

## Data Privacy Unlocked: Legislating Data Privacy Series



**Episode 13 –  
Data Privacy Unlocked: A Conversation with Kentucky  
Sen. Whitney Westerfield**  
April 28, 2022

Speaker	Statement
<b>David Stauss</b>	Welcome to another episode of Data Privacy Unlocked. My name is Dave Stauss. My guest today is Republican Sen. Whitney Westerfield, from Kentucky. Sen. Westerfield is the primary author of Senate Bill 15, entitled <i>An Act Relating to Consumer Data Privacy</i> . Senator, thank you so much for joining us today on the podcast.
<b>Sen. Westerfield</b>	Yeah, Dave, thanks for having me on. I appreciate it.
<b>David Stauss</b>	It's no problem. And so, I like to kind of start... I mean, it's it's, you know, it'll be a couple of weeks before we turn the podcast around, just getting it through the editing process. But just to kind of acquaint our listeners, it's April 18 <sup>th</sup> – Monday, April 18 <sup>th</sup> – and I say that because, you know, my understanding is Kentucky just finished its, its process. Yeah, Senate Bill 15 did not pass.
<b>Sen. Westerfield</b>	Yeah, this is a nice little In memoriam episode we can do for Senate Bill 15, which failed to, to make it anywhere in the state Senate. That's not completely true. It was given a committee hearing. I just had a reluctant committee chair, but that's part of the process. I had all but his vote on the committee and more than enough votes to put it on the Senate floor and to successfully pass it out of the Senate chamber, approaching



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	30 votes out of the 38, and there were a few that I just never bothered. Once I realized the bill wasn't going to go anywhere, I stopped whipping votes. So I think I had a solid bill from a political standpoint, but constitutionally we shut down April, midnight of April 14 <sup>th</sup> , and we did not see the bill make passage. So on my way home from Frankfort and the three-hour drive, one of my stops that night I sent the email requesting the bill draft to be ready for the '23 session.
<b>David Stauss</b>	You've, you've stolen so much of my thunder already on questions.
<b>Sen. Westerfield</b>	Well then we're off to a smashing start, Dave.
<b>David Stauss</b>	That was great. I mean, like when you render me irrelevant, we've reached a good point, and then done with the podcast. So yeah, I mean it's, yeah, listen, you know, no surprise the legislature closed and the bill didn't pass. But that's the nagging question, right? Will you be back next year? And it sounds like the answer is yes.
<b>Sen. Westerfield</b>	Yeah, I'm not in cycle this year, so Lord willing I'll be here in January of '23, and if so it'll be the first thing I file on Day One. The advocates who were about to be very, very opposed to the bill are aware of that, particularly the ones that I'm friends with the most, who represent various business interests. But they also know it's my most important bill, and I'm not going to be sleeping on it between now and next January. I'm going to build as much of a coalition of support behind it in my chamber and in the House as I possibly can. I've got a, I've got a member of the House that's just as passionate about it and as converse in it as I am, but I'm going to try to recruit a couple of others to help shore that up. That's a big caucus in the House I've got to deal with, Republican caucus to begin with. I don't normally see much trouble from the Democratic caucuses, but I want to build that support up in anticipation of a better run at it in '23.
<b>David Stauss</b>	Yeah, and so, you know, we were chatting just before we jumped on and hit the record button. But I mean I think it's important for listeners who maybe have not gone through your bill, this is a strong bill. This is not the Virginia or the Utah version. This borrows from GDPR. There's a lot of opt-out language in it. There's a limited private right of action in it as well. And I think people would find that surprising that a Republican senator in a deep red state would be pushing a, yeah, a very consumer-friendly privacy bill. Can you kind of elaborate on that for us?
<b>Sen. Westerfield</b>	Well, the other bills are just not good. I started with a bill that was handed to me by one of the state privacy and security coalition members. One of their Kentucky branches of that big, national or rather



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international group reached out and said, “Here’s –.” I asked. I asked for language. You tell me where you want me to start. And that’s literally what I started with. But then I pulled from Colorado’s, California’s to a lesser extent. Mainly Colorado’s and Virginia’s and a little bit as you just mentioned of the GDPR to improve upon that model bill that they wanted, which came from Virginia at the time, though I suspect that that will be a different bill the next time they start handing that out.

But I added to it a lot. I thought the thresholds were way too high in the Virginia and Colorado bills. It carved out or exempted out a lot of small and regional players that are, in my opinion, increasingly using consumer data to build up their business and to generate revenue, or importantly, using third-party services that rely on that data for free as part of that arrangement. And I don’t care how few – I mean, I’ve been very blunt and candid. I think the threshold should be zero customers or customer records. If you’re in this space at all, it’s important that you do so responsibly, that you behave in this space responsibly. And I think there’s a way for that to be done.

I just think the other states’ bills have been really watered down such that it doesn’t get at what I’m trying to get at. I want customers to know where their data is going and have an opportunity to control it. And I guess I’ll criticize myself here, the other sponsors, fine legislators as they are, in other states just are as big a nerd as I am. And so, it bothers me to see bills that I know aren’t going as far as they ought to go to protect privacy and make it through. But – I mean, Dave, I could have amended mine four times, five times, six times, I was given the opportunity, just switch to Virginia. They usually wouldn’t give me any specific reason for it. They just said, “Well, Virginia is the better version.” Not just the coalition, but the other state-based advocates who started listening to the coalition. But I don’t like Virginia’s and I don’t think it, I don’t think it does much to protect consumers. And I think, I just, I didn’t want to pass something.

And you and I are talking about this. Before the session began, as you well know, the country had three states with a bill in place: California, Colorado and Virginia. I don’t know how many other states... I know a bunch of them, including Kentucky, had bills up for consideration this year, and I don’t know what those other states look like, but I knew that if I just caved and went with what they were asking for to do – the Virginia model of this legislation – that that would be three or four states or five states or how many other states. It would be increasingly more difficult to do the right thing and push back against that norm, against that first open standard being set. And I just, I didn’t want to add or contribute to the deluge of states doing it wrong.



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David Stauss	So let me ask you this – and thank you for that. Where does this... Obviously you're passionate about it. Where does this passion come from? How did you get interested in this, this topic area?



**Sen. Westerfield**

I'm a nerd. I like gadgets. I love following the technology space. I love learning about it, reading about it. The players that I use products of, the players that I don't, it is just of interest to me. And I realize, and have realized for a number of years, that this is a space we don't have any public policy in. And I never am surprised. I'm never, I should be – I am disappointed, but every time there's a congressional hearing, I am still stunned at just how ill-prepared our members of Congress are or clueless. And I say that with respect because there are people in both parties that just don't understand the issue at all. And every public hearing is wasted. They want to ask "gotcha" questions to get sound bites or whatever, even those that can't do well. I just have increasingly little faith Congress is going to do something, and we're way past the time for states to stand up and do something on their own.

Kentucky has got a consumer protection statute. It was written years and years and years ago before anybody was thinking about the data economy, and it doesn't cover this at all. And I don't think you can, you know, bolt on some pieces to make it work for the data economy. We've got to have a whole other thing, a whole other separate section of the statute defining all the terms at issue and so forth. And I guess I just, I thought we were overdue to do something ourselves. I didn't trust anybody else to file such a bill, and I don't think, I don't think there's any risk of that because nobody else is thinking about it.

And here's the example I like to share. And this is now four years old, three or four years old, Dave. There's a story from the *Dallas Morning News* and it was about a company called Live Mobile Insights. And I've been aware of this issue for a long time, but this was an eye-opening story to show my caucus version and the rest of the legislature here in Kentucky that I've given a slide deck talk a couple of times about it and I've used this graphic from the *Dallas Morning News* in there. And the story is about this company called Live Mobile Insights that wanted to know where Chick-fil-A customers go to lunch on Sundays. And, of course, the graphic is a map of the whole country, and every state is filled in with the logo of the restaurant they go to on Sundays. And Kentucky is a Cracker Barrel state, if you're curious.

But the thing is that I tell people, "Think about what you had to know to identify this information." I had to know where David Stauss goes seven days a week at the same certain time of day, so that I knew where the device that Dave Stauss uses on Mondays at lunch time that goes to Chick-fil-A is the same device that showed up at Cracker Barrel or wherever you go to at that same time on Sunday. And every state was filled in. There's not a user anywhere that knowingly agreed to give that information out. And when that finally sinks in, I just, I'm surrounded by a bunch of head nods and they're all freaked out. I see that sort of stuff happening all the time, increasingly, and most people are ignorant about



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<b>David Stauss</b>	<p>it, and I mean that in a kind way. They just aren't aware. And I wanted to, I wanted to bring awareness to it and do the best I could in Kentucky to fix it.</p> <p>You know, before we jumped on I had shared, I'm a father of three young boys, so I think certainly the where-do-I-go-on-Sunday-that's-not-Chick-fil-A one is right up there, is right up my alley. That is, that's something I'd actually be really interested in thinking about that – where we go and tracking it.</p> <p>So let me ask you this, though, you know – getting a little off of track and getting back on now... This, this concept – I mean we've seen it, you know, California passed it and Colorado did, um and Virginia: all Democrat states. You know, Utah jumps in with a much more business-friendly bill, a Republican one. But it sounds to me like your caucus is prepared to do something stronger – a Republican caucus is prepared to do something stronger – and I think that that would strike people as really interesting that this is almost like a Libertarian privacy issue. Am I getting that right, or do you think that that's....?</p>
<b>Sen. Westerfield</b>	<p>I think... Well, at first I can't speak for my caucus and I had those votes. That whip count is about a month old and everybody can change their position. I mean, heck, the membership of my caucus in the Senate is always going to change this election cycle in some meaningful way. So who knows what it will be in 2023? But I know that when I spoke to my members one-on-one, and when I spoke to members of the minority caucus one-on-one, I got a lot of really strong feedback that this was something we should do. Now, there were some that were more concerned with providing protections for consumers, and some that were genuinely interested and concerned about any sort of compliance costs for businesses, particularly small business, and I get that completely. But there was pretty universal understanding that this is a space we can't ignore much longer. And I think that does track with your explanation there. I think people are concerned about, everything about us being out there in the wild and there being no mechanism of control or protection for that. Again, I think it's an important policy conversation that we should have started having many, many years ago. But better late than never, I suppose.</p>
<b>David Stauss</b>	<p>Yeah, and, you know, I've interviewed – I'm blanking on the number of lawmakers now that I've talked to who were in your same position. Seemed like the same, the same sentiment, right? We want the federal government to act. The federal government should act. We just can't do nothing anymore. It's too dangerous.</p>



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Sen. Westerfield	That's right.
David Stauss	And I hear you expressing that as well, if I'm getting that right.
Sen. Westerfield	<p>Yeah, I think it's exactly right. I mean, my gosh, if I had a dollar for every time someone from the coalition or one of their members said, well, I mean to start every single conversation or email thread with, "While we would prefer a federal solution, we are willing to talk about X." I get it. We all would love that if we only had that one thing to follow. But Congress isn't going to do it anytime soon and I wouldn't trust their work product if they did. In fact, Congress is considering a couple of bills right now that are garbage. And I forget the proper names of these things. But I wrote a letter to Leader McConnell and to Sen. Paul asking them to please do something better than the nonsense that's up there right now.</p> <p>The American Innovation Online Act and the Open App Markets Act, neither of which will accomplish the objectives that their sponsors would have us believe, are the intentions of those goals. And so, again, I still don't trust that we're going to get a good work product. We don't have to make it that complicated. And I don't want to cut off the data economy; it's a lot of value. There's a lot of economic value there for businesses of all sizes, for consumers of all sizes. There's value to us. I just want to have consumers a little bit closer to the front seat and not in the trunk gagged and bound. And I think there's a way to do that that allows both of them to coexist. My bill, I think, gets closer to that than anybody else's bill. That's a shocker that a bill sponsor thinks their own bill is better than the others that are around. But I try to strike that balance. My private right of action is a perfect example of that, and there are others, but I tried to find something that was in the middle.</p>
David Stauss	You know, let me ask you – a slight change of subject, but I think it digs into it. There was a second bill that was run in the House this year. Tell us about that. You got your bill first and then the second bill comes out of the House, the ( <i>inaudible</i> ) Bill.
Sen. Westerfield	Well, that was the work of the State Privacy & Security Coalition, who I found did not operate in good faith with me – at least not with any respect to the process. Nothing unusual at all about a competing bill being filed. It's not something that happens all the time, but ordinarily if you're working in good faith and with respect to the bill sponsor, you let them know that that's coming. They found a willing House member to file their model bill and it dropped one day. They dropped it and, of course, they didn't tell that sponsor that the Senate judiciary chair had filed one and has been working on it for many, many months. Didn't talk



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	to them about the details. And, of course, that sponsor is a great man, a good legislator, does a fine job, is not at all conversant in the issues involving consumer data privacy and protection. Lobbyists handed him a bill and he filed the bill. I was able to scuttle that bill and it never went anywhere, thank goodness. But it also let me know who I was dealing with and what they were willing to do.
<b>David Stauss</b>	You mentioned, sort of, the role of lobbyists a couple of times. You mentioned the coalition made a fair amount of news recently with Apple deciding to leave the coalition. Not sure if that came across your newsfeed.
<b>Sen. Westerfield</b>	It did.
<b>David Stauss</b>	And I don't need you to name names. I'm not asking you to do that by any stretch of the imagination. But I do want to get a sense of – because I think listeners, they see bills gets proposed, they hear about committee hearings, but what they don't see is, sort of like, the behind-the-scenes stuff, right? The sausage-making, so to speak.
<b>Sen. Westerfield</b>	Yeah.
<b>David Stauss</b>	The process of legislating. What, just in general terms, I mean, what is that like? You obviously heard from the coalition. Did you hear from privacy advocates as well on your bill? Did they jump in to support your bill?
<b>Sen. Westerfield</b>	Eventually there were some groups that jumped in to support the bill. There was – I'm drawing a blank now on who it was. <i>Consumer....</i>
<b>David Stauss</b>	<i>Consumer Reports</i> , maybe?
<b>Sen. Westerfield</b>	Yeah, maybe it was <i>Consumer Reports</i> , was a group that came in to support it and send a letter of endorsement. By that time, the decision had been made by the chair not to advance the bill and I couldn't move it somewhere else. But there were certainly a whole lot of more, a whole lot more voices opposed to it or just trying to express concern. And they would all come see me in my office and it would be a pleasant, cordial discussion or raise concerns about – vague concerns for the most part – about my bill. Only one or two groups, literally only one or two – could name specific provisions that they had heartburn about and they all, and those one or two groups had trouble with the PRA and the threshold that I had chosen.  For context for listeners, Virginia and Colorado had thresholds of 100,000 customer records or customer accounts. You had to have





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100,000 or more customers each year, and for in that year if you had 100,000 or more customers, individual customers, not specific pieces of customer data, which would be a much lower threshold, but 100,000 specific customers. I think 100,000 specific customers is way too high. That leaves a whole lot out. And so, my opening bill as I filed it had a 10,000-customer account threshold. And there were people asking me to move up without naming a specific threshold. One group local to Kentucky, specific to Kentucky, who I have a very good relationship with, asked for me to set it at 50,000. I never agreed to go that high. But there were objections to that threshold, and the objections just generally to the private right of action.

But there was a lot of the effort behind the scenes. You mentioned this bill being filed in the House. Again one of the – it was one of the groups that has a state presence in Kentucky, they've got a presence in all other states, and their national group is a member of the SBSC, and they decided to try to run an opposing bill. And for all I know we're having meetings with House members on that bill. I know that when lobbyists would meet with me it would be more cordial and then I would get reports from my fellow senators about meetings that were trying to scare them into saying my bill was some next generation California awfulness that would just kill business and do great damage. And that my private right of action was the end of Western civilization. And that my thresholds were so high or so low that this would impact everybody, when in fact it wouldn't, even though I openly admitted I wished I could make it apply to everybody.

So there's a lot of that work that happens. We're talking about this, Dave. My bill got one committee hearing – without a vote, just an information-only hearing, which was very good and nice. And as I told you before we started, I had every member of the committee but one to say yes. Unfortunately, the one I needed was the chair. So I had a lot of support. But that one meeting was preceded by and followed by a ton of meetings with legislators in their offices. There's a ton of legislating and policymaking and negotiating that happens well outside the committee room, and I'm outnumbered there. I'm just the one guy filing this bill, being the nerd that I am, arguing for why it's important, and I'm up against just about every lobbyist that can be hired in the commonwealth.

**David Stauss**

And thank you for that. In the interest of time, I want to ask you about one of the provisions in your bill. Again, I've mentioned that I've got young children, and what really kind of struck me is your treatment of children's data. You would say in the bill that for targeted advertising or tracking your sale or share of personal data, you would need consent if



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Sen. Westerfield	<p>it's for under 18, which would really raise the bar on those. I mean, California is 16. I take it that was intentional.</p>
Sen. Westerfield	<p>It was. You know, there is a lot of people asking for language that just tracks with the federal standard, and I'm drawing a blank on what that federal act is that sets a lot of online privacy concerns at 13. It bothers me to think that a 13-year-old child could agree to be targeted and followed and tracked from one thing to the next, and that data could follow them for a long time. There's some data, as you well know, that's got a shelf life of maybe a week or two, or maybe a month of really important value, but after that it's not nearly as important. There's some data, though, that follows you forever that has value. I wanted to go further than that and protect folks as much as possible. Again, I sat down with the coalition's dream bill and then changed and added to it and took from it as I felt I needed to, to provide more protections.</p>
David Stauss	<p>Let me ask you this: So when I talked to other lawmakers and we've looked and seen what bills have passed in other states, attorney general support tends to be a big piece of the puzzle.</p>
Sen. Westerfield	<p>I'd say that depends on whether or not your attorney general is of the same party of your majority caucuses or not, but yeah.</p>
David Stauss	<p>Yeah, and, you know, not to... Obviously we've learned a lot in the past few years how states differ, but, you know, as far as Kentucky, was the attorney general of Kentucky engaged on this or supportive of the bill?</p>
Sen. Westerfield	<p>They were not going to take a position on the bill. I reached out to them, so they did not engage on their own. I reached out and asked them. I said, "Hey, here's my bill draft." Back even before I filed it, I said, "Can you tell me, how do you think this looks? This language tracks with other states. It's sort of similar to the consumer protection. Once the OAG is activated in my bill, it's similar to our existing longstanding consumer protection statute framework. Is this something you work with? And then, two, give me a price tag. What's it going to cost your office to do this?" And they provided both and they, I mean they really didn't have any changes to the structure of the bill, but they did not take a position on it. They provided me the dollar figures for what it would cost, which I thought were pretty reasonable.</p>
	<p>Again it goes back to my PRA. I just, this is me trying to find that balance again. If you are pro-business, the OAG is the only way to go for enforcement of a bill like this. If you're pro-consumer, then a private right of action full blown is the only way to do that. I had no interest in doing either of those extremes. If you've got a wide-open PRA, then</p>



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	<p>you're inviting the trial bar in, and as a practicing attorney, I don't want that, and that wasn't my objective. My objective was to provide a way for consumers to control and protect their own data. Creating a feeding frenzy for the trial bar was not a goal of mine.</p> <p>On the other end, the OAG enforcement is mostly fine, but there's a threshold – right, Dave? – under which there's nothing that will happen. Depending on where your OAG feels triggered to do something, there's going to be some number of Kentuckians – or pick your state – who file a complaint. A form letter gets spit out of a computer that no human ever touches. It's automated, printed, mailed to some business. And beneath that... You know, how many complaints is it going to take to get above just that form letter from the AG's office? Is it 200 Kentuckians before somebody decides to act? Or is it going to depend, as I think it would, on who the defendant is? If we're talking about going after Google or Amazon, it may not be a threshold of 200; it may only 20 complaints. But if it's some small-time regional company that's being really abusive with data but won't make the splashy news press release sort of pizzazz that OAGs of both parties are famous for looking for, or frankly to give credit to OAGs, those sorts of size companies may not have the pockets deep enough to cover the expense of the litigation should the OAG win. It bothers me that there could be a number that we don't – no one can quantify of people that won't get any sort of relief. And so, I wanted to create a private right of action that covers that group. And that's why I wrote what I did. But again, trying to find some place in the middle that's on neither end of the extreme here in this continuum of concern. I think I've got a winning idea there, but legislatively it clearly wasn't yet. I don't think that was the reason. I think there were other parts that were the reason. Again, it will be something I file on Day One of '23.</p>
<b>David Stauss</b>	<p>You ended with where I was going to ask you for my last question, I think, today, which is, you know, the legislative session is closed. I imagine you'll open back up in probably January or February of next year. I haven't looked at the opening date. What happens between now and then? Or do you talk with stakeholders? Set up a task group to work through these issues? Do you have any idea of how? Or do you just let the bill lie until – ?</p>
<b>Sen. Westerfield</b>	<p>Oh, no, no, no. No, I plan on, I plan on coming back prepared as I was this year, but prepared in the sense – I've already made changes to the bill as filed. So the version you've read I had some additional changes in it that I've added over the course of the session based on feedback from various groups. Even the PRA that I've talked about is different from, what you read is different from what it is right now. So I'll have that bill and I'm going to shop it out to every group that I can. But first I'm going</p>



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David Stauss	<p>to work on my legislative groups, my legislative leadership and caucuses, and sit down with one-on-one meetings if that's what it takes and just try to get firm positions from as many people as I can before the session even starts. I want to at least open the door and try to, try to protect against and inoculate against the lobbying effort that I know is going to come at the bill. If they know that they've heard from someone who knows what they're talking about before they hear from a lobbyist that's only going to tell them all the bad, terrible things that my bill magically is going to do, then I've at least, I've dampened the impact of that effort that I know is going to come forward. So that's my objective between now and January. In the meantime, policy wise and drafting wise, there's nothing else for me to do. So all I've got is that.</p>
Sen. Westerfield	<p>Thank you so much for joining us on the podcast. Do you have any final parting thoughts before we draw –?</p> <p>Well, I would just encourage other legislators who are listening to this and other privacy-focused advocates to not step back but to engage more and to get involved in this effort in every state. We're talking now on the 18th of April. During this session I was told that Virginia was the gold standard and was the model. I have reason to believe that the coalition is now pushing other states – that while they were lobbying my state to go with Virginia, they were lobbying Virginia to water down theirs and they were lobbying yet other states with a new even more business-friendly bill draft. I know that if we don't push back and try to secure some key protections for consumers, regardless of their age, and to create a way for this data economy to thrive responsibly, it'll be that much harder for it to get fixed down the road or to add things to it down the road. So I would encourage everyone to gear up and get informed about this policy. I assume that most of your listeners are people that are already in this space and are aware. If you are for something like this and your state hasn't done something yet, go find a bill sponsor that can speak conversantly on it and understand the issue and can be passionate about it, and then move on and press forward so that we can get a gold standard that looks a little less like these other states.</p>
David Stauss	<p>Well, Senator, thank you so much for your time today. It's been a fascinating discussion. We're excited to see what you do next year.</p>

