

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 1917 (Levine)
Version: March 10, 2022
Hearing Date: June 14, 2022
Fiscal: Yes
Urgency: No
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SUBJECT

Personal information: contact tracing

DIGEST

This bill prohibits the involvement of law enforcement in contact tracing, except as provided.

EXECUTIVE SUMMARY

Contact tracing is a critical component in fighting the spread of infectious diseases. It has been traditionally conducted by public health officials to identify those infected, those who have come into contact with the infected individuals, and working with all parties to disrupt the spread of the disease. Given the worldwide COVID-19 pandemic, the importance of contact tracing has been brought to the fore.

This bill places protective limitations on contact tracing in California. It prohibits the involvement of law enforcement agencies in contact tracing with limited exceptions for contact tracing within law enforcement agencies and jails and prisons. The bill authorizes a civil action seeking injunctive relief for a violation of its provisions and provides for reasonable attorney's fees for a prevailing plaintiff.

This bill is author-sponsored. It is supported by a variety of privacy and civil liberties groups, including Privacy Rights Clearinghouse and Media Alliance. There is no known opposition. Should the bill pass out of this Committee, it would be referred to the Senate Public Safety Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.)
- 2) Establishes, pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA), privacy protections for patients' protected health information and generally provides that a covered entity, as defined (health plan, health care provider, and health care clearing house), may not use or disclose protected health information except as specified or as authorized by the patient in writing. (45 C.F.R. § 164.500 et seq.)
- 3) Prohibits, under the State Confidentiality of Medical Information Act (CMIA), providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient's written authorization, subject to certain exceptions. (Civ. Code § 56 et seq.)
- 4) Establishes the Information Practices Act of 1977 (IPA), which declares that the right to privacy is a personal and fundamental right and that all individuals have a right of privacy in information pertaining to them. It regulates the handling of personal information in the hands of state agencies. The IPA states the following legislative findings:
 - a) the right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies;
 - b) the increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information; and
 - c) in order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits. (Civ. Code § 1798 et seq.)
- 5) Provides consumers the right to request that a business delete any personal information about the consumer, which the business has collected from the consumer. (Civ. Code § 1798.105(a).)

This bill:

- 1) Defines "contact tracing" as identifying and monitoring individuals, through data collection and analysis, who may have had contact with an infectious person, as a means of controlling the spread of a communicable disease.

- 2) Prohibits an officer, correctional officer, deputy, employee, or agent of a law enforcement agency from conducting contact tracing, with two exceptions:
 - a) an employee of a law enforcement agency may conduct contact tracing of employees of the same law enforcement agency; and
 - b) a health care worker who is not a correctional officer may conduct contact tracing in a jail or prison.

- 3) "Law enforcement agency" means any of the following:
 - a) a police department;
 - b) a sheriff's department;
 - c) a district attorney;
 - d) a county probation department;
 - e) a transit agency police department;
 - f) a school district police department;
 - g) the police department of any campus of the University of California, the California State University, or a community college;
 - h) the Department of the California Highway Patrol;
 - i) the Department of Justice; and
 - j) the Department of Corrections and Rehabilitation.

- 4) Authorizes a person to bring a civil action seeking injunctive relief and reasonable attorneys' fees for any violations.

COMMENTS

1. What is contact tracing?

According to the Centers for Disease Control and Prevention (CDC):

Contact tracing is used by health departments to prevent the spread of infectious disease. In general, contact tracing involves identifying people who have an infectious disease (cases) and people who they came in contact with (contacts) and working with them to interrupt disease spread. This includes asking people with COVID-19 to isolate and their contacts to quarantine at home voluntarily.

This process typically entails the following elements:

- Interviewing people with the disease to identify everyone they had close contact with during the time they may have been infectious;
- Notifying contacts of their potential exposure;
- Referring contacts for testing;
- Monitoring contacts for signs and symptoms of the disease; and/or

- Connecting contacts with services they might need during the self-quarantine period.

On May 22, 2020, Governor Newsom announced the launch of California Connected, which he hailed as “the state’s comprehensive contact tracing program and public awareness campaign.”¹ The program was detailed as follows:

As part of California Connected, public health workers from communities across the state will connect with individuals who test positive for COVID-19 and work with them, and people they have been in close contact with, to ensure they have access to confidential testing, as well as medical care and other services to help prevent the spread of the virus.

The state’s program is led by the Administration in collaboration with the California Department of Public Health, local public health departments and the University of California, San Francisco (UCSF) and Los Angeles (UCLA), which have launched a robust online training academy to develop a culturally competent and skilled contact tracing workforce.

2. Addressing the security and privacy concerns surrounding contact tracing and building public trust

The Governor’s Office assured the public that the data is only collected and stored for use by local and state public health departments for public health purposes and that public health authorities would not share information collected as part of these contact tracing efforts with any outside entities.²

Despite these commitments to protecting privacy, there is arguably a void of regulations and protections for how contact tracing can be carried out, who can engage in contact tracing, and what can be done with the information collected. Concerns about this gap are only amplified when entities outside of public health departments, including law enforcement and private entities, are conducting the tracing.

As countries and other states rolled out contact tracing programs, a landslide of complaints and concerns surrounding the security and confidentiality of contact tracing ensued.³ Many concerns arose in response to the dramatic rise in technology-assisted

¹ Office of Governor Gavin Newsom, *Governor Newsom Launches California Connected – California’s Contact Tracing Program and Public Awareness Campaign* (May 22, 2020) Press Release, <https://www.gov.ca.gov/2020/05/22/governor-newsom-launches-california-connected-californias-contact-tracing-program-and-public-awareness-campaign/>. All further internet citations are available as of June 6, 2022.

² *Ibid.*; California Connected, *Contact Tracing* (August 3, 2020) <https://covid19.ca.gov/contact-tracing/>.

³ Alice Miranda Ollstein & Mohana Ravindranath, *Getting it right: States struggle with contact tracing push* (May 17, 2020) Politico, <https://www.politico.com/news/2020/05/17/privacy-coronavirus-tracing->

contact tracing, which commonly use digital applications. Officials that turned to these methods were forced to scramble to “address serious complaints that soon arose over extensive user data-mining or poor security practices.” Warnings streamed in from human rights groups and technologists that “the design of many apps put hundreds of millions of people at risk for stalking, scams, identity theft or oppressive government tracking – and could undermine trust in public health efforts.”

However, these concerns have also manifested in response to manual contract tracing. In one jurisdiction, families were weary to give strangers on the phone information about themselves or their children, hampering contact tracing efforts.⁴ The fears of members of the public are only further exacerbated with reports of contact tracing scams. According to a Los Angeles County Department of Consumer and Business Affairs *Scam Alert* during the height of the pandemic, “[s]cammers are impersonating legitimate COVID-19 contact tracers. Their purpose is to profit from the current public health emergency and they try to trick you into giving private personal or financial information.”⁵

Establishing oversight and regulation not only addresses the identified privacy and security risks but also builds the public trust that is necessary for effective contact tracing. Recent studies show that effective regulation can make individuals more likely to download a contact tracing app, share information about their contacts, and change their behavior. Research out of Oxford shows that digital contact tracing could “stop the epidemic if approximately 60% of the whole population use the app and adhere to the app’s recommendations.”⁶ However, it made clear that lower percentages will also have a positive effect.

Regardless of the necessary or ideal participation rate, the experts seem clear that trust is absolutely critical. The responses in various studies reveal that the confidence of individuals hinged greatly on who was collecting the data, what data was being

²⁶¹³⁶⁹; Natasha Singer, *Virus-Tracing Apps Are Rife With Problems. Governments Are Rushing to Fix Them* (July 8, 2020) *The New York Times*, <https://www.nytimes.com/2020/07/08/technology/virus-tracing-apps-privacy.html>; Enrique Dans, *We need to sort out the privacy issues with contact tracing apps if we are going to bring the pandemic under control* (June 17, 2020) *Forbes*, <https://www.forbes.com/sites/enriquedans/2020/06/17/we-need-to-sort-out-the-privacy-issues-with-contact-tracing-apps-if-we-are-going-to-bring-the-pandemic-undercontrol/#54ea91b955e6>.

⁴ Jeanie Lindsay, *McCormick: Privacy Concerns From Parents Make Contact Tracing In Schools Difficult* (August 7, 2020) *NPR*, <https://www.wbaa.org/post/mccormick-privacy-concerns-parents-make-contact-tracing-schools-difficult#stream/0>.

⁵ *Scam Alert: Avoid COVID-19 Contact Tracing Scams* (July 20, 2020) Los Angeles County Department of Consumer and Business Affairs, <https://dcba.lacounty.gov/newsroom/scam-alert-avoid-covid-19-contact-tracing-scams/>.

⁶ *Digital contact tracing can slow or even stop coronavirus transmission and ease us out of lockdown* (April 16, 2020) University of Oxford, <https://www.research.ox.ac.uk/Article/2020-04-16-digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown>.

collected, and what could be done with that information.⁷ Professor Michael Parker, a senior ethicist at Oxford University's Nuffield Department of Population Health, and an author of the study discussed above, acknowledges the legitimate "concerns relating to the potential misuse of data" and stresses that individuals need "to feel confident that these issues have been taken seriously."⁸ Professor Christophe Fraser, co-lead on the contact tracing program at Oxford University's Nuffield Department of Medicine and an independent scientific advisor to the UK government's contact tracing efforts, puts a finer point on the issue:

We know that public health is all about building trust. So how do we build an environment where people know that the data is being shared for good? People fear misuse of data, which we've seen in the digital space. How do we stop misuse while encouraging positive use of data? This is clearly an important area. The power to do good things increases as we share information, but we need frameworks.⁹

3. Contact tracing in California

According to the author:

On March 4, 2020, Governor Gavin Newsom declared a State of Emergency as a result of the COVID-19 virus. According to COVID-19.ca.gov's state dashboard, as of March 17, 2022, there have been nearly 9 million cases of COVID-19 in California and nearly 92,000 people have died from COVID-19 since the start of the pandemic. One of the strategies being deployed to limit the transmission of COVID-19, is the use of contact tracing, which identifies COVID-19 positive individuals and those they may have been in close contact with, so they can follow health guidelines and get tested, to limit the spread of the virus.

Measures must be taken to protect Californian's personal information and build trust that this information will not be used for law enforcement purposes. California is home to over 11 million immigrants including an estimated 2 million undocumented immigrants. These individuals have

⁷ Ashley Kirzinger et al., *KFF Health Tracking Poll – Late April 2020: Coronavirus, Social Distancing, and Contact Tracing* (April 24, 2020) Kaiser Family Foundation, <https://www.kff.org/coronavirus-covid-19/issue-brief/kff-health-tracking-poll-late-april-2020/>; Chris Jackson & Mallory Newall, *Axios-Ipsos Coronavirus Index*, (August 4, 2020) Ipsos, <https://www.ipsos.com/en-us/news-polls/axios-ipsos-coronavirus-index>.

⁸ *Digital contact tracing can slow or even stop coronavirus transmission and ease us out of lockdown* (April 16, 2020) University of Oxford, <https://www.research.ox.ac.uk/Article/2020-04-16-digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown>.

⁹ Patrick Howell O'Neill, *No, coronavirus apps don't need 60% adoption to be effective* (June 5, 2020) MIT Technology Review, <https://www.technologyreview.com/2020/06/05/1002775/covid-apps-effective-at-less-than-60-percent-download>.

been disproportionately impacted by COVID-19 and are less likely to seek medical aid because of their immigration status. Immigrant communities and communities of color are also less likely to willingly interact with law enforcement officials, regardless of context due to distrust and fear of law enforcement. Successfully limiting the spread of the coronavirus will require all COVID-19 positive Californians to participate in contact tracing programs, and those conducting contact tracing must have the trust of the person they are collecting information from. AB 1917 will ensure that law enforcement will not be conducting contact tracing in communities, to ensure that people feel safe sharing their and their close contacts' personal information to stop the spread of this virus and in potential future pandemics.

COVID-19 has spread rapidly and fatally in California's prisons and jails. According to the California Department of Corrections and Rehabilitation, as of March 17, 2022, there have been 73,128 confirmed COVID cases and 251 confirmed deaths in California state prisons due to COVID-19. There have been concerns from advocates about correctional officers contact tracing people who are incarcerated, and ensuring that the information provided will only be used for contact tracing purposes, and about people who are incarcerated being interviewed for contact tracing without a lawyer present. That is why AB 1917 only allows for health workers in prisons to conduct contact tracing, not correctional officers.

To increase public trust in the contact tracing process and protect public health, AB 1917 would prohibit employees of a law enforcement agency from conducting contact tracing except when contact tracing their own employees or if they are a health worker, not a correctional officer, contact tracing in jails or prisons.

One of the primary privacy concerns with contact tracing, outside of the threat of unauthorized data exfiltration, is that the data collected can be used for other purposes outside of directly battling the underlying public health emergency. Effective contact tracing requires the widespread collection of, at times, sensitive personal information from individuals. However, the process is undermined and trust is broken if communities do not trust who is collecting their data and what can be done with it.

This bill restricts law enforcement agencies from engaging in contact-tracing efforts. While there are certainly positives to having local officials help out in the efforts, there is evidence that law enforcement involvement could undermine contact tracing efforts, especially in communities where trust in law enforcement is particularly low.

According to a PBS NewsHour-NPR-Marist poll, "[n]early half of black Americans have very little or no confidence that police officers in their community treat people with

different skin colors the same.”¹⁰ According to another study, only “half of Hispanics and just 33% of black adults” say police officers treat racial and ethnic groups equally at least some of the time.¹¹ There is also documented distrust in immigrant communities with regard to interactions with police in any context.¹²

Other individuals may also feel hesitant to share information with law enforcement after contracting a communicable disease for fear that they may implicate themselves and others for, as an example, violating certain required public health protocols. As a recent analysis of digital contact tracing concludes: “No amount of technical cleverness is likely to fully resolve the privacy concerns posed by an app that sends police officers to your door.”¹³

Writing in support, Oakland Privacy states:

In some California communities, law enforcement officials are conducting contact tracing. In other communities, police are requesting access to public health data about the residences of people who have been infected. And the federal government has proposed the deployment of the National Guard to hospitals to process our COVID-related personal data.

The many diverse communities across California do not have the same perceptions or experiences with the law enforcement agencies of the state. In many cases, law enforcement is perceived as a benign force that keeps people safe from danger. In others, due to previous abuses, that is not at all the case and contact with law enforcement is seen as dangerous and to be avoided.

One of the things we have learned during the now-ebbing COVID-19 pandemic is the price of mistrust. Mistrust of large pharmaceutical corporations (i.e. “Big Pharma), some of it well-earned, has played a large role in disappointing vaccination rates. We don't have an alternative to

¹⁰ Laura Santhanam, *Two-thirds of black Americans don't trust the police to treat them equally. Most white Americans do.* (June 5, 2020) PBS, <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do>.

¹¹ Claire Gecewicz and Lee Rainie, *Why Americans Don't Fully Trust Many Who Hold Positions of Power and Responsibility* (September 19, 2019) Pew Research Center, <https://www.pewresearch.org/politics/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility/>.

¹² See Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation.* (June 3, 2018) The New York Times, <https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html>.

¹³ Toby Shevlane, et al., *Contact tracing apps can help stop coronavirus. But they can hurt privacy.* (April 28, 2020) The Washington Post, <https://www.washingtonpost.com/politics/2020/04/28/contact-tracing-apps-can-help-stop-coronavirus-they-can-hurt-privacy/>.

large pharmaceutical corporations in the development and distribution of vaccinations. But we do have the choice to firmly place contact tracing functions in the hands of our trained public health workers who have experience with the management of contagious disease outbreaks and the handling of sensitive personal information.

A coalition of civil liberties and privacy groups, including ACLU California Action and the Electronic Frontier Foundation, writes in support:

Not only is contact tracing an inappropriate function for police, this bar on the entanglement of police with public health is necessary to ensure that people cooperate with contact tracing. When COVID-related data is collected by police, it negatively impacts public health goals because people may share less of their personal information if they fear the government might use it against them. Yet in some California communities, law enforcement officials themselves have been conducting contact tracing. Much like use of DNA from sexual assault survivors to investigate unrelated crimes may erode trust and deter victims from coming forward, law enforcement access to contact tracing data about who a person was with and where a person was may impact people's willingness to share important contact tracing data needed for public health purposes if it might implicate them in a crime or risk labeling them as an associate of a supposed gang member. Location information and contacts with others are important to collect for public health purposes in the context of contact tracing and should not be repurposed for other uses.

There is also a high degree of distrust for law enforcement in many communities - particularly those that have both a history of police abuse and a disproportionate rate of COVID-19 infections. Absent AB 1917's safeguard against law enforcement engaging in contact tracing, people are likely to withhold information that is necessary to contain the outbreak.

At the same time, AB 1917 contains appropriate allowances for law enforcement to engage in contact tracing in certain contexts. The bill allows law enforcement agencies to engage in contact tracing of employees at that law enforcement agency to allow the agency to notify other employees who may have been exposed. The bill also allows health care workers who are not correctional officers to engage in contact tracing at a jail or prison to help stem an outbreak at that institution.

In order to encourage compliance with the law, the bill affords individuals the right to seek a civil judgment against those in violation limited to injunctive relief and *reasonable* attorneys' fees for a prevailing plaintiff.

SUPPORT

ACLU California Action
Electronic Frontier Foundation
Media Alliance
Oakland Privacy
Privacy Rights Clearinghouse

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 814 (Levine, 2021) included the same provisions as this bill. In addition, it would have provided that data collected, received, or prepared for purposes of contact tracing shall not be used, maintained, or disclosed for any purpose other than facilitating contact tracing efforts, except as provided. The bill would have required such data to be deleted, as specified. The bill died in the Senate Appropriations Committee.

AB 660 (Levine, 2020) was nearly identical to AB 814. The bill died in the Senate Appropriations Committee.

AB 685 (Reyes, Ch. 84, Stats. 2020) required employers to provide specified notifications to employees and specified state entities when they are aware of the exposure of their employees to COVID-19, among other things.

AB 1782 (Chau, 2020) would have regulated public entities and businesses engaging in technology-assisted contact tracing (TACT). It would have provided clear guidelines on who can engage in TACT, what information can be collected, and how long it can be kept. The bill would have implemented use and disclosure limitations and required the affirmative, informed consent of a user before any data could be collected or used and prohibited any discrimination based on participation in TACT. The bill died in the Senate Appropriations Committee.

PRIOR VOTES:

Assembly Floor (Ayes 53, Noes 16)
Assembly Appropriations Committee (Ayes 12, Noes 4)
Assembly Judiciary Committee (Ayes 7, Noes 2)
Assembly Privacy and Consumer Protection Committee (Ayes 7, Noes 1)
