February 4, 2025

Representative Cindy Ryu
Chair, Washington House Committee on Technology, Economic Development, & Veterans
215 John A Cherberg Building
Washington State Capitol
Olympia WA 98501

Dear Chair Ryu:

I write on behalf of the Software & Information Industry Association (SIIA) to raise concerns and reservations about the current draft HB1671, "Protecting personal data privacy." SIIA is the principal trade association for companies in the business of information, including its aggregation, dissemination, and productive use. Our members include roughly 375 companies reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software and platforms used worldwide, and companies specializing in data analytics and information services.

SIIA appreciates the Washington State Legislature's efforts to continue to consider comprehensive privacy through HB1671. We support the goals of the legislation and believe both that privacy is critical to democratic decision making and an important focus on legislative activity, although, privacy interests must be balanced against other core values, including freedom of speech. While the government generally has a legitimate, perhaps even a compelling interest, in protecting privacy, a statute that protects privacy must still fit within the traditional First Amendment framework. As currently written, this legislation does not.

Specifically, HB1671's treatment of publicly available information (PAI) does not comport with the First Amendment. The bill would exclude from the definition of PAI any inference made exclusively from multiple independent sources of PAI that reveals sensitive consumer data .We are concerned that this exemption makes the definition of PAI an unworkable—and likely unconstitutional—departure from best practices in comparable state privacy laws. This is because the Supreme Court has made clear that "the creation and dissemination of information is speech for First Amendment purposes." *Sorrel v. IMS Health Inc.*, 131 S. CT 2653 (2011) ("the creation and dissemination of information are speech within the meaning of the First Amendment"). The State may not infringe these rights to protect a generalized interest in consumer privacy. *See* *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999). The fact that it may be sold for a profit does not deprive it of constitutional protection.

As currently structured, the bill creates two main problems. The first problem is that the public domain that the First Amendment protects is a one-way ratchet. It extends beyond the publication of public domain information to the creation of inferences from such information and the formation of opinions. The bill subjects inferences from publicly available information to the consumer rights of deletion, do-not-sell, and similar requirements. Suppose, for example, an investigative reporter attempts to find out whether a fugitive named John Smith is living in Washington, and cross-references court filings, real estate records, and newspaper articles to infer that Mr. Smith is living there. If the reporter infers that he is in fact living there, that is opinion. If the reporter confirms it, it becomes fact. In either case, the publisher of that information has a First Amendment right to disseminate it. An undifferentiated fear of the collection of public information will not sustain a regulation against the heightened First Amendment

scrutiny that courts would apply. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-495 (1975) ("even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record"). Even if publicly-available information is exempted, it remains a violation of the First Amendment to restrict the transfer of inferences derived solely from this data.

Second, while public domain information can be combined with other, private information that can be regulated, personal information retains its First Amendment protection once removed from the context that created the consumer's reasonable expectation of privacy in that information. Thus, although publicly available information may be combined with non-public data subject to regulatory restrictions, this combination does not alter the status of nor reduce the First Amendment protection for the public data. Again, a hypothetical is helpful. Suppose, for example, in order to prevent e-commerce fraud, a firm provides a service where it cross-checks a consumer's delivery address against public records, and then compares that against credit card account information. A law that prevented the distribution of public record information outside the context of a credit card transaction would be unconstitutional. Unfortunately, this legislation as currently drafted would do just that.

Protection of privacy is a legitimate legislative interest and SIIA supports efforts to provide meaningful protections for consumers while clarifying compliance requirements and protecting constitutionally guaranteed speech interests. We thank you very much for your consideration and would be happy to discuss any of these issues further with you.

Thank you,

Abigail Wilson
State Policy Manager

cc: Vice Chair Shelley Kloba, Ranking Member Stephanie Barnard