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MEMORANDUM

TO: Senate Committee on Economic Development, Housing and General Affairs
FROM: Denise Reilly-Hughes, Secretary of Digital Services and State Chief
Information Officer; Josiah Raiche, Chief Data and Artificial Intelligence Officer
DATE: April 16, 2024
SUBJECT: Agency of Digital Services Recommendations on H.121, An act relating to
enhancing consumer privacy

I. Background

The Agency of Digital Services (ADS) submits this memo to provide recommendations to the proposed Consumer Privacy Act. ADS strongly supports the notion of legislative action on data privacy, as it is a fundamental protection for Vermonters and aligns with the work ADS is doing on ethical and responsible Artificial Intelligence.

However, it is important to take into consideration that best practices for data privacy protection continue to evolve. Therefore, considering the urgency of taking action on data privacy in the age of artificial intelligence, and after an extensive review of the current version of the bill (Draft No. 1.1 – H.121), ADS recommends Vermont adopt an incremental approach to Data Privacy legislation, building in mechanisms to improve our approach as we gain experience with enforcement and as regulatory best practices continue to develop.

II. Recommendations

A. Build on the success of the AI Council by expanding it to be a Data and AI Advisory Council.

ADS recommends, that instead of creating a new governing Board, the current AI Council be expanded to serve as a Data and AI Advisory Council, with a slightly expanded membership to include an appointee representing a small business and an expert on data privacy. The scope would be expanded to provide advice and counsel to the Chief Data and AI Officer and the Attorney General on the implementation of the data privacy law. With the work this council has already completed regarding AI ethics, this body has the existing structure to be foundational in developing a sustainable approach to protecting Vermonters' right to data privacy. ADS recommends using the updated AI Council rather than a newly created board, which offers many advantages including:



- A Council is more closely tied to an existing body than a board.
- Membership is flexible, as designees can change as the needs of the council mature.
- The AI Council's existing membership offers a diverse set of perspectives well-suited for ensuring good outcomes for Vermonters.

The AI Council has expressed interest in the ability to form subcommittees with additional representatives in order to investigate and advise on related topics that align with data privacy. If agreeable, the Legislature can modify the current statutory language of the 2022 Act 132 Sec. 5. 3 V.S.A. chapter 69 § 5013, much like the Vermont Senate drafted to create the Cyber Advisory Council, to authorize the Council to create subcommittees that address data privacy policy recommendations and provide advice to Legislature, ADS, and the Attorney General's Office. As an established council, it has the ability to begin work immediately.

Much like Vermont's nation-leading work with Artificial Intelligence, ADS recommends creating a roadmap for the Council, laying out specific tasks over the first few years and allowing the Council to include relevant issues as technology evolves. ADS has found the broad topics identified by the legislature valuable for the AI Council to focus discussions and provide insight into legislative intent and priorities. Providing a similar roadmap for data privacy work will guide recommendations and research on future expansions of Vermonters' rights to data privacy. These include an opt-out registry, determinations of applicable organization types, and data assessment requirements to name a few.

B. The Council should develop requirements and level of effort for the General Opt-out.

The bill creates a General Opt-out allowing Vermonters to register with the Secretary of State to have their data removed from data brokers' systems. It's important to understand no other states have completed the implementation of this provision. The implementation of a general opt-out capability carries significant security risks that must be considered, and multiple systems, processes, and operations within the Secretary of State's office would require modification. ADS recommends that the Council review the progress of other states and estimate the level of effort for implementing this complex system, which will be required to support hundreds of data brokers and thousands of Vermonters and 3rd parties exercising the right on their behalf. Additionally, the financial impact of the implementation and operation of this system has not been assessed to date. It is not probable this registry can be built and in place by 2027.

C. Align with neighboring States on thresholds to create stability and minimize impact on small businesses.

In the current draft, the thresholds for applicability are set at 25,000 consumers, which is lower than any other US state's data privacy threshold. While recognizing that Vermont has a much smaller population than most other states with data privacy laws, ADS recommends



that this threshold be raised to avoid costly impacts on small businesses and nonprofits and create alignment with neighboring states. Adjustments to this threshold could be a point for the Council to review.

ADS recommends that Vermont initially adopt New Hampshire and Delaware's threshold of 35,000 unique consumers or 10,000 unique consumers and derive a significant percent of revenue from the sale of personal data. A slightly higher threshold will also protect additional small businesses from running afoul of this law.

D. Do not include the Private Right of Action in the initial implementation.

ADS believes that a Private Right of Action (PRA) should only be created when existing enforcement mechanisms fail to keep up with violations of the law or when harms are so egregious that individuals should be able to seek compensation directly. At this stage, it is not clear to ADS that either of these criteria are met, and ADS would recommend awaiting a recommendation from the Council and the Attorney General once enforcement is underway before implementing a PRA.

