

November 6, 2007

Hon. Edmund G. Brown Jr.
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Krystal Paris
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed state constitutional amendment entitled the "Identification Device Protection Act" (A.G. File No. 07-0056).

Background

Electronic Identification Technology. Radio frequency identification devices, or RFIDs, are technology systems used to collect and manage information about objects which are implanted with an electronic tag. When an RFID tag, which is attached to the object being monitored, is within a predetermined distance of an RFID reader, the reader is able to collect, and in some cases, modify the information stored on the tag. This distance depends on the technology used and can vary from about an inch to a hundred feet. The simplest tags will store an unchanging code that identifies an object, while tags that are more complex can store information that can be updated as the tag interacts with readers. The RFID tags implanted in pets, frequently called microchips, are examples of tags that only store unchanging identifying information. In contrast, the FasTrak electronic toll collection system uses tags that store the amount of credits a driver has purchased and can automatically modify the total when the driver passes through a toll booth containing a reader. Even the simplest tags, however, can lead to the collection of extensive amounts of information on an object when the reader is employed in conjunction with a computer database that is updated whenever the reader scans the tag.

Current and Potential Uses of Implanted RFIDs. The RFID tags can be implanted under the skin of humans or animals (referred to in this measure as subcutaneous implantation) for a number of purposes.

Implanted RFID microchips are used frequently in pets as a form of permanent identification, allowing animal shelters or veterinarians to use a reader to scan lost pets for identifying information contained in the microchip. Several local jurisdictions in California mandate that owners agree to implantation of RFIDs in their pets. Microchips are also used as a means of identifying and tracking both livestock and poultry. The United State Department of Agriculture, with cooperation from the California Department of Food and Agriculture, has launched the National Animal Identification System, which includes efforts to promote the voluntary use by farmers of microchips in livestock and poultry to help track animals in the event of a disease outbreak. Currently, RFIDs are being used in cattle and other animals for such purposes on a voluntary basis.

Implantable RFID tags have potential human applications, as well, although their use to date has been limited. It has been proposed that implanted tags be used to provide doctors with access to a patient's medical history, especially in cases where the patient is unable to provide the doctor with such information. For example, RFID tags have been implanted in Alzheimer's patients in Florida who are at risk of wandering away. The implanted tags have also been used in isolated instances as security measures. Both a Cincinnati company and Mexico's Office of the Attorney General have required some employees to be implanted with tags to control access to sensitive information, and Mexico's Attorney General was himself implanted with a tag to discourage potential kidnappers.

Subcutaneous Ink. Subcutaneous ink is a new and developing technology for identification. Instead of implanting a microchip under the skin, as is the case with RFIDs, ink is applied subcutaneously that can interact with a reader in the same way as an RFID tag. This technology is currently being developed for use in cattle.

Current State and Local Requirements Relating to RFIDs. Currently, there are no provisions in the State Constitution or in statute related to the use of identification devices in either humans or animals. However, effective January 1, 2008, recently enacted state legislation (Chapter 538, Statutes of 2007 [SB 362, Simitian]), forbids anyone from requiring another person to be implanted with a subcutaneous identification device. Violators are subject to civil penalties of up to \$10,000 as well as the payment of financial damages. In regards to dogs and cats, several localities in the state have mandated the use of RFID microchips in pets for animal control purposes.

Proposal

Ban on Mandatory Implants for Humans or Animals. Under this proposed measure, the State Constitution would be changed to specify that no governmental or private entities could make or enforce any law or ordinance that mandates the subcutaneous implantation of any type of device or ink in any human or animal. The measure would also prohibit anyone from being denied employment, education, medical services, health plan membership, certification, or licensure for refusing to have such a device implanted. This measure does not prohibit the voluntary use of such devices by government agencies or private parties.

In effect, this measure would place in the State Constitution a prohibition on the involuntary use of subcutaneous implants in humans similar to the one that will become law under Chapter 538. Enactment of these provisions in the Constitution means that they could only be changed in the future with the ratification of the voters.

This measure also changes state law by extending the ban on subcutaneous RFIDs to animals. Existing local mandates that dogs or cats be implanted by RFID microchips would no longer be legally enforceable should this initiative be enacted. Also, the state would be precluded in the future from requiring the implantation of livestock or poultry with such devices as a means to prevent or mitigate the outbreak of diseases in animals that could also affect the health of the public. The constitutional prohibition on placing microchips in animals also could be changed in the future only with the consent of the voters.

Fiscal Impact

This measure could have various fiscal effects, particularly in regard to local animal shelters operated by counties and cities affected by the measure's provisions that block the adoption or enforcement of any ordinances that require that pets be implanted with RFID microchips. Local animal shelters which implant the devices in pets would have lower costs than otherwise because these activities would be reduced or discontinued, but these agencies would also lose some or all of the revenues from the fees they would otherwise collect from some pet owners for implantation of the devices. In addition, since microchips can sometimes foster a quicker return of lost pets to their owners, these shelters may also incur higher operating costs for keeping unidentified animals in shelters, and euthanizing animals that have not been recovered by owners. The net fiscal effect of all of these factors would potentially be higher local government costs than would otherwise be incurred in the future for animal shelter operations. The extra costs would probably not be significant on a statewide basis.

Summary of Fiscal Effects

- Potentially higher local government costs than would otherwise be incurred for animal shelter operations that would probably not be significant on a statewide basis.

Sincerely,

Elizabeth G. Hill
Legislative Analyst

Michael C. Genest
Director of Finance