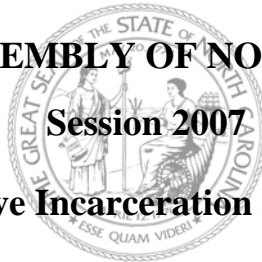


GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2007

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 1058 (Fifth Edition)

SHORT TITLE: Telephone Records Privacy Protection Act.

SPONSOR(S): Senator Stevens

	FISCAL IMPACT				
	Yes (X)	No ()	No Estimate Available ()		
	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>	<u>FY 2010-11</u>	<u>FY 2011-12</u>
GENERAL FUND					
Correction	Some fiscal impact anticipated; however, the exact amount cannot be determined. See Assumptions and Methodology.				
Judicial					
Justice					
TOTAL EXPENDITURES:					
ADDITIONAL PRISON BEDS: (cumulative)*					
POSITIONS: (cumulative)					
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Department of Justice.					
EFFECTIVE DATE: December 1, 2007					
<i>*This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.</i>					

BILL SUMMARY: The second edition of S.B. 1058 enacts new Article 19D of Chapter 14, "Telephone Records Privacy Protection Act," to prohibit the fraudulent obtaining, selling, or soliciting of phone records. The proposed Article includes the following sections:

- G.S. 14-113.30 defines the terms *caller identification record*, *customer*, *person*, *telephone record*, *telephone service*, and *telephone service provider*.

- G.S. 14-113.31 prohibits the following acts, related to obtaining, receiving, and/or selling telephone records by fraudulent means:
 - A. Obtaining or attempting to obtain, by any means, a telephone record pertaining to a customer without that customer's consent. Such fraudulent means include:
 - 1. Making a false statement/representation to an agent of a telephone service provider.
 - 2. Making a false statement/representation to a customer of a service provider.
 - 3. Knowingly providing to a service provider a fraudulent document – one that has been lost or stolen, obtained by fraud, or that contains a false statement/representation.
 - 4. Accessing a service provider's customer accounts via Internet, without prior authorization from the customer to whom the records pertain.
 - B. Knowingly purchasing, receiving, or asking another person to obtain/purchase (or attempt to obtain/purchase) a telephone record of a third person, without prior authorization from that third person; applies if a person knows or has reason to know that the other person will obtain the record fraudulently.
 - C. Selling or offering to sell a telephone record obtained without the customer's prior consent, knowing or having reason to know that the record has been obtained fraudulently.
- G.S. 14-113.32 excepts actions for law enforcement purposes; disclosure for service provision to customers; disclosure to the National Center for Missing and Exploited Children; disclosure otherwise permitted under law; disclosure to governmental agencies in emergency situations; and, disclosure for the purpose of testing telephone provider security systems. It also clarifies that the act does not expand the obligations of a telephone service provider to maintain the confidentiality of telephone records; and, exempts from criminal and civil liability any telephone service provider who reasonably and in good faith discloses telephone records if the disclosure is later determined to be in violation of the act.
- G.S. 14-113.33 provides for criminal and civil remedies for violation of the Article and provides that a violation of G.S. 14-113.31 is a violation of G.S. 75-1.1 (declaring unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce unlawful).
 - Violation of the Article is a Class G felony offense, unless covered under another provision of law providing for greater punishment.
 - Any customer whose records were unlawfully obtained, sold, or solicited under the Article may bring civil action against the violator to recover: 1) the amount of pecuniary loss suffered because of the violation or \$1,000, whichever is greater; and 2) the amount of any gain to the violator as a result of the violation.
 - Provides that reasonable attorney's fees may be awarded to the plaintiff upon a finding of defendant wrongdoing; in addition, attorney's fees may be awarded to the defendant upon finding that the plaintiff knew or should have known the action was frivolous and malicious.
 - Provides that a violation of G.S. 14-113.31 is a violation of G.S. 75-1.1.
- The Act becomes effective December 1, 2007, and applies to acts and offenses committed on or after that date.

The third edition (House amendment) modifies proposed G.S. 14-113.33 by:

- 1) Deleting the provisions for attorneys' fees and for recovering the amount of any gain resulting from a violation of G.S. 14-331.31; and,
- 2) Consolidating the remaining provisions regarding civil liability for a violation of G.S. 14-331.31; provides that a customer whose records were unlawfully obtained, sold, or solicited is entitled to treble damages pursuant to G.S. 75-16, or \$1,000, whichever is greater.

The fourth edition revises subsections (b) and (c) of proposed G.S. 14-113.31 to:

(b) prohibit soliciting another person from purchasing or receiving (was, to obtain or purchase or attempt to obtain or purchase) a telephone record that pertains to a customer without the customer's authorization, or if the purchaser or receiver knows or has reason to know that the record has been fraudulently obtained (was, or having reason to know that the person will obtain the telephone record fraudulently).

(c) prohibit a person from selling or offering to sell a telephone record that was obtained without the customer's consent, or if the person knows or has reason to know (was, obtained without the customer's consent knowing or having reason to know) that the record was fraudulently obtained.

The fifth edition modifies proposed new G.S. 14-113.33 to decrease the proposed penalty for violations of the Article from a Class G to a Class H felony.

ASSUMPTIONS AND METHODOLOGY:

General

Given current Courts and Corrections resources, any resultant charge, conviction, or civil action will generate some fiscal impact. However, because the proposed offenses are new, there are no historical data from which to reliably project such impact. Although an estimate is unavailable at this time, the prevalence of market activity (e.g. marketing, research firms, etc.) involving telephone record usage, coupled with prior year charge and conviction frequencies for similar, existing offenses, suggests that the fiscal impact of this proposal could *potentially* be significant. The actual frequency of conduct that constitutes "pretexting" is unknown. Nor is it known how prosecution would differ for criminal cases occurring under this bill - whether disposed at the state or federal level.

Department of Correction: Division of Prisons

Based on the most recent prison population projections and estimated available bed capacity, *there are no surplus prison beds available over the immediate five-year horizon or beyond.* Therefore, any new felony conviction that results in an active sentence will require an additional prison bed.

Proposed G.S. 14-113.31 creates three new Class H felony offenses, concerning the fraudulent acquisition or distribution of telephone records. Because these offenses are new, there is no historical data from which to project future violation and conviction frequencies, and therefore, prison bed impact. However, prior year conviction data for similar, existing offenses provide some insight into the potential offender pool – these similar offenses only pertain to proposed subsections (a) and (b). The overall scope of this pool is unknown; likewise, the number of entirely new offenses (those without shared elements, relative to existing offenses) is indeterminate.

G.S. 14-113.31(a): Persons eligible for conviction under subdivisions (1) – (3) of this section may currently be convicted, regardless of consent, of obtaining property by false pretenses under G.S. 14-100 – a Class H felony offense if the property's value is less than \$100,000; a Class C felony if the value is \$100,000 or more. Similarly, persons eligible for conviction under subdivision (4) may

currently be convicted of unlawful access of computers for the purpose of obtaining property by fraud under G.S. 14-454 – a Class 1 misdemeanor if the property’s value is \$1,000 or less; a Class G felony if the value is more than \$1,000).¹

In FY 2005-06, there were 1,634 Class H felony (or below) convictions under G.S. 14-100 for obtaining, attempting to obtain, conspiracy to obtain, and aiding and abetting to obtain property by false pretenses. There were two (2) Class G felony and one (1) Class 1 misdemeanor convictions for the unlawful access of computers for the purpose of obtaining property by fraud under G.S. 14-454. It is not known if any of these prior year convictions, under either statute, involved the fraudulent acquisition of telephone records. However, based on the applicable penalty levels, only those violations that meet the proposed offense criteria and which now result in charge/conviction at the Class 1 misdemeanor level would be enhanced to Class H felonies – thereby increasing prison bed demands and time served for such offense.²

G.S. 14-113.31(b): Those eligible for conviction under subsection (b) may currently be convicted of receiving stolen goods under G.S. 14-71 (Class H felony) or G.S. 14-72 (Class 1 misdemeanor if the value of the records is \$1,000 or less; Class H felony if that value is more than \$1,000). In FY 2005-06, there were seven (7) Class H felony convictions and twenty-eight (28) Class 1 misdemeanor convictions for receiving stolen goods. It is unknown if any of these convictions involved the fraudulent acquisition of telephone records. It is assumed that only those violations that meet the proposed offense criteria and which now result in charge/conviction at the Class 1 misdemeanor level would be enhanced to Class H felonies.

In FY 2005-06, 34% of Class H felony convictions resulted in active sentences, with an average estimated time served of 11 months. Although the potential impact on the prison population is indeterminate, assuming that three Class H convictions were to occur annually, *the combination of active sentences and probation revocations would require one additional prison bed in the first applicable year; two additional beds in the second year; and one new employee in the second year.*

Assuming these thresholds and inmate assignment to medium custody, the construction of two additional prison beds within a new, stand alone facility could cost the State \$136,080 in FY 2007-08; conversely, bed construction within an add-on facility could cost approximately \$84,240.³ These costs are attributed to FY 2007-08 since the construction of additional prison beds, whether within an add-on or stand-alone facility, requires budgeting at least three years in advance. Potential operating costs could total \$58,196 by FY 2009-10.⁴

¹ Assuming that the intent of subdivision (4) is to create a crime of fraud, and that access occurs without the consent of the telephone service provider and the customer.

² It is assumed that persons eligible for the existing Class C, G, and H offenses would continue to be prosecuted at that level. Only violations fitting the criteria of the current Class 1 misdemeanor offense would experience a penalty enhancement under this proposal.

³ New, “stand alone” institution built for Expanded Operating Capacity (EOC); single cells are assumed for close custody, and dormitories are assumed for medium and minimum custody (occupancy no greater than 130% of SOC).

“Add-on” facilities (close and medium custody) are built within the perimeter of an existing 1,000-cell Close Security Institution; a minimum custody “add-on” is built adjacent to an existing perimeter. “Add-on” facilities employ the same EOC custody configurations as “stand alone” (i.e. single cells for close custody, and dorms for medium and minimum custody levels).

⁴ Impact on incarcerated population is assumed for FY 2008-09, given the effective date of December 1, 2007 and typical lag time between charge and conviction (6 months).

Department of Correction – Division of Community Corrections

In FY 2005-06, 66% of Class H felony convictions resulted in intermediate punishments, predominately special and intensive supervision probation. *Thus, if future convictions for violation of the Article were to occur, the Division of Community Corrections could assume some additional costs for offenders placed on intermediate sanction/supervision.* It is not known to which type of sanction offenders would be sentenced, or for how long.

Included below is a brief summary of DCC sanction and supervisory costs:

- General supervision of intermediate and community offenders by a probation officer costs DCC \$1.96 per offender, per day; no cost is assumed for those receiving unsupervised probation, or who are ordered only to pay fines, fees, or restitution. DCC also incurs a daily cost of \$0.69 per offender sentenced to the Community Service Work Program.
- The daily cost per offender on intermediate sanction is much higher, ranging from \$7.71 to \$14.97 depending on the type of sanction.
- Intensive supervision probation is the most frequently used intermediate sanction, and costs an estimated \$14.97 per offender, per day; on average, intensive supervision lasts six-months, with general supervision assumed for a designated period thereafter.

Judicial Branch

Again, because the proposed offenses are new, there is no data from which to estimate the number of additional criminal charges or civil actions that might arise. Nor is it possible to distinguish how many violations fitting the proposed offense criteria have resulted in charges under G.S. 14-100 or G.S. 14-454. Accordingly, the potential fiscal impact for the Courts is indeterminate.

However, the Administrative Office of the Courts expects that any additional criminal or civil caseload will increase court-time requirements and the associated costs of case disposal. The table below illustrates the potential difference in estimated costs for criminal cases, by trial and guilty plea, assuming that some existing offenses (G.S. 14-100 and 14-454) would experience a penalty enhancement under this proposal. Effectively enhancing the penalty from a Class 1 misdemeanor to a Class H felony will elevate future cases to superior court, rather than district court. This elevation will increase jury involvement and workloads for district attorneys, superior court judges, clerks, court reporters, and indigent defense counsel.

<i>Offense Class</i>	<i>Trial</i>	<i>Plea</i>	<i>Change in Cost: Trial</i>	<i>Change in Cost: Plea</i>
Class 1 Misdemeanor	\$3,702	\$243	N/A	N/A
Class H Felony	\$7,345	\$325	\$3,643	\$82

** Change in cost, relative to prosecution at Class H felony level.*

Court-time requirements and personnel workload could also increase, contingent upon the number and complexity of resultant civil actions. This potential impact is inclusive of any action brought by the Attorney General in response to a violation of G.S. 75-1.1 (unfair methods of competition; unfair or deceptive acts or practices in or affecting commerce). Any civil penalty imposed (\$5,000; G.S. 75-15.2) by the Court upon a finding of violation would be credited to the Civil Penalty and Forfeiture Fund.

Department of Justice

Subsection (b) of new G.S. 14-133.33 also provides that violation of G.S. 14-133.31 constitutes a violation of G.S. 75-1.1, an unfair method of competition or unfair/deceptive practice affecting commerce. Chapter 75 of the General Statutes authorizes the Attorney General to investigate any alleged violation of the Chapter (includes G.S. 75-1.1) and to bring criminal or civil action. Thus, to the extent that additional violations and AG prosecution were to occur, some increased workload would be expected for the Department of Justice (e.g. Consumer Protection Division). However, it is not known how many investigations, prosecutions, or civil actions would result.

SOURCES OF DATA: Sentencing and Policy Advisory Commission; Administrative Office of the Courts; Department of Correction; and, Office of State Construction.

TECHNICAL CONSIDERATIONS: None

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