

**Representative Wayne A. Harper** proposes the following substitute bill:

**RADIO FREQUENCY IDENTIFICATION**

2011 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Wayne A. Harper**

Senate Sponsor: \_\_\_\_\_

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**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 remotely reading, storing, or disclosing personal 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:**

None

**Utah Code Sections Affected:**

AMENDS:



26 77-23a-3, as last amended by Laws of Utah 1998, Chapter 282

27 77-23a-4, as last amended by Laws of Utah 2010, Chapter 324

28 ENACTS:

29 77-23a-4.5, Utah Code Annotated 1953



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

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

33 **77-23a-3. Definitions.**

34 As used in this chapter:

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

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

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

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

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

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

51 (b) any wire or oral communications;

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

53 (d) any communication from an electronic or mechanical device that permits the  
54 tracking of the movement of a person or object, except as provided in Subsection

55 77-23a-4(1)(b)(ii) or any device used by a public utility that delivers water, gas, sewer, or

56 electrical power when used in connection with measuring the delivery of that utility's service or

57 commodity.

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

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

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

66 (a) any telephone or telegraph instrument, equipment or facility, or a component of any  
67 of them:

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

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

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

76 (9) "Electronic storage" means:

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

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

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

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

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

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

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

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

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

102 (a) first or last name;

103 (b) address;

104 (c) telephone number;

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

106 (e) date of birth;

107 (f) any unique personal identifier, including:

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

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

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

113 (h) religion;

114 (i) ethnicity or nationality;

115 (j) photograph;

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

118 (l) Social Security number.

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

123           ~~[(16)]~~ (18) "Readily accessible to the general public" means, regarding a radio  
124 communication, that the communication is not:

125           (a) scrambled or encrypted;

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

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

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

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

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

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

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

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

147           ~~[(17)]~~ (23) "Trap and trace device" means a device, process, or procedure that captures  
148 the incoming electronic or other impulses that identify the originating number of an instrument  
149 or device from which a wire or electronic communication is transmitted.

150 [~~(18)~~] (24) "User" means any person or entity who:

151 (a) uses an electronic communications service; and

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

153 [~~(19)~~] (25) (a) "Wire communication" means any aural transfer made in whole or in  
154 part through the use of facilities for the transmission of communications by the aid of wire,  
155 cable, or other like connection between the point of origin and the point of reception, including  
156 the use of the connection in a switching station, furnished or operated by any person engaged as  
157 a common carrier in providing or operating these facilities for the transmission of intrastate,  
158 interstate, or foreign communications.

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

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

163 **77-23a-4. Offenses -- Criminal and civil -- Lawful interception.**

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

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

168 (i) intentionally or knowingly intercepts, endeavors to intercept, or procures any other  
169 person to intercept or endeavor to intercept any wire, electronic, or oral communication[;],  
170 including a person who:

171 (A) intentionally or knowingly remotely reads, stores, or discloses, or endeavors to  
172 read, store, or disclose personal information from a tag that is attached to the person or to any  
173 item the person lawfully possesses using radio frequency identification technology without that  
174 person's prior knowledge and consent, which includes consent given in a contract or service  
175 agreement; or

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

181 (ii) intentionally or knowingly uses, endeavors to use, or procures any other person to  
182 use or endeavor to use any electronic, mechanical, or other device to intercept any oral  
183 communication, when the device is affixed to, or otherwise transmits a signal through a wire,  
184 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) intentionally or knowingly discloses or endeavors to disclose to any other person  
187 the contents of any wire, electronic, or oral communication, knowing or having reason to know  
188 that the information was obtained through the interception of a wire, electronic, or oral  
189 communication in violation of this section; or

190 (iv) 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.

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

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

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

208 (ii) a certification in writing by a person specified in Subsection 77-23a-10(7), or by  
209 the attorney general or an assistant attorney general, or by a county attorney or district attorney  
210 or his deputy that no warrant or court order is required by law, that all statutory requirements  
211 have been met, and that the specified assistance is required.

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

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

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

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

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

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

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

237 (c) An employee of a telephone company may intercept a wire communication for the  
238 sole purpose of tracing the origin of the communication when the interception is requested by  
239 the recipient of the communication and the recipient alleges that the communication is obscene,  
240 harassing, or threatening in nature. The telephone company and its officers, employees, and  
241 agents shall release the results of the interception, made under this subsection, upon request of  
242 the local law enforcement authorities.

243 (8) A person may:

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

247 (b) intercept any radio communication transmitted by:

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

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

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

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

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

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

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

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

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

271 (ii) with lawful consent of the originator or any addressee or intended recipient of the  
272 communication;

273 (iii) to a person employed or authorized or whose facilities are used to forward the

274 communication to its destination; or

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

277 (10) (a) Except under Subsection (10)(b)(ii) or (11), a violation of Subsection (1) is a  
278 ~~[third degree felony]~~ class A misdemeanor.

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

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

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

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

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

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

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

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

303 (ii) radio communication that is transmitted on frequencies allocated under Subpart D,  
304 Part 74, Rules of the Federal Communication Commission, that is not scrambled or encrypted

305 and the conduct in violation of this chapter is not for a tortious or illegal purpose or for  
306 purposes of direct or indirect commercial advantage or private commercial gain.

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

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

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

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

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

318 **77-23a-4.5. Implanting an electronic identification device -- Penalties.**

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

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

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

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

# FISCAL NOTE

H.B. 224 1st Sub. (Buff)

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 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 and misdemeanor cases are found as a result of this bill, it will cost county jails: (1) \$3,900 for each pretrial detainment and (2) \$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 these 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 estimated at this time.