State of New Hampshire
Commission on the Use of Radio Frequency Technology

Final Report
November 24, 2008

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Legal basis for the Commission

Chapter 165, Laws of 2006 established a Commission on the Use of Radio Frequency Technology ("the Commission"). The Commission was charged with studying "the use of radio frequency technology in the private and public sectors, its benefits, and potential privacy implications". The law further required the Commission to submit an Interim Report by November 1, 2007, and a final report on or before November 1, 2008.

Note: The Commission interpreted this charge to refer specifically to Radio Frequency Identification Devices (RFID). Radio Frequency Technologies such as cell phones, broadcast radio, etc. were not included in the deliberations.

Membership

Chapter 165 designated 18 members to be appointed to serve on the Commission. The current members are:

Rep. Jay Phinizy, Chairman; appointed by the Speaker;

Rep. Michael Kaelin, Clerk, member of the House Science, Technology and Energy Committee, appointed by the Speaker;

Rep. Charles Clark, member of the House Commerce Committee, appointed by the Speaker;

Sen. Joseph Kenney, appointed by the President;

Sen. Maggie Hassan, appointed by the President;

Dr. Katherine Albrecht, representing consumer or privacy interests, appointed by the Governor;

Ms. Elizabeth Board, representing EPC Global an organization developing standards for use of electronic product code technologies, appointed by the Governor;

Col. Fred Booth, representing a New Hampshire state agency that uses radio frequency technology, appointed by the President of the Senate.

Mr. Bruce Gerrity, representing the financial services industry, appointed by the New England Financial Services Association;

Mr. Ken Erikson, appointed by the Business and Industry Association of New Hampshire;

Ms. Lauren Noether, appointed by the Attorney General;

Mr. Rick Lough, appointed by the New Hampshire High Technology Council;

Mr. Robert Pernice, an expert in radio frequency technology, appointed by the Speaker;

Mr. Gregory Scholz, representing the university system of New Hampshire, appointed by the Governor;

Mr. Richard Varn, appointed by the Retail Merchants Association of New Hampshire;

Mr. Michael Ward, member of the public, appointed by the Governor;

Mr. John Dumais, appointed by the New Hampshire Grocers Association;

Mr. Robert Grimley, member of the public, appointed by the Governor;

Former Rep. Sam Cataldo (who served as Chairman), Rep. Stephen Stepanek, Senior Assistant Attorney General Richard Head and James Demers were initially appointed to the Commission, but were replaced due to changes in circumstances. The current Commission members wish to thank them for their valuable contributions in the early stages of the work of the commission.

Meetings

In 2006, the Commission met to organize on July 19. Subsequent meetings were held on August 23, September 27 and October 25.

After a change in some of the members and a break during the 2007 legislative session, the Commission met in 2007 on July 17, August 21, September 12 and October 17.

This Commission Final Report is based on those previous meetings and on those held in 2007 on November 28 and December 19 and in 2008 on February 1, March 24, April 28, June 2, June 24, and September 12.

Introduction

RFID stands for Radio Frequency IDentification, and typically refers to an established technology of electronic tags that can be attached to various objects. Tags can be as large as six inches with a read range at a considerable distance, or small enough to be mixed with ink or integrated into paper with a range of inches. RFID tags typically have a unique identifying number and possibly additional information, all of which, in certain circumstances may be able to be read through clothing, wallets, and purses. RFID tags have already been embedded in some credit cards and have the ability to contain personally identifiable information. The read time for RFID tags is typically on the order of milliseconds, and there are several different frequencies and at least twenty different tag types and formats.

Summary of Recommendations

Appendix A, Regulation of Remotely Readable Devices is the final text of the Recommendations of the Commission. It was adopted by a majority vote on March 12, 2008.

Topics included in Appendix A include:

- Definitions. Some definitions have no antecedents in the following text; however, their language is the product of many discussions and remain as suggestions for future work.
- Human Implantation of Remotely Readable Device.
- Restrictions on State Use of Remotely Readable Devices
- Electronic Tracking
- Penalties.
- Illegal Use of Payment Card Scanning Device or Reencoder
- Effective Date

Appendix B is a list of topics that the Commission agrees are important yet was unable to create consensus.

Topics included in Appendix B include:

- Consumer Notice
- Labeling
- Removal or Deactivation of Remotely Readable Devices from Consumer Products

Appendix A – Recommended Text
Agreed upon by the Commission by Majority Vote

1 New Chapter; Regulation of Remotely Readable Devices. Amend RSA by inserting after chapter 358-S the following new chapter:

CHAPTER 358-T

REGULATION OF REMOTELY READABLE DEVICES

358-T:1 Definitions.

I. "Consumer" means an individual in the state of New Hampshire who consumes or uses a retail product for personal, non-commercial reasons.

II. "Consumer product" means a physical object that is, or is intended to be, used or consumed by a consumer and includes, but is not limited to food, alcoholic and nonalcoholic beverages, and prescription and nonprescription drugs, clothing, merchandise, motor vehicles, advertising and sales documents and literature, books, magazines, greeting and business cards, and any packaging intended to be removed by a consumer. A "consumer product" does not include an identification document or any product to the extent that unique identification via radio waves is an essential part of the consumer's use, including, but not limited to, commercial mobile radio service as described in 47 U.S.C. section 332, electronic toll collection systems as defined in RSA 236:31, I(c), keys, and garage door openers.

III. "Identification document" means any document or object containing personal information that an individual uses alone or in conjunction with any other information to establish his or her identity, to obtain health or medical care, to engage in government-regulated activities, or to engage in financial transactions. Identification documents shall include but shall not be limited to:

(a) Drivers' licenses, identification cards, and license plates issued by the director of the division of motor vehicles, department of safety.

(b) Electronic toll collection systems as defined in RSA 236:31, I(c).

(c) Identification cards or badges issued to employees or contractors.

(d) Insurance benefit cards.

(e) Identification cards issued by schools and educational institutions.

(f) Benefit cards issued in conjunction with any government-supported aid program.

(g) Credit, debit, and financial account cards.

(h) Licenses, certificates, registrations, or other means to engage in a business or profession regulated by the state or its political subdivisions.

(i) Library cards issued by any public library.

IV. “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability corporation, association, foundation, joint venture, government, government subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity.

V. “Personal information” means information that can be used to identify an individual. Such information includes an individual’s name, address, telephone and cellular telephone number, social security number, credit card and financial account numbers, driver’s license number, e-mail address, date of birth, race, religion, ethnicity, nationality, political affiliation, photograph and digital image, fingerprint or other biometric identification, and any other unique personal identifier or number.

VI. “Remotely readable device” means any contactless item, application or mark that is passively or actively capable of transmitting an individual’s identity, characteristics, status, group membership, travel history, or location, or capable of storing or transmitting a number, symbol, signal, pattern, or other identifier that could be linked with any such identification or location information. A remotely readable device includes, but is not limited to, technologies that use radio waves to identify individual objects, such as radio frequency identification.

VII. “Track” means to locate, follow, or plot the path of an individual.

VIII. “Electronic tracking” shall mean to track by means of a remotely readable device.

IX. “Radio frequency device” means any item or application that is passively or actively capable of transmitting information through the use of radio waves.

358-T:2 Human Implantation of Remotely Readable Device Prohibited.

I. No person shall implant or attempt to implant or physically incorporate a remotely readable device into or on the body, skin, teeth, hair or nails of another individual without the prior, informed written consent of the individual. Consent of a guardian, guardian ad litem, attorney-in-fact, or parent of a minor child shall be considered adequate consent, unless a written instrument executed by the individual precludes implantation or physical incorporation. Use of a bracelet or other readily removable device is not considered implantation or physical incorporation under this section.

II. No individual shall be offered an incentive, denied an opportunity, or in any way treated by a person differently from any other individual as a consequence of providing or withholding such consent.

III. No person shall use the presence or absence of an implanted remotely readable device as a basis for discriminating against an individual for any purpose whatsoever, including, but not limited to, employment, housing, insurance, medical care, voting, education, travel, and commerce.

358-T:3 Restrictions on State Use of Remotely Readable Devices.

I. The state or a political subdivision, department, or agency shall not issue, or permit others to issue on its behalf, any identification document that contains or uses a remotely readable device, or use a remotely readable device, to locate an individual, either directly or indirectly through other persons, except in the following circumstances:

(a) To locate a person who is incarcerated in the state prison or county jail, is housed in a mental health facility pursuant to a court order after having been charged with a crime, is subject to court-ordered electronic monitoring, or is a resident of a state-funded or county-funded hospital, nursing facility or assisted living facility.

(b) When the remotely readable device is implanted in an identification document that is to be used on a toll road or bridge owned or operated by the state or a political subdivision, department, or agency thereof, but only for the specific purpose of collecting funds for the use of that road or bridge.

(c) An identification document that is issued to a person for the limited purpose of facilitating secure access by the identification document holder to a secured public building or parking area.

(d) Credit, debit, or financial account cards issued to a person for use on behalf of the state or a political subdivision, department, or agency of the state, provided that such card complies with RSA 358-T:2.

II. No identification document permitted under this section shall contain, transmit, or enable the remote reading of any personal information other than a unique personal identifier number which is not a social security number.

III. This section shall not apply to the court authorized use of remotely readable devices by law enforcement officials.

358-T:4 Electronic Tracking Prohibited. Except as otherwise provided in this chapter or as otherwise specifically authorized in law, no person may track an individual without a valid court order or the consent of the person being tracked. This prohibition shall not include locating technology used by the enhanced 911 system or commercial mobile radio service pursuant to 47 U.S.C. Section 332. Notwithstanding the foregoing, a person may track property owned or otherwise legally possessed where the person has reason to believe the property is being used in violation of the person's property interests or the property interests of the legal owner or legal possessor, and the person is acting on behalf of the legal owner or legal possessor to recover the property.

358-T:5 Penalties.

I. Any person convicted of violating RSA 358-T:4 shall be guilty of a misdemeanor if a natural person and a felony if any other person. Each such act shall constitute a separate offense.

II. Any person convicted of violating RSA 358-T:2 shall be guilty of a class B felony.

III. An aggrieved individual or the state may bring suit for civil penalties for up to $1,000 or actual damages, whichever is greater, plus court costs and reasonable attorney's fees, for each violation of this chapter.

2 Illegal Use of Payment Card Scanning Device or Reencoder. Amend RSA 638:28, I-III to read as follows:

I. "Scanning device" means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on [~~the magnetic strip or stripe of~~] or in a payment card.

II. "Reencoder" means an electronic device that places encoded information from [~~the magnetic strip or stripe of~~] a payment card onto [~~the magnetic strip or stripe of~~] or into a different payment card.

III. "Payment card" means a credit card, charge card, debit card, or any other card or device that is issued to an authorized [~~card~~] user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

3 Illegal Use of Payment Card Scanning Device or Reencoder. Amend RSA 638:29, I to read as follows:

I. A person is guilty of the crime of using a scanning device or reencoder to defraud when the person knowingly:

(a) Uses a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on [~~the magnetic strip or stripe of a~~] or in a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant; or

(b) Uses a reencoder to place information encoded on [~~the magnetic strip or stripe of a~~] or into a different payment card onto [~~the magnetic strip or stripe of~~] or into a different card without the permission of the authorized user of the card from which the information is being reencoded and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

4 Effective Date.

This act shall take effect 60 days after passage.

Appendix B – Topics on which Commission was unable to reach agreement

Note: Italics refer to adopted definitions in Appendix A.

The Commission was not able to come to agreement on the following topics:

- ***Consumer* Notice**. This is intended to alert the *Consumer* to the presence of a *Remotely Readable Device* on or in a *Consumer Product* and to the potential that it can be read without their knowledge from a substantial distance. A majority of the Commission agreed that Consumer Notice should be required; however, no consensus was reached on who should be required to provide notice or the form that such notice should take.
- ***Consumer Product* Labeling.** This is intended to be part of the packaging of a *Consumer product* to alert the *Consumer* to the presence of a *Remotely Readable Device* on or in a *Consumer Product* and to the potential that it can be read without their knowledge from a substantial distance. A majority of the Commission agreed that *Consumer Product* Labeling should be required whenever a consumer product leaves the store with an active RFID tag; however, no consensus was reached on who should be required to provide the label or the form that such a label should take.
- **Embedded *Remotely Readable Devices***. This refers to the possibility that a *Remotely Readable Device* can be hidden in a Consumer product, such as a shoe or clothing, so that it is not visible.
- **Removal or Deactivation of a *Remotely Readable Device* from a *Consumer Product*.** This refers to methods for disabling a Remotely Readable Device, either by the *Consumer* or the retailer selling the *Consumer Product*.
- **Interstate commerce, state statute and labeling.** The commission could not agree upon what constitutes an appropriate threshold for labeling and whether or not such statutory requirements would violate federal interstate commerce. Before implementation in statute of any requirements for labeling, it is recommended that proposed language be reviewed in relation to federal law.