

# HB0224S01 compared with HB0224

~~{deleted text}~~ shows text that was in HB0224 but was deleted in HB0224S01.

inserted text shows text that was not in HB0224 but was inserted into HB0224S01.

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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 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~~

## HB0224S01 compared with HB0224

~~financial gain;~~

- ‡ ▶ prohibits intentionally or knowingly remotely reading, storing, or disclosing ~~{identifying}~~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:

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

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

ENACTS:

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

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

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

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

As used in this chapter:

- (1) "Aggrieved person" means a person who was a party to any intercepted wire, electronic, or oral communication, or a person against whom the interception was directed.
- (2) "Aural transfer" means any transfer containing the human voice at any point between and including the point of origin and the point of reception.
- (3) "Communications common carrier" means any person engaged as a common carrier for hire in intrastate, interstate, or foreign communication by wire or radio, including a provider of electronic communication service. However, a person engaged in radio broadcasting is not, when that person is so engaged, a communications common carrier.
- (4) "Contents" when used with respect to any wire, electronic, or oral communication includes any information concerning the substance, purport, or meaning of that communication.

## HB0224S01 compared with HB0224

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

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

(b) any wire or oral communications;

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

(d) any communication from an electronic or mechanical device that permits the tracking of the movement of a person or object, except as provided in Subsection 77-23a-4(1)(b)(ii) or any device used by a public utility that delivers water, gas, sewer, or electrical power when used in connection with measuring the delivery of that utility's service or commodity.

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

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

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

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

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

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

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

(9) "Electronic storage" means:

## HB0224S01 compared with HB0224

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

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

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

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

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

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

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

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

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

(a) first or last name;

(b) address;

(c) telephone number;

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

(e) date of birth;

(f) any unique personal identifier, including:

## HB0224S01 compared with HB0224

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

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

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

(h) religion;

(i) ethnicity or nationality;

(j) photograph;

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

(l) Social Security number.

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

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

(a) scrambled or encrypted;

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

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

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

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

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

(20) "Require, coerce, or compel" includes physical violence, threat, intimidation,

## HB0224S01 compared with HB0224

retaliation, the conditioning of any private or public benefit or care on consent to implantation, including employment, promotion, or other employment benefit, or by any means that causes a reasonable person of ordinary susceptibilities to acquiesce to implantation when that person otherwise would not.

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

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

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

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

- (a) uses an electronic communications service; and
- (b) is authorized by the provider of the service to engage in the use.

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

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

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

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

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

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

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

## HB0224S01 compared with HB0224

including a person who:

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

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

~~(ii)~~ ~~(iii)~~ intentionally or knowingly uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication, when the device is affixed to, or otherwise transmits a signal through a wire, cable, or other like connection used in wire communication or when the device transmits communications by radio, or interferes with the transmission of the communication;

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

~~(iv)~~ ~~(v)~~ intentionally or knowingly uses or endeavors to use the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this section ~~(i)~~. ~~(j)~~ or ~~(k)~~

~~(vi) intentionally or knowingly leaves 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 imbedded in the article, good, product, or product packaging for direct or indirect commercial advantage or for private financial gain.~~

~~(2)~~ (2) The operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire communication may intercept, disclose, or use that communication in the normal course of his

## **HB0224S01 compared with HB0224**

employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service. However, a provider of wire communications service to the public may not utilize service observing or random monitoring except for mechanical or service quality control checks.

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

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

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

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

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

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

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

## **HB0224S01 compared with HB0224**

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

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

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

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

(8) A person may:

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

(b) intercept any radio communication transmitted by:

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

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

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

(iv) by a marine or aeronautics communications system;

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

## HB0224S01 compared with HB0224

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

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

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

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

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

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

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

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

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

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

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

(c) Conduct otherwise an offense under this section is not an offense if the conduct was

## HB0224S01 compared with HB0224

not done for the purpose of direct or indirect commercial advantage or private financial gain, and consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled, and is either transmitted:

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

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but

in any event not including data transmissions or telephone calls.

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

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

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

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

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

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

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

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

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

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

## HB0224S01 compared with HB0224

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

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

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

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**Legislative Review Note**

~~as of 1-6-11 8:18 AM~~

~~Office of Legislative Research and General Counsel}~~