



AMERICAN CIVIL
LIBERTIES UNION OF
WASHINGTON
705 2ND AVENUE, 3RD FL.
SEATTLE, WA 98104
T/206.624.2184
WWW.ACLU-WA.ORG

February 17, 2009

To: Interested Parties

Fr: Doug Klunder, Privacy Project Director

Re: Electronic tolling

Recent proposals for financing construction of a replacement bridge for SR 520 have involved charging tolls for vehicles crossing Lake Washington, on either SR 520 alone, or on both SR 520 and I-90. The ACLU takes no position on whether tolls should be used, nor on the appropriate level of toll charges. We do, however, firmly believe that any toll system must comport with basic civil liberties principles, including the right to privacy and equal protection.

BACKGROUND

As currently proposed, all tolling across Lake Washington would be handled electronically; there is currently no plan to have any tollbooths where payment can be made in the traditional manner with cash. Instead, two mechanisms will be used for electronic toll payment. The primary method is the use of a Good-to-Go! transponder. An individual can open an account with the Department of Transportation, and fund it in a variety of manners (most commonly through a credit card or EFT transfer from a bank account), and link it to a transponder which is purchased from DOT. When that transponder is read on the highway, the toll will automatically be deducted from the account. This mechanism is already in use on the Tacoma Narrows Bridge (as one option), and in the HOT lanes of SR 167 between Renton and Auburn (as the only toll option).

Not all vehicles will be equipped with transponders, so a secondary method of recognizing vehicles is proposed: cameras combined with license plate scanning software. Drivers intending to use a tolled area can register and pay in advance, in effect registering their license number; when that license plate is viewed on a car without a transponder, the list of pre-registered plates will be checked. Drivers who have not pre-registered/paid will be sent an invoice, with an “administrative fee” added. Prepayment can be done through a variety of methods, including online and by phone (with electronic payment options), and maybe even by cash at a service center. Some of the details of the system are still unclear, such as how prepayment works with variable tolls (where the rates change based on current congestion levels). Some of this technology is currently in use at the Tacoma Narrows Bridge; although non-transponder prepayment is not currently an option, cameras are used to detect and identify vehicles that use the transponder lanes without having a valid transponder.

It is anticipated that the number of toll facilities will burgeon over the coming years—both to pay for expensive highway projects and to reduce highway congestion and greenhouse gases. After going for almost 20 years without tolls anywhere in the state of Washington, in just the past two years we

have already added two toll facilities (Tacoma Narrows Bridge and SR 167 HOT lanes), and are exploring many more (including the Lake Washington bridges and the Alaskan Way Viaduct replacement). It would not be surprising to see the current Good-to-Go! system expanded to handle Washington State Ferry fares as well. As the number of toll facilities increases, it is also likely that the number of Good-to-Go! accounts will increase, with a substantial percentage of the population in areas around toll facilities using transponders.

PRIVACY

There are two threats posed to privacy by electronic tolling: the record of toll payments (including date, time, location, and identity), and the potential secondary use of tolling technology for surveillance unrelated to use of toll facilities.

The obvious threat to privacy is the record of toll payments, showing each time a person passes through a toll facility. That provides a considerable amount of information about that person, especially as the number of facilities increases. It can reveal work, family, recreational, and social patterns, as well as variations from the normal pattern. It could even reveal political leanings (heading towards a rally) or medical issues (frequent travel to medical facilities). If there is variable tolling based on occupancy (one option being discussed), the records can show whether an individual travels alone or with others (work colleagues, family members, or perhaps others). Areas that already use electronic tolling have received a significant number of requests for toll records about specific individuals, often in the context of a divorce proceeding or a criminal matter. (Existing law varies between jurisdictions as to whether requested records must be disclosed.)

The less obvious threat is secondary use of transponders. The Department of Transportation is ideally situated to use information from transponders for purposes other than toll payment. In theory, DOT could place readers in a variety of places to track vehicle traffic. Traffic planning is ever more dependent on data revealing what typical driving patterns are like. Traditionally, DOT has been forced to accumulate this data through surveys, or by manually trying to capture license plates of drivers on sample days at sample locations. If transponders are widely used, at least by the most frequent highway users, DOT can instead capture that information by placing readers at locations of interest. Fortunately, RCW 47.04.240 prohibits any governmental use of transponders that provides individualized information unrelated to toll transactions.

The prohibition on secondary use does not, however, apply to third parties. Depending on how transponders are configured, and exactly how they communicate with readers, it may be possible for a third party to use the transponder for tracking purposes. We can be reasonably confident that DOT has taken precautions to avoid cloning of transponders, or unauthorized access to financial information, or perhaps even unauthorized access to personal information entirely. It is quite possible, however, that the transponder is set up to always use a unique identifier as part of its communication with the reader—just as is done with ORCA transit passes and enhanced driver's licenses. This unique number is not meaningful in and of itself, but if it remains the same for a given transponder, that number will identify the transponder, and may eventually be able to be coupled with the identity of the driver. (Imagine, for instance, a reader installed at a gas station, which could combine the number of the transponder with the identity of a driver who pays for gas with anything other than cash.) Shopping malls could find it valuable to be able to identify whoever drives into

their parking lot, accumulating over time who is a frequent visitor, or comes only during big specials, or the like.

There is no way to entirely eliminate the threats to privacy posed by electronic tolling. At the same time, there are undeniable benefits to electronic tolling, including convenience for drivers and reduced highway congestion. Accordingly, the ACLU does not suggest that electronic tolling be prohibited. Instead, we believe that non-electronic tolling must be available as an option to drivers who are more concerned about privacy than convenience, and that both technological and legal measures be implemented to minimize the risks to privacy posed by electronic tolling. Specific recommendations are discussed below.

EQUAL PROTECTION

In addition to the threat to privacy, the ACLU is also concerned that a move to all-electronic tolling will pose unreasonable burdens on some members of society. Not all drivers will wish to obtain a transponder and open an account, and some that wish to do so may be unable to do so. For example, infrequent users of the Lake Washington bridges—both local residents and visitors—may see no reason to pay for a transponder that will be rarely used. Some people will refuse to use a transponder because of privacy concerns. Others may not have sufficient funds to buy a transponder (\$12) and open an account (minimum \$30 prepayment). Those without a credit or debit card likely need to appear in person (during business hours) at a service center (of which there is currently only one). And since transponders are currently tied to a single vehicle, they don't work for those who share vehicles (e.g., Zipcar users).

Similarly, electronic tolling without a transponder also poses burdens on drivers. Although DOT intends to make the process as easy as possible, by allowing prepayment via telephone or online, many people are still left behind. Most obvious are those without telephones or computers, and those without credit or debit cards. Perhaps cash payment will be allowed via service centers, but that requires an additional trip (adding to road congestion) whenever such a person wants to cross Lake Washington. And if a person without a credit card needs to take an unplanned trip when service centers are closed, there is no apparent way to do so without incurring a substantial "administrative fee" for post-trip billing, which bears a striking resemblance to a fine.

One should also not underestimate the confusion factor for infrequent drivers, including out-of-town visitors. No matter how good the signage, many such people will simply not understand that they are supposed to place a phone call before crossing the bridge. And those who do understand, but simply forget to place the call before starting their trips, also raise concerns—the specter of confused people fumbling for credit cards and cell phones (and handfree units in order to comply with state law) while trying to remember their license plate numbers (or fumble for rental agreements) all while driving on an unfamiliar highway makes one wonder about the safety implications.

The ACLU believes that highways are a basic component of modern society, and must be reasonably available to all. Requiring all-electronic tolling will eliminate that availability for a significant portion of society. Although that is currently done for the HOT lanes on SR 167, travel in the adjacent regular lanes is open to all. In contrast, there is no reasonable alternative to using the Lake Washington bridges for many drivers, and even less option to avoid the Tacoma Narrows

Bridge. Requiring either participation in all-electronic tolling or avoiding these bridges places a huge burden on drivers without transponders. It is worth noting that over 25% of drivers on the Tacoma Narrows Bridge currently pay via cash; these are people who would instead need to use a complicated phone/online per-trip option.

Although the Final Report of the 520 Tolling Implementation Committee asserts that electronic tolling supports variable tolling (p. 34), just the reverse is true. Variable tolling could be easily handled with cash payments; the amount of money charged simply varies depending on time of payment. In contrast, any system that separates the moment of payment from the moment of driving causes problems. If the toll is determined at time of registration, there will be incentive to “game” the system by registering at off hours; if determined at time of travel, there does not appear to be a way to prepay in cash. Perhaps the intent is to always charge pre-trip registrants at the highest variable toll, which is clearly unfair. Overall, we are concerned that tolling authorities will unreasonably bias toll rates in favor of transponders, placing a greater toll burden on those who can least afford it. A fair system would allow only relative collection costs to determine differences in tolls based on type of payment; that includes limiting the “administrative fee” for post-trip invoicing to the actual costs of sending the invoice.

SPECIFIC RECOMMENDATIONS

1) Provide payment lane(s) with no record kept of vehicle identity

The only way to ensure anonymity in travel is to prevent the creation of records of the travel. Once a record exists, there is no simply no way to ensure it will not be used, either by the lawful custodians of the record, or by unauthorized parties who gain access to it. All electronic toll payment methods require making a record of the identity of vehicles passing the toll point. In contrast, if tolls are paid in the traditional method via cash at a tollbooth, there is no need to record the identity of the traveler. Allowing cash payment also solves the equal protection problems discussed above, by providing a reasonable method for all individuals to pay tolls and gain access to a necessary thoroughfare. Accordingly, the ACLU urges the Legislature to mandate lanes accommodating traditional cash payments in any tolling project it authorizes; the only exception should be HOT lanes where travel remains freely available in adjoining lanes of the highway.

2) Retain records only as long as necessary to ensure payment of tolls

The ACLU recognizes that most frequent travelers will choose to take advantage of the convenience of a transponder, and even infrequent travelers may prefer the convenience of payment by phone. This choice should not be construed as a waiver of privacy. Instead, to the greatest extent possible, those travelers should retain the same anonymity as traditional cash payers. The key to this anonymity is the destruction of records of identified travel as soon as possible—which means as soon as payment for the toll has been processed. There may be some need to retain records for a period of even up to a few months to ensure payment from credit card processors, but once payment has been finalized, all records identifying the particular vehicle should be destroyed. DOT’s current retention period of 8½ years is cannot be justified as necessary to ensure proper payment of tolls. The ACLU urges the Legislature to both clarify that existing state law does not require a long retention period and to specifically require the destruction of identifiable toll records as soon as payment is finalized.

3) Implement legal prohibitions on secondary use of toll/travel records

Although destruction of records is the only guaranteed method of preventing their use and misuse, the Legislature can also take steps to protect toll or travel records while they exist. The experience of other jurisdictions using electronic tolling is instructive; those records are already in high demand for a variety of purposes, including both law enforcement and family law disputes. As tolling records become more detailed, it is likely the demand for them will grow for other purposes, including marketing. The best way to encourage people to adopt electronic toll payment methods is to guarantee that records of those payments will not be used for other purposes, period. The only reason the records are created is to facilitate toll payment, and that is the only use that should be made of the records. The Legislature should enact prohibitions on any other use of toll records by any party.

4) Implement legal safeguards against third parties reading transponders

In 2008 the Legislature recognized that the RFID chips in enhanced driver's license provided the technological capability to track individuals and enacted Chapter 9A.58 RCW to prohibit reading of those RFID chips except for border crossing purposes. Almost all of the same risks of inappropriate uses apply to transponders used for toll payments. Therefore, the ACLU urges the legislature to enact similar prohibitions on reading information on transponders for any purpose other than toll payment.

5) Allow cash payments for transponders, without registration to single vehicle

The current Good-to-Go! program allows cash payments for transponders, both to purchase the transponder itself and to replenish accounts. One would think, therefore, that this provides an anonymous method of travel, while providing many of the advantages of electronic payment. Unfortunately, that potential win-win solution is not realized in actuality—because the Department of Transportation requires registration of a transponder to a single vehicle. This not only defeats the possibility of anonymous travel, it also eliminates the possibility of moving a transponder between vehicles for those who use multiple vehicles, including car-share programs. The ACLU recognizes that some of these restrictions may be due to deficiencies in current transponder technology. For example, windshield-mounted transponder stickers cannot physically be moved between vehicles without damaging the transponder. We suspect that the registration requirement may also be due to deficiencies in technology, registration allows a transponder account to be charged based on the vehicle license plate when the transponder is not accurately read—which apparently happens hundreds of thousands of times per year at the Tacoma Narrows Bridge! Nonetheless, we believe that technological deficiencies are not a sufficient reason to intrude on the privacy of Washingtonians. The ACLU urges the Legislature to direct the Department of Transportation to adopt alternative procedures or technologies to eliminate the vehicle registration requirement and facilitate anonymous electronic toll payments.