



HB 1844 by Representative Giovanni Capriglione
Re: Texas Data Privacy and Security Act (Filed Version)
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Texas Data Privacy and Security Act vs. Virginia Consumer Data Protection Act Comparison

HB 1844 is based on the Virginia Consumer Data Protection Act (VCDPA), which was originally passed in 2021 as [SB 1392](#), and was later amended in 2022 by [HB 381](#).

However, this HB 1844 is not identical to the VCDPA. You will find departures from VCDPA for one of two reasons in this draft: to conform with Texas statutes and drafting language, or changes that improve and clarify the intent of the bill. All of the changes that are indented to improve or clarify the VCDPA are listed below.

The definition of consent

Virginia:

Sec. 59.1-571. "Consent" means a clear affirmative act signifying a consumer's freely given, specific, informed, and unambiguous agreement to process personal data relating to the consumer. Consent may include a written statement, including a statement written by electronic means, or any other unambiguous affirmative action.

Texas:

Sec. 541.002 (6) "Consent," when referring to a consumer, means a clear affirmative act signifying a consumer's freely given, specific, informed, and unambiguous agreement to process personal data relating to the consumer. The term includes a written statement, including a statement written by electronic means, or any other unambiguous affirmative action. "Consent" does not include:

- (A) acceptance of a general or broad terms of use or similar document that contains descriptions of personal data processing along with other, unrelated information;
- (B) hovering over, muting, pausing or closing a given piece of content; or
- (C) agreement obtained through the use of dark patterns.

Sec. 541.002 (10) "Dark pattern" means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making or choice, and includes, but is not limited to, any practice the Federal Trade Commission refers to as a "dark pattern".

Change Rationale

Since the passage of VCDPA, many controllers have attempted to obtain consent by creating user interfaces that are designed to intentionally steer consumers toward the option that gives away the most personal information. This definition makes it clear that obtaining consent through so called "dark patterns" is not considered sufficient to obtain consent. Similar language can be found in the Colorado and Connecticut data privacy laws.



Definition of "personal data"

Virginia:

Sec. 59.1-571. "Personal data" means any information that is linked or reasonably linkable to an identified or identifiable natural person. "Personal data" does not include de-identified data or publicly available information.

Texas:

Sec. 541.002(19) "Personal data" means any information, including pseudonymous data and sensitive data, that is linked or reasonably linkable to an identified or identifiable individual. The term does not include deidentified data or publicly available information.

Sec. 541.106 (b) This chapter may not be construed to require a controller or processor to:

- (1) reidentify deidentified data or pseudonymous data;
- (2) maintain data in identifiable form or obtain, retain, or access any data or technology for the purpose of allowing the controller or processor to associate a consumer request with personal data; or

Change Rationale

Many stakeholders have voiced concerns that the VCDPA definition of personal data is too narrow and is not relevant with how most ad tech companies catalog and use personal data. Under this bill, no controller would be required to reidentify data that is deidentified. However, if pseudonymous data is layered with personal data, uses quasi identifiers which link the data to a natural person, or the data is not adequately deidentified the data it is considered personal data under this bill.

Definition of "sale of personal data"

Virginia:

Sec. 59.1-571."Sale of personal data" means the exchange of personal data for monetary consideration by the controller to a third party.

Texas:

Sec 541.002 (28) "Sale of personal data" means the sharing, disclosing, or transferring of personal data for monetary or other valuable consideration by the controller to a third party.

Change Rationale

Many stakeholders expressed concern that "exchange" was too narrow and could lead to controllers making semantic arguments to avoid compliance with the bill. The addition of "sharing, disclosing, or transferring" should alleviate these concerns. Additionally, the term monetary consideration requires a direct transaction to be considered a sale. This term excludes other *quid pro quo* agreements that a corporation may make, but may not be accompanied with a direct financial transaction. This definition adds the term commercial purposes to include these transactions. The term "or other valuable consideration" can be found in other state data privacy laws.



Exemptions to "sale of personal data"

Virginia:

Sec. 59.1-571(5) The disclosure or transfer of personal data to a third party as an asset that is part of a merger, acquisition, bankruptcy, or other transaction in which the third party assumes control of all or part of the controller's assets.

Texas:

Sec 541.002 (28) (E) the disclosure or transfer of personal data to a third party as an asset that is part of a merger or acquisition.

Change Rationale

The last part of subsection E is struck because many stakeholders noted that the current drafting would allow a third-party to purchase only the consumer information of a company and avoid the repercussions of a "sale of personal data."

Applicability and Scope

Virginia:

Sec. 59.1-572. This chapter applies to persons that conduct business in the Commonwealth or produce products or services that are targeted to residents of the Commonwealth and that (i) during a calendar year, control or process personal data of at least 100,000 consumers or (ii) control or process personal data of at least 25,000 consumers and derive over 50 percent of gross revenue from the sale of personal data.

Texas:

Sec. 541.003. APPLICABILITY OF CHAPTER. (a) This chapter applies only to a person that:

- (1) conducts business in this state or produces a product or service consumed by residents of this state;
- (2) processes or engages in the sale of personal data; and
- (3) is not a small business as defined by the United States Small Business Administration.

Change Rationale

VCDPA requires that a company either conduct business in the state, or target services to residents of the state to have to comply with the law. In a previous court case regarding an ISP (*LS Scan, Inc. v. Digital Serv. Consultants, Inc., 4th Cir. 2002*), a Federal Appellate court held that a Georgia based ISP was not subject to Maryland's corporate copyright laws because the ISP was not intending to do business in Maryland but rather intended to "send information over the internet." Some legal experts believe this precedent could lead someone to argue that since they did not target residents of the state they are not subject to the law. This bill would change "targeted to" to "consumed by" to ensure this argument is not made in Texas.

Additionally, many stakeholders felt the scoping in VCDPA was arbitrary and the revenue requirements were difficult to discern. This bill would change the scope to include all businesses that process or sell data which are classified as a small businesses by the Small Business Administration (SBA). SBA



guidelines are clearly defined in law, tailored to each industry, and do not require additional compliance costs to determine if the bill is applicable any company.

Data Collected on Human Subjects

Virginia:

59.1-572(C)(4)...collected as part of human subjects research pursuant to the good clinical practice guidelines issued by The International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use; the protection of human subjects under 21 C.F.R. Parts 6, 50, and 56;

Texas:

Sec. 541.004(4)(b)(B): collected as part of human subjects research in accordance with the good clinical practice guidelines issued by The International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) or of the protection of human subjects under 21 C.F.R. Parts 6, 50, and 56; or

Change Rationale

Replacing the “under” language removes any confusion about which entities this exemption applies to and makes clear that biomedical research that is conducted “in accordance with” existing ethics and privacy principles is exempted.

Public Health Activities

Virginia:

59.1-572(C)(9). Information used only for public health activities and purposes as authorized by HIPAA;

Texas:

Sec. 541.004(4)(C)(9) information **collected or** used only for public health activities and purposes as authorized by the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Section 1320d et seq.)

Change Rationale

The U.S. Food and Drug Administration (FDA) imposes requirements on sponsors related to the quality, safety, or effectiveness of an FDA-regulated product or activity – including mandated reporting of any adverse events experienced by a patient. This change clarifies that the exception would permit FDA-regulated entities to collect and manage such information in accordance with federal standards.

Compliance with COPPA

Virginia:

Sec. 59.1-572 (D).Controllers and processors that comply with the verifiable parental consent requirements of the Children’s Online Privacy Protection Act (15 U.S.C. Sec. 6501 et seq.) shall be deemed compliant with any obligation to obtain parental consent under this chapter.



Texas:

Sec. 541.006. EFFECT OF COMPLIANCE WITH PARENTAL CONSENT REQUIREMENTS UNDER CERTAIN FEDERAL LAW. A controller or processor that complies with the verifiable parental consent requirements of the Children's Online Privacy Protection Act (15 U.S.C. Section 6501 et seq.) with respect to data collected online is considered to be in compliance with any requirement to obtain parental consent under this chapter.

Change Rationale:

While the Virginia law extends to both online and offline data collection practices, it specifies that if a consumer is a child the controller must comply with the federal Children's Online Privacy Protection Act (COPPA). However, COPPA only applies to personal information collected from children online. This leads to the possible loophole that offline adult data is subject to the law, but children's data is not. By adding "with respect to data collected online" this concern should be alleviated.

Data Portability

Virginia:

Sec. 59.1-573.(A)(4) To obtain a copy of the consumer's personal data that the consumer previously provided to the controller in a portable and, to the extent technically feasible, readily usable format that allows the consumer to transmit the data to another controller without hindrance where the processing is carried out by automated means;

Texas:

Sec. 541.051 (b)(4) if the data is available in a digital format, obtain a copy of the consumer's personal data that the consumer previously provided to the controller in a portable and, to the extent technically feasible, readily usable format that allows the consumer to transmit the data to another controller without hindrance;

Change Rationale:

The modifier "where the processing is carried out by automated means" has led to confusion about how a controller transmits data. Additionally, the section has often been conflated with provisions in GDPR which limit the scope of manual processing and prescribe when to use automated processing. Since no such distinction exists in this bill or VCDPA, this clarification ensures that all digitally available consumer personal data can be accessed by the consumer. Other sections and exemptions in VCDPA prevent controllers from being forced to reidentify deidentified data.

Consumer Requests

Virginia:

Sec. 59.1-574.(E) A controller shall establish, and shall describe in a privacy notice, one or more secure and reliable means for consumers to submit a request to exercise their consumer rights under this chapter. Such means shall take into account the ways in which consumers normally interact with the controller, the need for secure and reliable communication of such requests, and the ability of the controller to authenticate the identity of the consumer making the request. Controllers shall not require a consumer



to create a new account in order to exercise consumer rights pursuant to Sec. 59.1-577 but may require a consumer to use an existing account

Texas:

Sec. 541.055. METHODS FOR SUBMITTING CONSUMER REQUESTS. (a) A controller shall establish two or more secure and reliable methods to enable consumers to submit a request to exercise their consumer rights under this chapter. The methods must take into account:

- (1) the ways in which consumers normally interact with the controller;
- (2) the necessity for secure and reliable communications of those requests; and
- (3) the ability of the controller to authenticate the identity of the consumer making the request.

(b) A controller may not require a consumer to create a new account to exercise the consumer's rights under this subchapter but may require a consumer to use an existing account.

(c) Except as provided by Subsection (d), if the controller maintains an Internet website, the controller must make the website available to consumers to submit requests for information required to be disclosed under this chapter.

(d) A controller that operates exclusively online and has a direct relationship with a consumer from whom the controller collects personal information is only required to provide an e-mail address for the submission of requests described by Subsection (c).

Change Rationale:

Most controllers have to comply with both the California Consumer Privacy Act (CCPA) and VCDPA. This bill attempts to square the difference between the two laws by adding the CCPA requirements that a controller must have two secure and reliable means for consumers to submit requests, but it does not require a toll free number as CCPA does.

Privacy Notice

Virginia:

59.1-574. (C) A controller shall provide consumers with a reasonably accessible and clear privacy notice that includes:

- (1) the categories of personal data processed by the controller;

Sec. 541.102. PRIVACY NOTICE. A controller shall provide consumers with a reasonably accessible and clear privacy notice that includes:

- (1) the categories of personal data processed by the controller;
- (A) if applicable, the categories must include any sensitive data processed by the controller

Change Rationale

This change ensures that a controller discloses any collection of sensitive data in their privacy notice.



Duties of a Subprocessor

Virginia:

Sec. 59.1-579. (B)(5) Engage any subcontractor pursuant to a written contract in accordance with subsection C that requires the subcontractor to meet the obligations of the processor with respect to the personal data.

Texas:

541.104(b)(6)(E) engage any subcontractor pursuant to a written contract that requires the subcontractor to meet the requirements of the processor with respect to the personal data.

Change Rationale

This change removes typo from VCDPA. This change ensures that subprocessors have all the same requirements regarding the data as do processors.

Exemption for Disclosing Trade Secrets

Virginia:

N/A

Texas:

Sec. 541.201 (d) This chapter may not be construed as requiring a controller, processor, third party, or consumer to disclose a trade secret.

Sec. 541.002 (33) "Trade secret" means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Change Rationale

This definition defines a trade secret as it is defined in the Texas Uniform Trade Secrets Protection Act and clarifies that this chapter does not require the disclosure of trade secrets.

Construction of Chapter

Virginia

59.1-582. Limitations.

A. Nothing in this chapter shall be construed to restrict a controller's or processor's ability to:

1. Comply with federal, state, or local laws, rules, or regulations;



2. Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, local, or other governmental authorities;
3. Cooperate with law-enforcement agencies concerning conduct or activity that the controller or processor reasonably and in good faith believes may violate federal, state, or local laws, rules, or regulations;
4. Investigate, establish, exercise, prepare for, or defend legal claims;
5. Provide a product or service specifically requested by a consumer, perform a contract to which the consumer is a party, including fulfilling the terms of a written warranty, or take steps at the request of the consumer prior to entering into a contract;

Texas:

Sec. 541.201. CONSTRUCTION OF CHAPTER. (a) This chapter may not be construed to restrict a controller's or processor's ability to:

- (1) comply with federal, state, or local laws, rules, or regulations;
- (2) comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, local, or other governmental authorities;
- (3) investigate, establish, exercise, prepare for, or defend legal claims;
- (4) provide a product or service specifically requested by a consumer or the parent or guardian of a child, perform a contract to which the consumer is a party, including fulfilling the terms of a written warranty, or take steps at the request of the consumer before entering into a contract;

Change Rationale

The Texas language removes superfluous clauses and clarifies that a parent can request a service of behalf of a child.

Local Preemption:

Virginia:

N/A

Texas:

Sec. 541.205. LOCAL PREEMPTION. This chapter supersedes and preempts any ordinance, resolution, rule, or other regulation adopted by a local political subdivision regarding the processing of personal data by a controller or processor.

Change Rationale

This new section adds a preemption to ensure local laws do not conflict with this one. This avoids the uncertainties that would arise if a city or other local subdivision attempted to adopt different regulations regarding data privacy.

Interim Review:

Virginia: N/A



Texas:

SECTION 2. (a) The Department of Information Resources, under the management of the chief privacy officer, shall review the implementation of the requirements of Chapter 541, Business & Commerce Code, as added by this Act.

(b) Not later than March 1, 2024, the Department of Information Resources shall create an online portal available on the department's Internet website for members of the public to provide feedback and recommend changes to Chapter 541, Business & Commerce Code, as added by this Act. The online portal must remain open for receiving feedback from the public for at least 90 days.

(c) Not later than January 1, 2025, the Department of Information Resources shall make available to the public a report detailing the status of the implementation of the requirements of Chapter 541, Business & Commerce Code, as added by this Act, and any recommendations to the legislature regarding changes to that law.

(d) This section expires September 1, 2025.

Change Rationale

Virginia created a legislative workgroup following the passage of VCDPA to study its implementation and recommend changes. This bill would give that responsibility to the Department of Information Resources (DIR), under the office of the Chief Privacy Officer, to ensure the process was free from political forces. DIR will not have rulemaking authority and its report would only relate to the implementation of this bill.

Severability

Virginia:

N/A

Texas:

SECTION 3. The provisions of this Act are hereby declared severable, and if any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this Act.

Change Rationale

This change adds a standard severability clause at the end off the bill.