

Fifty-eighth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1388

Introduced by

Representatives Warner, Hawken, N. Johnson

Senators Andrist, Krauter

1 A BILL for an Act to create and enact chapters 51-27 and 51-28 of the North Dakota Century
2 Code, relating to internet privacy and commercial electronic mail solicitation; and to provide an
3 expiration date.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** Chapter 51-27 of the North Dakota Century Code is created and enacted
6 as follows:

7 **51-27-01. Definitions.** In this chapter, unless context otherwise requires:

- 8 1. "Consumer" means a person who agrees to pay a fee to an internet service
9 provider for access to the internet for personal, family, household, or commercial
10 business purposes, and who does not resell access.
- 11 2. "Internet service provider" means a person who provides consumers in this state
12 authenticated access to, or presence on, the internet by means of a switched or
13 dedicated telecommunications channel upon which the provider provides transit
14 routing of internet protocol packets for and on behalf of the consumer. Internet
15 service provider does not include the offering, on a common carrier basis, of
16 telecommunications facilities or of telecommunications by means of these facilities.
- 17 3. "Ordinary course of business" means debt collection activities, order fulfillment,
18 request processing, or the transfer of ownership.
- 19 4. "Personally identifiable information" means information that identifies a consumer
20 by physical or electronic address or telephone number; a consumer as having
21 requested or obtained specific materials or services from an internet service
22 provider; internet or on-line sites visited by a consumer; or any of the contents of a
23 consumer's data storage devices.

24 **51-27-02. Disclosure of personal information.**

- 1 1. Except as provided in subsections 2 and 3, an internet service provider may not
2 knowingly disclose personally identifiable information concerning a consumer of
3 the internet service provider.
- 4 2. An internet service provider shall disclose personally identifiable information
5 concerning a consumer:
 - 6 a. Pursuant to a grand jury subpoena;
 - 7 b. To a law enforcement officer while acting as authorized by law;
 - 8 c. Pursuant to a court order in a civil proceeding upon a showing of compelling
9 need for the information that cannot be accommodated by other means;
 - 10 d. To a court in a civil action for conversion commenced by the internet service
11 provider or in a civil action to enforce collection of unpaid subscription fees or
12 purchase amounts, and then only to the extent necessary to establish the fact
13 of the subscription delinquency or purchase agreement, and with appropriate
14 safeguards against unauthorized disclosure;
 - 15 e. To the consumer who is the subject of the information, upon written or
16 electronic request and upon payment of a fee not to exceed the actual cost of
17 retrieving the information;
 - 18 f. Pursuant to subpoena, including an administrative subpoena, issued under
19 authority of a law of this state or another state or the United States; or
 - 20 g. Pursuant to a warrant or court order.
- 21 3. An internet service provider may disclose personally identifiable information
22 concerning a consumer to:
 - 23 a. Any person if the disclosure is incident to the ordinary course of business of
24 the internet service provider;
 - 25 b. Another internet service provider for purposes of reporting or preventing
26 violations of the published acceptable use policy or customer service
27 agreement of the internet service provider, except that the recipient may
28 further disclose the personally identifiable information only as provided by this
29 chapter; or
 - 30 c. Any person with the authorization of the consumer.

1 4. The internet service provider may obtain the consumer's authorization of the
2 disclosure of personally identifiable information in writing or by electronic means.
3 The request for authorization must reasonably describe the types of persons to
4 whom personally identifiable information may be disclosed and the anticipated
5 uses of the information. In order for an authorization to be effective, a contract
6 between an internet service provider and the consumer must state either that the
7 authorization will be obtained by an affirmative act of the consumer or that failure
8 of the consumer to object after the request has been made constitutes
9 authorization of disclosure. The provision in the contract must be conspicuous.
10 Authorization may be obtained in a manner consistent with self-regulating
11 guidelines issued by representatives of the internet service provider or on-line
12 industries, or in any other manner reasonably designed to comply with this
13 subdivision.

14 **51-27-03. Security of information.** An internet service provider shall take reasonable
15 steps to maintain the security and privacy of a consumer's personally identifiable information.

16 **51-27-04. Exclusion from evidence.** Except for purposes of establishing a violation of
17 this chapter, personally identifiable information obtained in any manner other than as provided
18 in this chapter may not be received in evidence in a civil action.

19 **51-27-05. Enforcement - Civil liability - Defense.**

20 1. A consumer who prevails or substantially prevails in a civil action brought under
21 this chapter is entitled to the greater of five hundred dollars or actual damages.
22 Costs, disbursements, and reasonable attorney fees may be awarded to a party
23 awarded damages for a violation of this chapter.

24 2. In a civil action under this chapter, it is a defense that the defendant has
25 established and implemented reasonable practices and procedures to prevent a
26 violation of this chapter.

27 **51-27-06. Other law.** This chapter does not limit any greater protection of the privacy
28 of information under other law. This chapter does not limit the authority under other state or
29 federal law of law enforcement or prosecuting authorities to obtain information. If federal law is
30 enacted that regulates the release of personally identifiable information by internet service

1 providers but does not preempt state law on the subject, the federal law supersedes any
2 conflicting provision of this chapter.

3 **SECTION 2.** Chapter 51-28 of the North Dakota Century Code is created and enacted
4 as follows:

5 **51-28-01. Definitions.**

- 6 1. "Commercial electronic mail message" means an electronic mail message sent
7 through an internet service provider's facilities located in this state to a resident of
8 this state for promoting real property, goods, or services for sale or lease.
- 9 2. "Electronic mail address" means a destination, commonly expressed as a string of
10 characters, to which electronic mail may be sent or delivered.
- 11 3. "Electronic mail service provider" means a person that provides a set of users the
12 ability to send or receive electronic mail messages via the internet.
- 13 4. "Initiate the transmission" refers to the action by the original sender of an electronic
14 mail message and not to the action by an intervening internet service provider or
15 electronic mail service provider that may handle or retransmit the message.
- 16 5. "Internet service provider" means a person who provides users authenticated
17 access to, or presence on, the internet by means of a switched or dedicated
18 telecommunications channel upon which the provider provides transit routing of
19 internet protocol packets for and on behalf of the user.
- 20 6. "Internet domain name" refers to a globally unique, hierarchical reference to an
21 internet host or service, assigned through centralized internet naming authorities,
22 comprising a series of character strings separated by periods, with the rightmost
23 string specifying the top of the hierarchy.

24 **51-28-02. False or misleading messages prohibited.** A person may not initiate the
25 transmission of a commercial electronic mail message that contains false or misleading
26 information in the subject line or uses a third-party's internet domain name without permission
27 of the third party, or otherwise misrepresents any information in identifying the point of origin or
28 the transmission path of a commercial electronic mail message.

29 **51-28-03. Subject disclosure.** The subject line of a commercial electronic mail
30 message must include "ADV" as the first characters. If the message contains information that
31 consists of material of a sexual nature that may only be viewed by an individual eighteen years

1 of age and older, the subject line of the message must include "ADV-ADULT" as the first
2 characters. For purposes of this section, "commercial electronic mail message" does not
3 include a message if the recipient has consented to receive or has solicited electronic mail
4 messages from the initiator; from an organization using electronic mail to communicate
5 exclusively with its members; from an entity which uses electronic mail to communicate
6 exclusively with its employees or contractors; or if there is a business or personal relationship
7 between the initiator and the recipient. For purposes of this section, "business relationship"
8 means a prior or existing relationship formed between the initiator and the recipient, with or
9 without an exchange of consideration, on the basis of an inquiry, application, purchase, or
10 services offered by the initiator or an affiliate or agent of the initiator. "Affiliate" means a person
11 that directly or indirectly controls, is controlled by, or is under common control with a specified
12 person.

13 **51-28-04. Toll-free number.**

- 14 1. A sender initiating the transmission of a commercial electronic mail message must
15 establish a toll-free telephone number, a valid sender-operated return electronic
16 mail address, or another easy-to-use electronic method that the recipient of the
17 commercial electronic mail message may call or access by electronic mail or other
18 electronic means to notify the sender not to transmit by electronic mail any further
19 unsolicited commercial electronic mail messages. The notification process may
20 include the ability for the commercial electronic mail messages recipient to direct
21 the initiator to transmit or not transmit particular commercial electronic mail
22 messages based upon products, services, divisions, organizations, companies, or
23 other selections of the recipient's choice.
- 24 2. A commercial electronic mail message must include a statement informing the
25 recipient of a toll-free telephone number that the recipient may call, or a valid
26 return address to which the recipient may write or access by electronic mail or
27 another electronic method established by the initiator, notifying the sender not to
28 transmit to the recipient any further unsolicited commercial electronic mail
29 messages to the electronic mail address, or addresses, specified by the recipient,
30 and explaining the manner in which the recipient may specify what commercial
31 electronic mail messages the recipient does and does not want to receive.

1 **51-28-05. Blocking receipt or transmission.** This chapter does not prevent or limit
2 an internet service provider from adopting a policy regarding commercial or other electronic
3 mail, including a policy of declining to transmit certain types of electronic mail messages, or
4 from enforcing a policy through technical means, through contract, or by pursuing a remedy
5 available under any other law. An electronic mail service provider may not be held liable in an
6 action by a recipient for any act voluntarily taken in good faith to block the receipt or
7 transmission through its service of any commercial electronic mail message that the electronic
8 mail service provider reasonably believes is, or will be, sent in violation of this chapter.

9 **51-28-06. Defenses.**

- 10 1. A person is not liable for a commercial electronic mail message sent in violation of
11 this chapter if the person can show by a preponderance of the evidence that the
12 commercial electronic mail message was not initiated by the person or was
13 initiated in a manner and form not subject to the control of the person.
- 14 2. In an action under this chapter, it is a defense that the defendant has established
15 and implemented reasonable practices and procedures to prevent violations of this
16 chapter.

17 **51-28-07. Damages.**

- 18 1. A person injured by a violation of this chapter may recover damages caused by the
19 violation as specified in this section.
- 20 2. An injured person, other than an electronic mail service provider, may recover:
- 21 a. The lesser of two thousand dollars for each commercial electronic mail
22 message received that violates section 51-28-02, or thirty-five thousand
23 dollars per day; or
- 24 b. The lesser of two thousand dollars for each commercial electronic mail
25 message received that violates section 51-28-03 or 51-28-04, or twenty-five
26 thousand dollars per day.
- 27 3. An injured electronic mail service provider may recover actual damages or elect, in
28 lieu of actual damages, to recover:
- 29 a. The lesser of twenty-five dollars for each commercial electronic mail message
30 received that violates section 51-28-02, or thirty-five thousand dollars per day;
31 or

- 1 b. The lesser of ten dollars for each commercial electronic mail message
2 received that violates section 51-28-03 or 51-28-04, or twenty-five thousand
3 dollars per day.
- 4 4. At the request of any party to a civil action brought under this chapter, the court
5 may conduct all legal proceedings in a manner so as to protect the secrecy and
6 security of the computer, computer network, computer data, computer program,
7 and computer software involved in order to prevent possible recurrence of the
8 same or a similar act by another person and to protect any trade secrets of any
9 party.
- 10 5. Costs, disbursements, and reasonable attorney fees may be awarded to a party
11 awarded damages for a violation of this chapter.
- 12 6. Except as otherwise provided in this section, the remedies in this section are in
13 addition to remedies available under other law.

14 **51-28-08. Relationship to federal law.** If federal law is enacted that regulates false,
15 misleading, or unsolicited commercial electronic mail messages but does not preempt state law
16 on the subject, the federal law supersedes any conflicting provision of this chapter.

17 **SECTION 3. EXPIRATION DATE.** The governor shall certify to the legislative council
18 the effective date of federal legislation that preempts state regulation of the release of
19 personally identifiable information by an internet service provider or of false, misleading, or
20 unsolicited commercial electronic mail messages. Chapter 51-27 expires upon the effective
21 date contained in the certification of federal legislation that preempts state regulation of the
22 release of personally identifiable information by an internet service provider. Chapter 51-28
23 expires upon the effective date contained in the certification of federal legislation that preempts
24 state regulation on false, misleading, or unsolicited commercial electronic mail messages.