prior knowledge and consent; or

177 (B) procures any other person to read, store, or disclose, or endeavor to read, store, or
178 disclose information from a tag that is attached to the person or to any item the person lawfully
179 possesses, using radio frequency identification technology or similar technology without that
180 person's prior knowledge and consent;

181 ~~[(ii)]~~ (iii) intentionally or knowingly uses, endeavors to use, or procures any other
182 person to use or endeavor to use any electronic, mechanical, or other device to intercept any

183 oral communication, when the device is affixed to, or otherwise transmits a signal through a
184 wire, cable, or other like connection used in wire communication or when the device transmits
185 communications by radio, or interferes with the transmission of the communication;

186 ~~[(iii)]~~ (iv) intentionally or knowingly discloses or endeavors to disclose to any other
187 person the contents of any wire, electronic, or oral communication, knowing or having reason
188 to know that the information was obtained through the interception of a wire, electronic, or oral
189 communication in violation of this section; ~~[or]~~

190 ~~[(iv)]~~ (v) intentionally or knowingly uses or endeavors to use the contents of any wire,
191 electronic, or oral communication, knowing or having reason to know that the information was
192 obtained through the interception of a wire, electronic, or oral communication in violation of
193 this section~~[-]; or~~

194 (vi) intentionally or knowingly leaves a radio frequency identification tag in an article,
195 good, or product that the person sells without rendering it inoperable and uses or intends to use
196 the radio frequency identification tag imbedded in the article, good, product, or product
197 packaging for direct or indirect commercial advantage or for private financial gain.

198 (2) The operator of a switchboard, or an officer, employee, or agent of a provider of
199 wire or electronic communication service whose facilities are used in the transmission of a wire
200 communication may intercept, disclose, or use that communication in the normal course of his
201 employment while engaged in any activity which is a necessary incident to the rendition of his
202 service or to the protection of the rights or property of the provider of that service. However, a
203 provider of wire communications service to the public may not utilize service observing or
204 random monitoring except for mechanical or service quality control checks.

205 (3) (a) Providers of wire or electronic communications service, their officers,
206 employees, or agents, and any landlords, custodians, or other persons may provide information,
207 facilities, or technical assistance to persons authorized by law to intercept wire, oral, or
208 electronic communications or to conduct electronic surveillance if the provider and its officers,
209 employees, or agents, and any landlords, custodians, or other specified persons have been
210 provided with:

211 (i) a court order directing the assistance signed by the authorizing judge; or

212 (ii) a certification in writing by a person specified in Subsection 77-23a-10(7), or by
213 the attorney general or an assistant attorney general, or by a county attorney or district attorney

214 or his deputy that no warrant or court order is required by law, that all statutory requirements
215 have been met, and that the specified assistance is required.

216 (b) The order or certification under this subsection shall set the period of time during
217 which the provision of the information, facilities, or technical assistance is authorized and shall
218 specify the information, facilities, or technical assistance required.

219 (4) (a) The providers of wire or electronic communications service, their officers,
220 employees, or agents, and any landlords, custodians, or other specified persons may not
221 disclose the existence of any interception or surveillance or the device used to accomplish the
222 interception or surveillance regarding which the person has been furnished an order or
223 certification under this section except as is otherwise required by legal process, and then only
224 after prior notification to the attorney general or to the county attorney or district attorney of the
225 county in which the interception was conducted, as is appropriate.

226 (b) Any disclosure in violation of this subsection renders the person liable for civil
227 damages under Section 77-23a-11.

228 (5) A cause of action does not lie in any court against any provider of wire or electronic
229 communications service, its officers, employees, or agents, or any landlords, custodians, or
230 other specified persons for providing information, facilities, or assistance in accordance with
231 the terms of a court order or certification under this chapter.

232 (6) Subsections (3), (4), and (5) supersede any law to the contrary.

233 (7) (a) A person acting under color of law may intercept a wire, electronic, or oral
234 communication if that person is a party to the communication or one of the parties to the
235 communication has given prior consent to the interception.

236 (b) A person not acting under color of law may intercept a wire, electronic, or oral
237 communication if that person is a party to the communication or one of the parties to the
238 communication has given prior consent to the interception, unless the communication is
239 intercepted for the purpose of committing any criminal or tortious act in violation of state or
240 federal laws.

241 (c) An employee of a telephone company may intercept a wire communication for the
242 sole purpose of tracing the origin of the communication when the interception is requested by
243 the recipient of the communication and the recipient alleges that the communication is obscene,
244 harassing, or threatening in nature. The telephone company and its officers, employees, and

245 agents shall release the results of the interception, made under this subsection, upon request of
246 the local law enforcement authorities.

247 (8) A person may:

248 (a) intercept or access an electronic communication made through an electronic
249 communications system that is configured so that the electronic communication is readily
250 accessible to the general public;

251 (b) intercept any radio communication transmitted by:

252 (i) any station for the use of the general public, or that relates to ships, aircraft,
253 vehicles, or persons in distress;

254 (ii) any government, law enforcement, civil defense, private land mobile, or public
255 safety communications system, including police and fire, readily accessible to the general
256 public;

257 (iii) a station operating on an authorized frequency within the bands allocated to the
258 amateur, citizens' band, or general mobile radio services; or

259 (iv) by a marine or aeronautics communications system;

260 (c) intercept any wire or electronic communication, the transmission of which is
261 causing harmful interference to any lawfully operating station or consumer electronic
262 equipment, to the extent necessary to identify the source of the interference; or

263 (d) as one of a group of users of the same frequency, intercept any radio
264 communication made through a system that utilizes frequencies monitored by individuals
265 engaged in the provision or the use of the system, if the communication is not scrambled or
266 encrypted.

267 (9) (a) Except under Subsection (9)(b), a person or entity providing an electronic
268 communications service to the public may not intentionally divulge the contents of any
269 communication, while in transmission of that service, to any person or entity other than an
270 addressee or intended recipient of the communication or [his] the addressee's or intended
271 recipient's agent.

272 (b) A person or entity providing electronic communications service to the public may
273 divulge the contents of any communication:

274 (i) as otherwise authorized under this section or Section 77-23a-9;

275 (ii) with lawful consent of the originator or any addressee or intended recipient of the

276 communication;

277 (iii) to a person employed or authorized or whose facilities are used to forward the
278 communication to its destination; or

279 (iv) that is inadvertently obtained by the service provider and appears to pertain to the
280 commission of a crime, if the divulgence is made to a law enforcement agency.

281 (10) (a) Except under Subsection (10)(b) or (11), a violation of Subsection (1) is a third
282 degree felony.

283 (b) If the offense is a first offense under this section and is not for a tortious or illegal
284 purpose or for purposes of direct or indirect commercial advantage or private commercial gain,
285 and the wire or electronic communication regarding which the offense was committed is a
286 radio communication that is not scrambled or encrypted:

287 (i) if the communication is not the radio portion of a cellular telephone communication,
288 a public land mobile radio service communication, or paging service communication, and the
289 conduct is not under Subsection (11), the offense is a class A misdemeanor; and

290 (ii) if the communication is the radio portion of a cellular telephone communication, a
291 public land mobile radio service communication, or a paging service communication, the
292 offense is a class B misdemeanor.

293 (c) Conduct otherwise an offense under this section is not an offense if the conduct was
294 not done for the purpose of direct or indirect commercial advantage or private financial gain,
295 and consists of or relates to the interception of a satellite transmission that is not encrypted or
296 scrambled, and is either transmitted:

297 (i) to a broadcasting station for purposes of retransmission to the general public; or

298 (ii) as an audio subcarrier intended for redistribution to facilities open to the public, but
299 in any event not including data transmissions or telephone calls.

300 (11) (a) A person is subject to civil suit initiated by the state in a court of competent
301 jurisdiction when ~~his~~ the person's conduct is prohibited under Subsection (1) and the conduct
302 involves a:

303 (i) private satellite video communication that is not scrambled or encrypted, and the
304 conduct in violation of this chapter is the private viewing of that communication and is not for
305 a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or
306 private commercial gain; or

307 (ii) radio communication that is transmitted on frequencies allocated under Subpart D,
308 Part 74, Rules of the Federal Communication Commission, that is not scrambled or encrypted
309 and the conduct in violation of this chapter is not for a tortious or illegal purpose or for
310 purposes of direct or indirect commercial advantage or private commercial gain.

311 (b) In an action under Subsection (11)(a):

312 (i) if the violation of this chapter is a first offense under this section and the person is
313 not found liable in a civil action under Section 77-23a-11, the state may seek appropriate
314 injunctive relief;

315 (ii) if the violation of this chapter is a second or subsequent offense under this section,
316 or the person has been found liable in any prior civil action under Section 77-23a-11, the
317 person is subject to a mandatory \$500 civil penalty.

318 (c) The court may use any means within its authority to enforce an injunction issued
319 under Subsection (11)(b)(i), and shall impose a civil fine of not less than \$500 for each
320 violation of the injunction.

321 Section 3. Section **77-23a-4.5** is enacted to read:

322 **77-23a-4.5. Implanting an electronic identification device -- Penalties.**

323 (1) A person may not require, coerce, or compel any other individual to undergo or
324 submit to the subcutaneous implanting of a radio frequency identification tag.

325 (2) Any person who violates Subsection (1) is guilty of a class A misdemeanor.

326 (3) (a) A person who is implanted with a subcutaneous identification device in
327 violation of Subsection (1) may bring a civil action in any court of competent jurisdiction for
328 actual damages, compensatory damages, punitive damages, injunctive relief, or any
329 combination of these.

330 (b) The initial civil penalty may not be more than \$10,000, and no more than \$1,000
331 for each day the violation continues until the electronic identification device is removed or
332 disabled.

Legislative Review Note
as of 1-6-11 8:18 AM

Office of Legislative Research and General Counsel

FISCAL NOTE

H.B. 224

SHORT TITLE: Radio Frequency Identification

SPONSOR: Harper, W.

2011 GENERAL SESSION, STATE OF UTAH

STATE GOVERNMENT (UCA 36-12-13(2)(b))

To the extent that new felonies and misdemeanor cases are found as a result of this bill, it will cost the Courts \$455 per felony and \$255 per misdemeanor from the General Fund. For each conviction, no more than \$10,000 in new General Fund revenue will be generated. The number of cases and convictions cannot be estimated at this time.

LOCAL GOVERNMENTS (UCA 36-12-13(2)(c))

To the extent that arrests, felonies and misdemeanor cases are found as a result of this bill, it will cost county jails: (1) \$3,900 for each pretrial detainment, (2) \$4,500 per felony conviction, (3) \$910 per misdemeanor conviction for incarceration costs. The number and type of cases and convictions cannot be estimated at this time.

DIRECT EXPENDITURES BY UTAH RESIDENTS AND BUSINESSES (UCA 36-12-13(2)(d))

To the extent that there individuals are convicted of the newly created offenses in this bill, offenders will pay no more than \$10,000 in civil penalties. The number of convictions cannot be convicted at this time.