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**HOUSE BILL 750**

**45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001**

**INTRODUCED BY**

**Danice R. Picraux**

**AN ACT**

**RELATING TO INFORMATION; ENACTING THE CONSUMER PRIVACY ACT TO  
PROTECT PERSONAL AND SENSITIVE INFORMATION PROVIDED BY  
CONSUMERS IN A COMMERCIAL CONTEXT; PROVIDING PENALTIES AND  
REMEDIES FOR VIOLATIONS; PROVIDING EXCEPTIONS.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:**

**Section 1. SHORT TITLE.--This act may be cited as the  
"Consumer Privacy Act".**

**Section 2. PURPOSE OF ACT.--The purpose of the Consumer  
Privacy Act is to protect the security and confidentiality of  
the personal and sensitive information of consumers. The  
Consumer Privacy Act shall be liberally construed as a  
consumer protection statute to effectuate its purpose.**

**Section 3. DEFINITIONS.--As used in the Consumer Privacy  
Act:**

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1           A. "business" means a commercial enterprise but  
2 does not include a person that:

3                   (1) has contracted, in writing, with a  
4 business to provide products, goods or services on behalf of  
5 the business that are part of or integral to the provision of  
6 the business's own products, goods or services to the  
7 consumer; and

8                   (2) does not make an independent use,  
9 including marketing use, of the personal and sensitive  
10 information, apart from providing the products, goods or  
11 services requested by the consumer;

12           B. "consumer" means a natural person or his legal  
13 representative, who is a resident of New Mexico, and who  
14 purchases, leases or otherwise contracts for products, goods  
15 or services within New Mexico that are primarily used for  
16 personal, family or household purposes;

17           C. "consumer-initiated request" means a request  
18 initiated by a consumer for the purpose of obtaining a  
19 product, good or service; and

20           D. "personal and sensitive information" means  
21 personally identifiable information that is provided by the  
22 consumer in a commercial context, that:

23                   (1) is correlated or identifiable to the  
24 specific individual consumer;

25                   (2) concerns the amount or condition of the

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1 consumer's assets, liabilities, financial transactions,  
2 purchasing history, buying preferences or business  
3 relationships; or

4 (3) reflects current or historical deposit or  
5 credit card account balances or purchase amounts of the  
6 consumer, and includes information maintained in a commercial  
7 context that is correlated or identifiable to a specific  
8 individual consumer or a specific account and customarily held  
9 or used for the purpose of the consumer's transaction  
10 initiation, account access or identity verification,  
11 including:

12 (a) account numbers, access codes or  
13 passwords, social security numbers, consumer tax  
14 identification numbers, driver's license or permit numbers,  
15 state identification numbers and credit card numbers or  
16 expiration dates; or

17 (b) electronically captured signatures,  
18 names, addresses, telephone numbers or electronic mail  
19 addresses.

20 Section 4. PROHIBITION ON DISCLOSURE OF PERSONAL AND  
21 SENSITIVE INFORMATION. --A business shall not disclose personal  
22 and sensitive information other than in connection with a  
23 consumer-initiated request except as provided in the Consumer  
24 Privacy Act.

25 Section 5. CONSUMER PRIVACY POLICIES-- NOTICE TO

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1 CONSUMERS-- CONSUMER'S RIGHT TO ACCESS AND CORRECT PERSONAL AND  
2 SENSITIVE INFORMATION. --

3 A. A business shall have a consumer privacy policy  
4 that discloses to existing and prospective consumers the  
5 policies and practices of the business regarding the use of a  
6 consumer's personal and sensitive information.

7 B. The consumer privacy policy shall, at a  
8 minimum, summarize the business's responsibilities under the  
9 Consumer Privacy Act, describe the consumer's rights and  
10 remedies under that act and generally describe with whom the  
11 consumer's personal and sensitive information may be shared or  
12 to whom it may be sold or transferred. This general  
13 description shall disclose either the names of those with  
14 which the information will be shared, sold or transferred or a  
15 reasonable description of the nature or type of entity with  
16 which information may be shared, sold or transferred. The  
17 consumer privacy policy shall inform the consumer when  
18 information collected for a consumer-initiated request will be  
19 used for any other purpose.

20 C. The consumer privacy policy shall provide a  
21 reasonable means for consumers to review their personal and  
22 sensitive information that the business shares, sells or  
23 transfers. The policy shall also provide a reasonable  
24 procedure for consumers to dispute the accuracy or  
25 completeness of the information and to correct erroneous

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1 information.

2 D. A business shall clearly and conspicuously  
3 disclose its consumer privacy policy to consumers in advance  
4 of the collection of personal and sensitive information from  
5 consumers.

6 Section 6. DISCLOSURE OF INFORMATION-- CONSUMER  
7 CONSENT. --

8 A. A business shall not disclose personal and  
9 sensitive information except in connection with a consumer-  
10 initiated request unless the consumer has first received  
11 written notification of:

12 (1) the information to be disclosed;

13 (2) the entity or type of entity  
14 authorized to receive the information;

15 (3) a specific description of the  
16 purpose for which the disclosure of information will be made;  
17 and

18 (4) the consumer's right to choose not  
19 to have his personal and sensitive information shared, sold or  
20 otherwise transferred.

21 B. In addition to the notice requirements of  
22 Subsection A of this section, a business shall not disclose  
23 personal and sensitive information for purposes other than in  
24 connection with a consumer-initiated request unless the  
25 consumer by prior and informed affirmative consent authorizes

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1 the disclosure. The attorney general shall adopt rules to  
2 determine the requirements for obtaining a consumer's informed  
3 and affirmative consent.

4 Section 7. CONFIDENTIALITY AND SECURITY OF CONSUMER  
5 PERSONAL AND SENSITIVE INFORMATION. --

6 A. A person that obtains personal and sensitive  
7 information from a business shall:

8 (1) not sell, share or otherwise transfer the  
9 information for any reason other than the allowed purposes for  
10 which the information was sold, shared or transferred by the  
11 business;

12 (2) keep the information confidential; and

13 (3) safeguard the information from loss,  
14 misuse, theft, unauthorized access, disclosure, defacement or  
15 alteration.

16 B. Before sharing, selling or otherwise  
17 transferring personal and sensitive information, a business  
18 shall obtain a binding agreement from the intended recipient  
19 to:

20 (1) keep the information confidential;

21 (2) use the information only for the allowed  
22 purposes for which it has been shared, sold or provided; and

23 (3) safeguard the information from loss,  
24 misuse, theft, unauthorized access, disclosure, defacement or  
25 alteration.

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1 C. Every business shall establish reasonable  
2 safeguards to ensure the confidentiality and safety of  
3 personal and sensitive information and to protect it from  
4 loss, misuse, theft, unauthorized access, disclosure,  
5 defacement or alteration.

6 Section 8. EXCEPTIONS ALLOWING DISCLOSURE. -- The Consumer  
7 Privacy Act does not apply to disclosure of personal and  
8 sensitive information under the following circumstances:

9 A. disclosure of personal and sensitive  
10 information required by federal, state or local law,  
11 regulation or rule;

12 B. disclosure of personal and sensitive  
13 information made in the course of a properly authorized civil,  
14 criminal or regulatory examination or investigation or under a  
15 search warrant, court order or subpoena, including an  
16 administrative subpoena or other legal process; or

17 C. disclosure of personal and sensitive  
18 information to protect against, investigate or prevent actual  
19 or potential fraud or unauthorized transactions, claims or  
20 other liability or to verify information provided by a  
21 consumer in connection with a claim or application for  
22 services or benefits.

23 Section 9. PRIVATE REMEDIES. --

24 A. A person likely to be damaged by a violation of  
25 the Consumer Privacy Act may be granted an injunction against

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1 it under the principles of equity and on terms that the court  
2 considers reasonable. Proof of monetary damage, loss of  
3 profits or intent to deceive or take unfair advantage of a  
4 person is not required.

5 B. A person who suffers a loss of money or  
6 property as a result of the employment by another person of a  
7 method, act or practice in violation of a prohibitory  
8 provision of the Consumer Privacy Act may bring an action to  
9 recover actual damages or the sum of five thousand dollars  
10 (\$5,000), whichever is greater. Where the trier of fact finds  
11 that the party charged with a violation of the Consumer  
12 Privacy Act has willfully engaged in the violation, the court  
13 may award up to three times actual damages or fifteen thousand  
14 dollars (\$15,000), whichever is greater, to the party  
15 complaining of the violation.

16 C. The court shall award attorney fees and costs  
17 to the party complaining of a violation of the Consumer  
18 Privacy Act if he prevails. The court shall award attorney  
19 fees and costs to the party charged with a violation of the  
20 Consumer Privacy Act if it finds that the private party  
21 complaining of such violation brought an action that was  
22 groundless.

23 D. The relief provided in this section is in  
24 addition to remedies otherwise available against the same  
25 conduct under the common law or other statutes of this state.



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1           E. In any class action filed under this section,  
2 the court may award damages to the named plaintiffs and may  
3 award members of the class such actual damages as were  
4 suffered by each member of the class as a result of the  
5 unlawful method, act or practice.

6           F. The Consumer Privacy Act neither enlarges nor  
7 diminishes the rights of parties in private litigation except  
8 as specifically set forth in the Consumer Privacy Act.

9           Section 10. PUBLIC ENFORCEMENT. --To promote the uniform  
10 administration of the Consumer Privacy Act, the attorney  
11 general is authorized to enforce that act and may delegate  
12 this authority to the district attorneys of the state.

13           Section 11. RESTRAINT OF PROHIBITED ACTS--SETTLEMENTS. --

14           A. Whenever the attorney general has reason to  
15 believe that a person is violating, has violated or is about  
16 to violate the Consumer Privacy Act, and that proceedings  
17 would be in the public interest, the attorney general may  
18 bring an action in the name of the state alleging violations  
19 of the Consumer Privacy Act. The action may be brought in the  
20 district court of the county in which the person resides or  
21 has his principal place of business or in the district court  
22 in any county in which the person is violating, has violated  
23 or is about to violate the Consumer Privacy Act. The attorney  
24 general acting on behalf of the state shall not be required to  
25 post bond when seeking a temporary or permanent injunction.

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1           B. In any action filed pursuant to the Consumer  
2 Privacy Act the attorney general may petition the district  
3 court for temporary or permanent injunctive relief,  
4 restitution and civil penalties.

5           C. In lieu of beginning or continuing an action  
6 pursuant to the Consumer Privacy Act, the attorney general  
7 may accept a written assurance of discontinuance of any  
8 practice in violation of the Consumer Privacy Act from the  
9 person engaged in violation of the Consumer Privacy Act. All  
10 settlements are a matter of public record but are not  
11 admissible against a defendant in an action brought by another  
12 person or public body against a defendant pursuant to the  
13 Consumer Privacy Act and do not constitute a basis for the  
14 introduction of the assurance of discontinuance as prima facie  
15 evidence against the defendant in any action or proceeding.

16           D. A violation of an assurance entered into  
17 pursuant to this section is a violation of the Consumer  
18 Privacy Act.

19           Section 12. CIVIL PENALTY.--In an action brought  
20 pursuant to Section 10 of the Consumer Privacy Act, if the  
21 court finds that a person or entity has willfully or  
22 repetitively violated the Consumer Privacy Act, the attorney  
23 general, upon petition to the court, may recover, on behalf of  
24 the state of New Mexico, a civil penalty not exceeding five  
25 thousand dollars (\$5,000) per violation.

1           Section 13.   CIVIL INVESTIGATIVE DEMAND. --

2           A.   Whenever the attorney general has reason to  
3 believe that a person may be in possession, custody or control  
4 of an original or copy of a book, record, report or other  
5 tangible document or recording that he believes to be relevant  
6 to the subject matter of an investigation of a probable  
7 violation of the Consumer Privacy Act, he may, prior to the  
8 institution of a civil proceeding, execute in writing and  
9 cause to be served upon the person a civil investigative  
10 demand requiring the person to produce documentary material  
11 and permit the inspection and copying of the material. The  
12 demand of the attorney general shall not be a matter of public  
13 record and shall not be published by him except by order of  
14 the court.

15           B.   Each demand shall:

16                   (1) state the general subject matter of the  
17 investigation;

18                   (2) describe the classes of documentary  
19 material to be produced with reasonable certainty;

20                   (3) prescribe the return date within which  
21 the documentary material is to be produced, which in no case  
22 shall be less than ten days after the date of service; and

23                   (4) identify the members of the attorney  
24 general's staff to whom the documentary material is to be made  
25 available for inspection and copying.

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C. No demand shall:

(1) contain a requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state;

(2) require the disclosure of documentary material that would be privileged or that for another reason would not be required by a subpoena duces tecum issued by a court of this state; or

(3) require removal of any documentary material from the custody of the person upon whom the demand is served except in accordance with the provisions of Subsection E of this section.

D. Service of the demand may be made by:

(1) delivering a duly executed copy of the demand to the person to be served, or if the person is not a natural person, to the statutory agent for the person or to an officer of the person to be served;

(2) delivering a duly executed copy of the demand to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail a duly executed copy of the demand addressed to the person to be served at his principal place of business in this state, or, if the person has no place of business in this state, to his principal office or place of business.

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1           E. Documentary material demanded pursuant to the  
2 provisions of this section shall be produced for inspection  
3 and copying during normal business hours at the principal  
4 office or place of business of the person served or may be  
5 inspected and copied at those other times and places agreed to  
6 by the persons served and the attorney general.

7           F. No documentary material or copies produced  
8 pursuant to a demand, unless otherwise ordered for good cause  
9 shown by the district court in the county in which the person  
10 resides or has his principal place of business, or is about to  
11 perform or is performing the practice that is alleged to be  
12 unlawful pursuant to the Consumer Privacy Act, shall be  
13 produced for inspection or copying by anyone other than an  
14 authorized employee of the attorney general. The contents of  
15 material produced shall not be disclosed to anyone other than  
16 an authorized employee of the attorney general or in court in  
17 an action relating to a violation of the Consumer Privacy Act.

18           G. Before the return date of the demand, a  
19 petition to set aside the demand, modify the demand or extend  
20 the return date of the demand may be filed in the district  
21 court in the county in which the person resides or has his  
22 principal place of business, or is about to perform or is  
23 performing the practice alleged to be unlawful pursuant to the  
24 Consumer Privacy Act. The court upon good cause shown may set  
25 aside the demand, modify it or extend the return date.

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H. After service of the investigative demand upon him, if a person neglects or refuses to comply with the demand, the attorney general may invoke the aid of the court in enforcement of the demand. In appropriate cases the court shall issue its order requiring the person to appear and produce the documentary material required in the demand and may upon the failure of the person to comply with the order punish the person for contempt.

Section 14. RULEMAKING.--The attorney general shall adopt rules necessary or appropriate to implement and enforce the provisions of the Consumer Privacy Act.

Section 15. SEVERABILITY.--If any part or application of the Consumer Privacy Act is held invalid, the remainder or its application to other situations and persons shall not be affected.

Section 16. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2001.