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## Joint Commission on Technology and Science

### Virginia Consumer Data Protection Act Work Group

2021 Final Report

<http://dls.virginia.gov/commission/jcots.htm>

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The Virginia Consumer Data Protection Act Work Group (the Work Group) of the Joint Commission on Technology and Science (the Commission) met six times with Delegate C.E. Cliff Hayes, Jr., chair, presiding. The Work Group was created pursuant to the second enactments of HB 2307 and SB 1392 (2021, Special Session I), known as the Virginia Consumer Data Protection Act (VCDPA), to study findings, best practices, and recommendations prior to the January 2023 implementation of the Act. Materials presented at the meeting are accessible through the [Commission's meetings webpage](#). Full videos of each meeting are archived on the [House video streaming webpage](#).

Information presented at the meetings is summarized here.

#### Membership

Delegate C.E. Cliff Hayes, Jr. (chair)	Attorney General Mark Herring (represented by Samuel Towell)	Stacey Gray, Future of Privacy Forum
Senator David W. Marsden		
Secretary of Commerce & Trade Brian Ball (represented by Evan Feinman)	Gill Bland, Urban League of Hampton Roads	Jim Halpert, State Privacy & Security Coalition
Secretary of Administration Grindly Johnson (represented by Marcus Thornton)	Elizabeth Falcone, U.S. Senator Mark Warner (represented by Rafi Martinez & Kate Landers)	Keir Lamont, Computer & Communications Industry Association

## Executive Summary

The following are points of emphasis that arose during the six Work Group meetings:

- Consider leadership, outside of the Office of Attorney General, to lead an educational initiative to assist small to medium-sized businesses in complying with the VCDPA;
- Submit a budget amendment to fund two staff members, and two attorneys through general funds to lead enforcement of the VCDPA from day one of enactment;
- Replace the Consumer Privacy Fund with the existing general funds;
- Allow the Office of the Attorney General to pursue actual damages based on consumer harm, should they exist;
- Employ an "ability to cure" option for violations, should a potential cure exist;
- Authorize consumers to assert and requiring companies to honor a global opt-out setting as a single-step for consumers to opt-out of data collection;
- Sunset the "right to cure" provision after the initial years of VCDPA enactment to prevent companies from exploiting this provision;
- Amend the "right to delete" provision to be a "right to opt out of sale" provision in order to promote compliance and restrict further dissemination of consumer personal data;
- Consider a narrow exemption for § 501(c)(4) nonprofit organizations established to detect or prevent insurance-related crime or fraud;
- Study specific data privacy protection provisions for children;
- Request an annual report from the Office of the Attorney General on enforcement of the VCDPA;
- Encourage the development of third-party software and browser extensions to allow users to universally opt out of data collection, rather than individually from each website;
- Recruit nonprofit consumer and privacy organizations to address concerns with the definitions of "sale," "personal data," and "publically available information" in the VCDPA;
- Consider whether the definition of "sensitive data" should include general demographic data used to promote diversity and outreach to underserved populations;
- Create a website dedicated to educating consumers about their rights under the VCDPA;
- Direct an agency to promulgate regulations because the current VCDPA does not allow the Office of the Attorney General to promulgate regulations; and
- Post and promote sample data protection forms on an educational website to provide guidance to smaller businesses seeking to comply with the VCDPA.

Delegate Hayes and Senator Marsden will present the Work Group's recommendations based on these points of emphasis during the upcoming legislative session.



*The Work Group met virtually on June 14, 2021, to discuss the following topics:*

### **Presentation: Timeline of Virginia Consumer Data Protection Act**

*Delegate C.E. Cliff Hayes, Jr.*

Delegate Hayes described the process of writing the Virginia Consumer Data Protection Act (VCDPA) beginning in January 2020 and the General Assembly passing the legislation (HB 2307 [Hayes] and SB 1392 [Marsden]) during the 2021 Special Session I. He explained that Virginia is only the second state to pass comprehensive general data privacy legislation, following the passage of the California Consumer Privacy Act in 2018. The VCDPA was modeled on SB 5062 in Washington, which failed to pass the Washington State Legislature earlier this year. As part of the enactment of the VCDPA, the General Assembly directed the Joint Commission to create the Work Group to review the provisions of the act and issues related to its implementation.

### **Presentation: Provisions of the VCDPA**

*Hassan Abdelhalim, Attorney, Division of Legislative Services*

*David Barry, Attorney, Division of Legislative Services*

Mr. Abdelhalim and Mr. Barry described the provisions of the VCDPA, including the data, controllers, and processors that are covered by the VCDPA and data that is exempted by federal law; rights of customers to control their data; limitations on requirements of controllers and processors; and enforcement authority. They also outlined the responsibilities of the Work Group and the effective date of the VCDPA as well as proposed future dates for Work Group meetings.

### **Public Comment**

Work Group member Jim Halpert said that because the Attorney General's office is tasked with enforcement of the VCDPA, the Work Group should consider what type of educational outreach should be done, particularly to small-sized and medium-sized businesses, to assist with compliance with the VCDPA.

Joint Commission member Delegate Kathy J. Byron asked for more information about the Washington privacy act. Delegate Hayes responded that the VCDPA was based on the Washington privacy act, but that the VCDPA omitted any reference to or regulation of facial recognition technology because that was a contributing factor to the Washington bill's failure to pass. He added that U.S. Representative Suzan DelBene from Washington has introduced legislation for federal regulation of data privacy.

*The following is a summary of the information presented at the Work Group's meeting on July 12, 2021, in Richmond:*

### **Presentation: Attorney General Presentation**

*Samuel Towell, Deputy Attorney General, Office of Attorney General*

Mr. Towell presented on the Virginia Consumer Data Protection Act (the VCDPA) from the perspective of the Office of the Attorney General (OAG). Enforcement issues identified by the Attorney General include the ability to cure; funding; damages, penalties, expenses, and fees; and separating the educational campaign from the enforcement within the Office of the Attorney General. Mr. Towell noted that the VCDPA cannot fix issues such as the leaking of data after a breach and the sale of such data to a third party. A company seeking to address such a violation



will need to remedy the architecture that allowed the breach to occur within 30 days, he said. He also noted that funds to enforce the VCDPA are currently anemic. Members of the Work Group responded by recommending submitting a budget amendment during the next session of the General Assembly. Mr. Towell concluded by outlining the following recommendations on behalf of the OAG:

- Fund two attorney and two staff positions through general funds;
- Replace the Consumer Privacy Fund with existing general funds;
- Allow the OAG to pursue actual damages to consumers, to the extent they exist;
- Employ "ability to cure" for those violations in which a cure is possible; and
- Involve OAG as a piece, but not the lead, of an education campaign.

### **Public Comment**

Dr. Maureen Mahoney, a senior analyst at Consumer Reports, Inc., requested that the Work Group consider requiring companies to honor browser privacy signals as a global opt out as a single step for consumers (similar to the California Consumer Privacy Act); a sunset on the right to cure to prevent companies from exploiting this provision; and continuing to close loopholes in the law as they arise, similar to California's ongoing efforts to strengthen the California Consumer Privacy Act.

*The following is a summary of the information presented at the Work Group's meeting on August 17, 2021, in Richmond:*

### **Topics Identified with Regard to Implementation of the VCDPA**

Delegate Hayes led a discussion involving points of interest related to the Virginia Consumer Data Protection Act (the Act). Julien Nagarajan, representing LexisNexis, spoke on challenges of maintaining compliance identified with deleting original data that could be compiled through indirect collection at a later date. Mr. Nagarajan offered a solution of amending the "right to delete" provision as a "right to opt out of sale" provision in order to restrict the further dissemination of consumer personal data. The proposed language linking the "right to delete" to the "opt out" provision seeks to give consumers the peace of mind that if they request data deletion, their request will be honored. The Work Group requested specific language to consider be provided before the next meeting.

Tim Lynch and Richard DiZinno, representing the National Insurance Crime Bureau, asked the Work Group to consider a narrow exemption to the Act. Mr. Lynch sought to exempt § 501(c)(4) nonprofit organizations "established to detect or prevent insurance-related crime or fraud" from the Act. He clarified that the nonprofit that fits this definition is unique in its positioning as it's the only one of its kind that communicates between insurance agencies and law enforcement and compliance with the Act would significantly alter their obligations and alter operations. Some members of the Work Group requested specific language be submitted to the Work Group so that the members may better understand their request



## **Presentation: Governor's Administration Considerations**

*Evan Feinman, Chief Broadband Officer, Office of the Governor*

Mr. Feinman, a member of the Work Group, presented on behalf of the Office of the Governor on issues related to implementing the Act. Mr. Feinman explained the following issues:

- The Act would be strengthened by addressing data privacy protections for children;
- A universal opt-out tool would improve the effectiveness of the Act for Virginia citizens;
- Addition of an annual report from the Office of Attorney General would create a lasting avenue to fine-tune enforcement and build public confidence in the law; and
- Some fine-tuning for the treatment of public records processors may be productive

Mr. Feinman asked the Work Group to encourage the development of third-party software options to allow users to universally opt out of data collection from all websites rather than expecting a consumer to individually opt out of each site they visit. Mr. Feinman highlighted that the availability of software to standardize this process would be more in line with consumer expectations of data privacy. Some members expressed concern with the feasibility of global opt-out provisions due to differences between opt-out provisions in data privacy laws across states.

At the conclusion of the presentations, members of the Work Group discussed next steps. Delegate Hayes reacted favorably to gathering presentations, language suggestions for alterations to the Act, and public comments and to make such information available to the Work Group and staff in preparation for the Work Group's final report.

## **Public Comment**

During the public comment period, a representative from the Virginia Citizens Consumer Council outlined concerns with educating the public of their rights under the Act. A representative from the Consumer Federation of America sought to encourage further participation by nonprofit consumer and privacy organizations to address concerns with the definitions of sale, personal data, and publically available information.

*The following is a summary of the information presented at the Work Group's meeting on September 13, 2021, in Richmond:*

## **Topics Identified with Regard to Implementation of the VCDPA**

Delegate Hayes led a discussion related to the Consumer Data Protection Act (the Act). Chris Oswald, representing the Association of National Advertisers, spoke on potential issues with the Act's definition of "sensitive data." He pointed out the difficulties of using demographic data to reach out to particular underserved populations if the provisions of the law define such data as sensitive. Members had questions about businesses that want to serve diverse and underserved populations and collect racial demographic information about them, which can be used by companies to track their targets, according to Mr. Oswald. He gave an example of allowing a marketer that wants to engage potential customers to ask consumers to opt in to this data collection. Some members pointed out that opt-in provisions for behavioral advertisers are an industry custom, although in the context of tracking diversity these provisions may not currently apply to the use of data for that purpose. Mr. Oswald concluded that he will follow up and incorporate these comments and suggestions into ongoing discussions with the Work Group



Members of the Work Group then discussed next steps. Delegate Hayes noted that member Dana Wiggins will be giving a presentation to the Work Group on the implementation of the Act. By November, the Work Group will draft and present a final report to the General Assembly. Members of the Work Group announced their choice of Delegate Hayes and Senator David W. Marsden to present legislation based on the findings of the Work Group during the upcoming session of the General Assembly.

*The following is a summary of the information presented at the Work Group's meeting on October 13, 2021, in Richmond:*

### **Topics Identified with Regard to Implementation of the VCDPA**

*Dana Wiggins, Virginia Poverty Law Center, Consumer Education*

Ms. Wiggins stated that consumer education is paramount to consumer protection and suggested a dedicated website to educate consumers. She said polling and messaging and working with instructional designers will be helpful in educating consumers of the rights under the law. She recommended a browser extension as a global opt-out to exercise privacy rights. Ms. Wiggins concluded by reiterating the value of being clear about where the law does and doesn't meet consumer expectations to empower and educate consumers on the implementation of the law.

Members had questions about the browser extension, and Ms. Wiggins clarified that a tweak in the law will be needed to allow consumers an opportunity to opt out globally rather than individually opting out of each website. Some members had questions about the current state of the law and remedies of negligent consumer data violations. Samuel Towell, of the Office of the Attorney General, described the differences in available remedies under the Virginia Consumer Protection Act and the Virginia Consumer Data Protection Act (VCDPA). He noted that the VCDPA does not currently provide for a consumer to recover actual damages suffered from a violation of the VCDPA. Other legal theories may allow a consumer to recover through litigation unrelated to the VCDPA, but often the cost of such litigation in comparison to the potential recovery makes pursuing such an option impractical. Additionally, Mr. Towell stated that the VCDPA does not allow for the Office of the Attorney General to promulgate regulations, and that in any litigated matter under the VCDPA, a judge would decide any monetary award.

At the conclusion of the presentation, members of the Work Group discussed next steps. Delegate Hayes noted that he will work with Senator David W. Marsden to suggest recommendations for funding the initial operations within the Office of the Attorney General. Specific recommendations will be made available prior to the final Work Group report due on November 1, 2021. Senator Marsden also encouraged future collaboration with other states while noting data protection legislation will not likely occur on the federal level.

Stacey Gray inquired about allowing written public comments. Staff confirmed that a notice will go out after the meeting and public comments will be made available to the members of the Work Group after the meeting.

*The following is a summary of the information presented at the Work Group's meeting on*





*October 25, 2021, in Richmond:*

### **Summary of Work Group**

*Delegate C.E. Cliff Hayes, Jr.*

Delegate Hayes summarized the events leading to the creation of the Work Group. He noted that legislation in Washington state was a starting model for the effort to pass similar data privacy legislation in the Commonwealth and added that two important strategic distinctions that led to the successful passage of the Virginia Consumer Data Protection Act (VCDPA), as opposed to similar legislative efforts in other states other state efforts, remain the exclusion of facial recognition and the enforcement of the law by the Attorney General. He also emphasized the need for comprehensive consumer education about the VCDPA as well as fully funding attorneys and staff within the Office of the Attorney General (OAG) through the upcoming budget process. To that end, Delegate Hayes noted that there are plans to develop a website to educate consumers and offer contact information for the OAG. Senator David W. Marsden pointed out that the Commonwealth has developed the first workable data privacy bill on the state level. He stated that there will be a continuing effort to improve upon the bill during the upcoming legislative session.

Samuel Towell suggested minor changes to the structure of the Consumer Privacy Fund (the Fund) to facilitate funding from day one of the enactment of the VCDPA, noting that, as currently written, the Fund subsidizes enforcement of the VCDPA through the OAG.

Jim Halpert brought to the attention of the Work Group that there are currently minor differences in the requirements of data protection assessments required by the VCDPA as compared to European law. As part of a broader educational effort, he recommended providing sample forms as a guidance tool for smaller companies seeking to comply with the data protection assessments under the VCDPA. Stacey Gray endorsed this model as helpful, and Mr. Towell once again underscored the effectiveness of an office outside of the OAG as part of an initiative to educate consumers and businesses.

Kate Landers, on behalf of U.S. Senator Mark Warner's office, promoted the inclusion of a global privacy control to allow consumers to opt-out on a wide scale and assert their rights under the VCDPA.

Dana Wiggins requested formatting the final report to include a list of the recommendations discussed throughout the five Work Group meetings. Delegate Hayes responded that the report is in draft form and that the list of recommendations will be incorporated into the final version.

### **Closing Remarks**

At the conclusion of the meeting, Delegate Hayes thanked staff and each member of the Work Group individually for their service. He said that the findings and final report will be distributed to members and staff upon completion. Delegate Hayes and Senator Marsden said that they will introduce the official recommendations of the Work Group during the upcoming session of the General Assembly.



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For more information, see the [\*Joint Commission's website\*](#) or contact the Division of Legislative Services staff:

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