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H.B. 376
134th General Assembly

Fiscal Note & Local Impact Statement

[Click here for H.B. 376's Bill Analysis](#)

Version: As Introduced

Primary Sponsors: Reps. Carfagna and Hall

Local Impact Statement Procedure Required: No

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Highlights

- The bill establishes requirements for businesses related to the collection, processing, and sale of digital personal data. It appears that the scope of the bill mostly applies to large businesses with many exemptions.
- The Attorney General is provided with exclusive authority to enforce the requirements of the bill. The bill expressly states that it is not to be construed as authorizing a consumer to bring a lawsuit against a covered business, including a class action lawsuit, and provides affirmative defense against lawsuits brought under the bill.
- Staff of the Attorney General estimate their annual operating costs of enforcing the bill's requirements at about \$556,000, with close to 70% paying for the payroll costs of three full-time staff (two attorneys and one analyst).

Detailed Analysis

The bill creates the Ohio Personal Privacy Act that addresses consumers' rights to privacy and the responsibility of businesses to protect "personal data," and authorizes the Attorney General as the sole entity to enforce its requirements. Under the bill, "personal data" means any information that relates to an identified or identifiable consumer processed by a business for a commercial purpose, excluding publicly available information, deidentified, or anonymous information.

As it relates to businesses, the bill establishes requirements regarding the collection, processing, and sale of digital personal data. The requirements apply to a business that conducts business in Ohio, or whose products or services target consumers in Ohio, that meet any of the following criteria: (1) gross annual revenue exceeds \$25 million, (2) controls or processes personal data of 100,000 or more consumers during a calendar year, or (3) during a calendar

year, derives more than 50% of gross revenue for the sale of personal data and processes or controls personal data of 25,000 or more consumers.

Under the bill, “consumer” encompasses only Ohio residents acting in an individual or household context and not individuals acting in a business or employment capacity.

The bill targets businesses that warehouse very large volumes of personal data on consumers and potentially sell that data. The Ohio Small Business Association supports this assessment, indicating to the CyberOhio Advisory Board that a very small fraction of their membership would be affected by the bill.¹ It is difficult to determine how many businesses would fall within the scope of the bill, partially because of the bill’s many exemptions. For example, the bill’s requirements do not apply to certain businesses, industries, and data if they are already subject to federal data privacy standards such as through GLBA, HIPAA, FERPA, and FCRA.²

Enforcement

As noted, the bill establishes the Attorney General as the sole entity to enforce the Ohio Personal Privacy Act. The bill expressly states that it is not to be construed as authorizing a consumer to bring a lawsuit against a covered business, including a class action lawsuit.

According to staff of the Attorney General’s Office, there are several provisions of the bill that affect staffing. A considerable amount of time and effort will likely be required to determine whether a business is subject to the bill. The Attorney General anticipates the determination process to work similar to an audit. This type of review requires the opinion of an attorney, as well as an analyst with specialized technical training.

Staff of the Attorney General estimate their annual operating costs of enforcing the bill’s requirements at about \$556,000, with close to 70% paying for the payroll costs of three full-time staff (two attorneys and one analyst). Apparently, the salaries for attorneys in the data privacy field can be relatively high due to demand for their specialized skills.

The bill authorizes the Attorney General to use \$250,000 of GRF line item 055321, Operating Expenses, in FYs 2022 and 2023 for enforcement costs. These annual amounts are around \$300,000 less than the Attorney General’s estimated cost of \$556,000. Because of the nature of the Attorney General’s operating budget, this relatively small funding shortfall may not be problematic. The Attorney General’s total appropriated operating budget for FYs 2022 and 2023 is \$419.0 million and \$398.3 million, respectively. The FYs 2022 and 2023 appropriations for GRF line item 055321 total \$70.8 million and \$71.6 million, respectively; there is no law restricting the Attorney General from allocating more than the above-noted \$250,000 from that

¹ The CyberOhio Advisory Board is under InnovateOhio.

² Gramm-Leach Bliley Act (GLBA) governs financial institutions’ use and protection of nonpublic personal information; Health Insurance Portability and Accountability Act (HIPAA) protects certain health information and generally applies to three covered entities including most health care providers; Family Educational Rights and Privacy Act (FERPA) protects the privacy of students’ education records; Fair Credit Reporting Act (FCRA) governs the acts of credit reporting agencies (CRAs), entities that furnish information to CRAs (furnishers), and individuals who use credit reports issued by CRAs.

line item to enforce the bill's requirements. The Attorney General also has access to two unrestricted non-GRF funds that may carry cash balances sufficient to make up any operating cost shortfall: the General Reimbursement Fund (Fund 1060) and the Attorney General Claims Fund (Fund 4190).

The bill provides a path to compliance without legal enforcement through a 30-day cure period for any business found in violation. The type of relief that can be sought by the Attorney General filing a civil action in a court of common pleas includes a declaratory judgement, injunctive relief, civil penalties of up to \$5,000 for each violation, attorneys' fees and investigative costs, and other court-ordered (consumer) relief.³ All money awarded, except for consumer relief, is deposited into the Attorney General's existing Consumer Protection Fund (Fund 6310).

If the Attorney General has reasonable cause to believe that a covered business has engaged or is engaging in an act or practice that violates the bill's requirements, the Attorney General may initiate a lawsuit and seek civil penalties of up to \$5,000 for each violation. Appropriate relief may be awarded to each identified consumer affected by a violation of the bill's requirements, regardless of whether any actual damages were suffered. As mentioned, prior to initiating any such lawsuit the Attorney General is required to provide a 30-day cure period. This may reduce the frequency with which the Attorney General files a civil action and takes a matter to trial.

Affirmative defense

The bill provides an affirmative defense against lawsuits brought under the bill, similar to that set forth in Ohio's Cybersecurity Safe Harbor Law.⁴ However, in order to assert the defense, the covered business must satisfy all components of a three-prong test. First, the covered business must establish a privacy program that meets a national standard. Second, that program must be kept up to date, mirroring the national standard. And third, the covered business's privacy program must be appropriate given the business's size and nature.

Anecdotal evidence suggests that large businesses, to which the bill will predominately apply, typically have privacy plans in place, although not all are uniform and may be limited in scope. The bill's affirmative defense includes adopting a privacy program that reasonably conforms to the National Institute of Standards and Technology (NIST) Framework that is widely considered the gold star of privacy protection.

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³ Court-ordered consumer relief: \$100-\$750 per violation regardless of actual damages or up to three times that amount for a willful violation.

⁴ S.B. 220 of the 132nd General Assembly.