# Data Privacy Legislation:

# An Analysis of the Current Legislative Landscape and

# the Implications for Higher Education

**Scope of the Issue**

With the ubiquity of mobile devices and the increases in data breaches, Congress has responded with bipartisan support for comprehensive privacy legislation. As of August 2011, 18 bills have been introduced in the 112th Congress concerning data privacy. EDUCAUSE continues to follow this issue and has reported on several of these bills in earlier *Policy Update* blog posts.[[1]](#footnote-1) There are numerous websites and blogs that are following privacy legislation. For example, an interesting graphic[[2]](#footnote-2) illustrates the overlap among the bills and the blog entry, “112th Privacy Legislation” by Tim Lisko[[3]](#footnote-3) details each piece of legislation as it moves through the legislative process.

These privacy bills generally fall into three distinct areas: comprehensive online privacy protection, geolocation and mobile devices, and data security and breach notification. If enacted, many of the bills have implications for data collection, storage, and use that could affect higher education and campus IT operations and academic research.

**Online Privacy Protection**

Comprehensive privacy protection bills, including those introduced by Rep. Rush (D-IL) (H.R. 611), Rep. Stearns (R-FL) (H.R. 1528), Rep. Speier (D-CA) (H.R. 653 and H.R. 654), Sen. Kerry (D-MA) and Sen. McCain (R-AZ) (S. 799), aim to foster transparency about the commercial use of personal information and provide consumers with meaningful choice about the collection, use, and disclosure of their personal information. The Kerry-McCain bill also provides a safe harbor for organizations that participate in industry self-regulatory consumer privacy and data security programs.

Sen. Rockefeller (D-WV) has introduced “Do Not Track” legislation (S. 913) that fills a gap in the Kerry-McCain legislation by letting consumers opt-out of having their online behavior tracked, plus it sets up a legal framework to regulate violators. Rep. Markey (D-MA) and Rep. Barton (R-TX) (H.R. 1895) have offered a bill that amends the Children’s Online Privacy Protection Act (COPPA)[[4]](#footnote-4) to extend, enhance, and update the provisions relating to the collection, use, and disclosure of children’s personal information. The Markey-Barton bill further establishes new protections for personal information of children and teens. This bill would go well beyond existing federal law. The Children’s Online Privacy Protection Act of 1998 only requires websites aimed at children under 13 years old to obtain parental permission before collecting personal information, such as a child’s name or e-mail address. The new legislation would prohibit companies from using or providing to third parties personal information about children under 18 years old. Since campuses may likely have students under 18 or provide services to minors who participate in summer camps and other activities, this bill is important to watch.

**Geolocation and Mobile Devices**

Recently, consumers learned that their smartphones were automatically sending companies, like Apple and Google, information about the smartphone’s location—even when users were not using geolocation applications and, in Apple’s case, even though users had no way to stop this collection. These events have raised serious concerns about location privacy on mobile devices. Current federal laws allow many of the companies that obtain location information from customers’ cellphones and smartphones to give out that information without their customers’ consent. Sen. Leahy (D-VT) has introduced comprehensive Electronic Communications Privacy Act (ECPA) reform legislation (S. 1011) that will address the advancements in communication technologies, including smartphones and social networking sites, that have now outpaced the privacy protections included in the original law. Bills introduced by Sen. Franken (D-MN) and Sen. Blumenthal (D-CT) (S. 1223), Sen. Wyden (D-OR) (S. 1212), and Rep. Chaffetz (R-UT) (H.R. 2168) aim to close loopholes in federal law to ensure that mobile device customers know what location information is being collected about them and allow them to decide if they want it shared.

Additionally, the current legal environment creates a confusing patchwork of regulation. All the geolocation bills introduced create, to one extent or another, a legal framework designed to give government agencies, commercial entities, and private citizens clear guidelines for when and how geolocation information can be accessed and used. Perhaps most significant for the operation of campus networks is the bill introduced by Rep. Smith (R-TX), Protecting Children from Internet Pornographers Act of 2011 (H.R. 1981). This bill mandates that Internet service providers (ISPs) keep detailed logs, for up to 18 months, on all users to facilitate the prosecution of child pornography, including all IP addresses assigned, customer names, addresses, phone records, type and length of service, credit card numbers, and more. If passed, the constraints placed on campus networks would be staggering.

**Data Security and Breach Notification**

There are a number of pending data breach bills, including Rep. Rush’s (D-IL) Data Accountability and Trust Act (H.R.1707), Rep. Stearns’s (R-FL) and Rep. Matheson’s (D-UT) Data Accountability and Trust Act of 2011 (H.R. 1841), Rep. Bono Mack’s (R-CA) Secure And Fortify Electronic (SAFE) Data Act (H.R. 2577) , and Sen. Pryor’s (D-AR) and Sen. Rockefeller’s (D-WV) Data Security and Breach Notification Act (S. 1207). Other pending legislation, including Sen. Feinstein’s (D-CA) Data Breach Notification Act of 2011 (S. 1408), Sen. Leahy’s (D-VT) Personal Data Privacy and Security Act (S. 1151), and the White House’s Cybersecurity Proposal[[5]](#footnote-5) also address data breaches. Each bill or proposal differs slightly in its approach to protecting data from security breach and/or notification.

The bills proposed by Rep. Bono Mack, Rep. Rush, and Sen. Pryor and Sen. Rockefeller would empower the FTC to promulgate regulations for handling of personal data. These would include appointing information security managers; identifying and correcting potential data security vulnerabilities, and taking steps to safely dispose of electronic personal data. Rep. Bono Mack’s bill adds a requirement for data minimization so that an organization retains only data needed for a legitimate business purpose and otherwise disposes of personal information as soon as possible.

It is generally agreed that even the best security practices will not prevent all data breaches. In the event of a breach, however, these bills generally require notification of all individuals affected. The bills also exempt organizations from notification if they perform a risk assessment that determines there is no “reasonable” or “significant” risk of harm, such as identity fraud. Sen. Leahy’s bill and the White House proposal include an additional requirement that if a business makes an affirmative determination of no risk it is still required to promptly inform the government of this result.

Each bill differs slightly in its definition of “personal information.” In general, covered personal information includes an individual’s first name or initial and last name, in combination with other forms of identifying information, such as address, social security number, driver’s license, or financial account information. The Leahy bill would also cover unique biometric data, another category of personally identifiable information.

All of the current bills would supersede state data breach notification laws, although the Rush and Rockefeller-Pryor bills would make exceptions for state victim assistance requirements. Preempting state laws may be necessary to simplify an organization’s obligations, but the federal regime should not be weaker than current state laws.

**The Future and Implications for Higher Education**

When Congress returns from its August recess, it will have a number of these bills to consider. Opinion differs as to whether any legislation will finally be enacted. Because institutions of higher education handle personal data at various levels of its operation, it is important that we are attentive to passage of any legislation that require ISPs to retain more information about users and to ensure that the data that are already retained are adequately protected against disclosure. EDUCAUSE will continue to monitor and report on the progress of these various pieces legislation.

**Sources**

* Center for Democracy and Technology – <http://www.cdt.org/>
* Electronic Frontier Foundation – <https://www.eff.org/>
* Electronic Privacy Information Center – <http://epic.org/>
* Lisko, Tim. “112th Privacy Legislation.” *Privacy Wonk* (8/2/11). Available at: <http://www.privacywonk.net/2011/08/112th-privacy-legislation.php>
* Open Congress – <http://www.opencongress.org/>
* Privacy Rights Clearinghouse – <http://www.privacyrights.org/>
* EDUCAUSE Policy Update blog – <http://www.educause.edu/Policy/PolicyUpdate>
* U.S. Federal Trade Commission – http://www.ftc.gov
* U.S. Government Printing Office – <http://www.gpo.gov/>
* The White House – <http://www.whitehouse.gov/>
* Tucker, Jaime. *Privacy Diagram*. Available at: <http://twitpic.com/5ybqru>

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**Data Privacy Bills Introduced in the 112th Congress**

(as of August 2011)

| **Bill** | **Title** | **Sponsor** | **Status** |
| --- | --- | --- | --- |
| H.R. 611 <http://www.gpo.gov/fdsys/pkg/BILLS-112hr611ih/pdf/BILLS-112hr611ih.pdf> | Best Practices Act | Rep. Rush (D-IL) | Referred to House Subcommittee on Commerce, Manufacturing, and Trade – (2/18/11) |
| H.R. 1528 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:h1528ih.txt.pdf> | Consumer Privacy Protection Act of 2011 | Rep. Stearns (R-FL) | Referred to House Subcommittee on Commerce, Manufacturing, and Trade – (4/25/11) |
| H.R. 653 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:h653ih.txt.pdf> | Financial Information Privacy Act of 2011 | Rep. Speier (D-CA) | Referred to the House Subcommittee on Financial Institutions and Consumer Credit – (3/23/11) |
| H.R. 654 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:h654ih.txt.pdf> | Do Not Track Me Online Act of 2011 | Rep. Speier (D-CA) | Referred to the House Subcommittee on Commerce, Manufacturing, and Trade - (2/18/11) |
| S. 799 <http://www.gpo.gov/fdsys/pkg/BILLS-112s799is/pdf/BILLS-112s799is.pdf> | Commercial Privacy Bill of Rights Act of 2011 | Sen. Kerry (D-MA); Sen. McCain (R-AZ) | Referred to Senate Committee on Commerce, Science, and Transportation – (4/12/11) |
| S. 913 <http://www.gpo.gov/fdsys/pkg/BILLS-112s913is/pdf/BILLS-112s913is.pdf> | Do Not Track Online Act of 2011 | Sen. Rockefeller (D-WV) | Referred to Senate Committee on Commerce, Science, and Transportation - (5/9/11) |
| H.R. 1895 <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1895ih/pdf/BILLS-112hr1895ih.pdf> | Do Not Track Kids Act of 2011 | Rep. Markey (D-MA); Rep. Barton (R-TX) | Referred to House Subcommittee on Commerce, Manufacturing, and Trade - (5/23/11) |
| S. 1011 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:s1011is.txt.pdf> | Electronic Communications Privacy Act Amendments Act of 2011 | Sen. Leahy (D-VT) | Referred to Senate Committee on the Judiciary - (5/17/11) |
| S. 1223 <http://www.gpo.gov/fdsys/pkg/BILLS-112s1223is/pdf/BILLS-112s1223is.pdf> | Location Privacy Protection Act of 2011 | Sen. Franken (D-MN); Sen. Blumenthal (D-CT) | Referred to Senate Committee on the Judiciary – (6/16/11) |
| S. 1212 <http://www.gpo.gov/fdsys/pkg/BILLS-112s1212is/pdf/BILLS-112s1212is.pdf> | Geolocation Privacy and Surveillance Act (GPS) Act | Sen. Wyden (D-OR); | Referred to Senate Committee on the Judiciary – (6/15/11) |
| H.R. 2168 <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2168ih/pdf/BILLS-112hr2168ih.pdf> | Geolocation Privacy and Surveillance Act | Rep. Chaffetz (R-UT) | Referred to House Subcommittee on Crime, Terrorism, and Homeland Security – (7/11/11) |
| H.R. 1981 <http://hdl.loc.gov/loc.uscongress/legislation.112hr1981> | Protecting Children from Internet Pornographers Act of 2011 | Rep. Smith (R-TX) | Referred to House Subcommittee on Crime, Terrorism, and Homeland Security – (5/25/11); Hearings held – (7/12/11); House Judiciary Committee conducted markup and held a final roll call vote and approved the bill (19-10) – (7/28/11); bill moves to the full House for vote |
| H.R. 1707 <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1707ih/pdf/BILLS-112hr1707ih.pdf> | Data Accountability and Trust Act | Rep. Rush (D-IL) | Referred to House Subcommittee on Commerce, Manufacturing, and Trade – (5/6/11) |
| H.R. 1841 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:h1841ih.txt.pdf> | Data Accountability and Trust Act of 2011 | Rep. Stearns (R-FL);  Rep. Matheson (D-UT) | Referred to House Subcommittee on Commerce, Manufacturing, and Trade – (5/13/11) |
| H.R. 2577 <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2577ih/pdf/BILLS-112hr2577ih.pdf> | Secure and Fortify Electronic (SAFE) Data Act | Rep. Bono Mack (R-CA) | Referred to the House Committee on Energy and Commerce -(7/18/11) |
| S. 1207 <http://www.gpo.gov/fdsys/pkg/BILLS-112s1207is/pdf/BILLS-112s1207is.pdf> | Data Security and Breach Notification Act of 2011 | Sen. Pryor (D-AR); Sen. Rockefeller (D-WV) | Referred to Senate Committee on Commerce, Science, and Transportation – (6/15/11) |
| S. 1408 <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_cong_bills&docid=f:s1408is.txt.pdf> | Data Breach Notification Act of 2011 | Sen. Feinstein (D-CA) | Referred to Senate Committee on the Judiciary – (7/22/11) |
| S. 1151 <http://www.gpo.gov/fdsys/pkg/BILLS-112s1151is/pdf/BILLS-112s1151is.pdf> | Personal Data Privacy and Security Act of 2011 | Sen. Leahy (D-VT) | Referred to Senate Committee on the Judiciary – (6/7/11) |

1. See the following related EDUCAUSE *Policy Update* blog entries:

   Cheverie, Joan, “Mobile Privacy and the Responsibility of Communications Service Providers” (5/12/11): <http://www.educause.edu/blog/cheverij/MobilePrivacyandtheResponsibil/228777>

   Cheverie, Joan, “Electronic Communications Privacy Act of 2011” (5/18/11): <http://www.educause.edu/blog/cheverij/ElectronicCommunicationsPrivac/229064>

   Cheverie, Joan, “Consumer Privacy and Protection in the Mobile Marketplace” (5/19/11): <http://www.educause.edu/blog/cheverij/ConsumerPrivacyandProtectionin/229123>

   Cheverie, Joan, “Personal Data Privacy and Security Act” (7/15/11): http://www.educause.edu/blog/cheverij/PersonalDataPrivacyandSecurity/232390 [↑](#footnote-ref-1)
2. Privacy bills graphic from Jamie Tucker via his Twitter account, @JamieTuckerDC; graphic available from: <http://twitpic.com/5ybqru> [↑](#footnote-ref-2)
3. Lisko, Tim, “112th Privacy Legislation” (*Privacy Wonk*: 8/2/11). Available at: <http://www.privacywonk.net/2011/08/112th-privacy-legislation.php> [↑](#footnote-ref-3)
4. *Children's Online Privacy Protection Act of 1998*, available at: <http://www.ftc.gov/ogc/coppa1.htm> [↑](#footnote-ref-4)
5. See the White House’s “Fact Sheet: Cybersecurity Legislative Proposal”, available at: <http://www.whitehouse.gov/sites/default/files/fact_sheet-administration_cybersecurity_legislative_proposal.pdf> [↑](#footnote-ref-5)