

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1223 (Becker)
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Fiscal: Yes
Urgency: No
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SUBJECT

Consumer privacy: sensitive personal information: neural data

DIGEST

This bill includes “neural data,” as defined, within the definition of “sensitive personal information” for purposes of the California Consumer Privacy Act (CCPA).

EXECUTIVE SUMMARY

The California Consumer Privacy Act of 2018 (CCPA) grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. (Civ. Code § 1798.100 et seq.) It places attendant obligations on businesses to respect those rights. In the November 3, 2020, election, voters approved Proposition 24, which established the California Privacy Rights Act of 2020 (CPRA). The CPRA amends the CCPA, limits further amendment, and creates the California Privacy Protection Agency (PPA).

The CPRA also created a new category of “sensitive personal information” and afforded consumers enhanced rights with respect to that information, including the ability to restrict businesses’ use of that information. The emergence of consumer neurotechnologies such as neuromonitoring devices, cognitive training applications, neurostimulation devices, mental health apps, and so called “brain wearables” has raised concerns about whether more regulatory oversight is necessary. Specifically, issues of privacy, when devices can interact with your brain and nervous system, have been highlighted. Given the heightened sensitivity of neural data, this bill includes it within the definition of sensitive information, defining it as “information that is generated by the measurement of the activity of an individual’s central or peripheral nervous systems that can be processed by, or with the assistance of, neurotechnology.”

The bill is sponsored by the NeuroRights Foundation and supported by several Colorado state legislators. The bill is opposed by industry associations, including Technet.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CCPA, which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)
- 2) Grants a consumer the right to request that a business that collects personal information about the consumer disclose to the consumer the following:
 - a) the categories of personal information it has collected about that consumer;
 - b) the categories of sources from which the personal information is collected;
 - c) the business or commercial purpose for collecting or selling personal information;
 - d) the categories of third parties with whom the business shares personal information; and
 - e) the specific pieces of personal information it has collected about that consumer. (Civ. Code § 1798.110.)
- 3) Provides consumers the right to request that a business that sells the consumer's personal information, or that discloses it for a business purpose, disclose to the consumer the following:
 - a) the categories of personal information that the business collected about the consumer;
 - b) the categories of personal information that the business sold about the consumer and the categories of third parties to whom the personal information was sold, by category or categories of personal information for each third party to whom the personal information was sold; and
 - c) the categories of personal information that the business disclosed about the consumer for a business purpose. (Civ. Code § 1798.115.)
- 4) Provides a consumer the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. It requires such a business to provide notice to consumers, as specified, that this information may be sold and that consumers have the right to opt out of the sale of their personal information. (Civ. Code § 1798.120.)

- 5) Prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer's rights under the CCPA. (Civ. Code § 1798.125(a)(1).)
- 6) Provides that a business need not comply with the CCPA to the extent it restricts the business' ability to carry out certain conduct, including complying with federal, state, or local laws or to cooperate with law enforcement. This also includes cooperating with a government agency request for emergency access to a consumer's personal information if a natural person is at risk or danger of death or serious physical injury where certain circumstances are met. (Civ. Code § 1798.145(a).)
- 7) Defines "personal information" as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. The CCPA provides a nonexclusive series of categories of information deemed to be personal information, including identifiers, biometric information, and geolocation data. (Civ. Code § 1798.140(v).) The CCPA defines and provides additional protections for sensitive personal information, as defined, that reveals specified personal information about consumers. (Civ. Code § 1798.140(ae).)
- 8) Establishes the CPRA, which amends the CCPA and creates the PPA, which is charged with implementing these privacy laws, promulgating regulations, and carrying out enforcement actions. (Civ. Code § 798.100 et seq.; Proposition 24 (2020).)
- 9) Provides that administrative actions to enforce the CCPA must be brought by the PPA within five years after the date on which the underlying violation occurred. (Civ. Code § 1798.199.70.)
- 10) Establishes civil penalties for CCPA violations, to be recovered through a civil action brought on behalf of the people of the state of California by the Attorney General. (Civ. Code § 1798.199.90(a).)
- 11) Permits amendment of the CPRA by a majority vote of each house of the Legislature and the signature of the Governor, provided such amendments are consistent with and further the purpose and intent of this act as set forth therein. (Proposition 24 § 25 (2020).)

This bill includes personal information that reveals a consumer's citizenship or immigration status in the CCPA's definition of sensitive personal information.

COMMENTS

1. California's landmark privacy protection law

As stated, the CCPA grants consumers certain rights with regard to their personal information, as defined. With passage of the CPRA in 2020, the CCPA got an overhaul. Consumers are afforded the right to receive notice from businesses at the point of collection of personal information and the right to access that information at any time. The CCPA also grants a consumer the right to request that a business delete any personal information about the consumer the business has collected from the consumer. However, a business is not required to comply with such a request to delete if it is necessary for the business to maintain the consumer's personal information in order to carry out certain obligations or other conduct. (Civ. Code § 1798.105(d).)

The CCPA provides adult consumers the right, at any time, "to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. This right may be referred to as the right to opt-out." Changes made by the CPRA extend this to opting out of the "sharing" of the personal information as well. A business is thereafter prohibited from selling (or sharing) that information unless consent is subsequently provided. A business that sells personal information to third parties is required to notify consumers that this information may be sold and that they have the right to opt out of such sales. (Civ. Code § 1798.120(a).) The CPRA added a new category of information, sensitive information, which includes data such as precise geolocation and genetic information. Consumers are additionally empowered to limit businesses' use of such information.

2. The emergence of neurotechnologies

Neurotechnologies have been described as the "next technology frontier" by the Institute of Electrical and Electronics Engineers (IEEE), the world's largest technical professional organization dedicated to advancing technology for the benefit of humanity.¹ Neurotechnology describes the field of science and engineering in which the nervous system is interfaced with technical devices, it uses neural interfaces to read or write information into the central nervous system (CNS), the peripheral nervous system (PNS), or the autonomic nervous system (ANS). There are a number of methods to do this, both invasive and noninvasive.

Like with most advanced technologies, there are tremendous possibilities:

¹ *Neurotechnologies: The Next Technology Frontier*, IEEE Brain, <https://brain.ieee.org/topics/neurotechnologies-the-next-technology-frontier/>. All internet citations are current as of April 9, 2024.

Neurotechnologies can provide insights into brain or nervous system activity, or can influence brain or nervous system function. Essentially, neurotechnologies have the potential to help neuroscientists gather information that might help uncover some of the secrets of the biology underlying the normal and pathological functioning of the human brain – arguably the most complex and least understood organ of the human body – as well as delivering practical therapeutic or rehabilitative solutions in the clinical care of neurological disorders to help ease the personal and socioeconomic burden of these conditions. Adopting a technology-based approach can also have benefits for research, allowing the use of more sensitive endpoints that will accelerate data gathering and evidence generation in clinical trials.²

The infinite applications are also being explored for consumer products: “Eventually, neurotechnologies could enable commercial devices, like phones, powered by mind control. Neurotechnologies could also potentially enable features like a thought-to-text writing function, or virtual and augmented reality devices assisted by brain control for purposes of entertainment.”³ For example, a few years back, Facebook purchased a neurotechnology startup, as part of efforts to develop a wristband for controlling smartphones, computers and other digital devices without having to touch a screen or keyboard.⁴

With the emergence of these consumer neurotechnology devices comes not only concern that regulatory oversight is insufficient to, for example, assess efficacy claims, many are sounding alarms around the privacy implications:

A last bastion of privacy, our brains have remained inviolate, even as sensors now record our heartbeats, breaths, steps and sleep. All that is about to change. An avalanche of brain-tracking devices—earbuds, headphones, headbands, watches and even wearable tattoos—will soon enter the market, promising to transform our lives. And threatening to breach the refuge of our minds.

Tech titans Meta, Snap, Microsoft and Apple are already investing heavily in brain wearables. They aim to embed brain sensors into smart watches, earbuds, headsets and sleep aids. Integrating them into our everyday lives could revolutionize health care, enabling early diagnosis and personalized

² Roongroj Bhidayasiri, *The grand challenge at the frontiers of neurotechnology and its emerging clinical applications* (January 17, 2024) *Front Neurol*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10827995/pdf/fneur-15-1314477.pdf>.

³ See fn. 1.

⁴ Queenie Wong & Scott Stein, *Facebook buys startup working on technology that lets you control computers with your mind* (September 23, 2019) *CNET*, <https://www.cnet.com/science/facebook-buys-ctrl-labs-to-work-on-a-wristband-that-will-let-you-control-computers-with-your-mind/>.

treatment of conditions such as depression, epilepsy and even cognitive decline. Brain sensors could improve our ability to meditate, focus and even communicate with a seamless technological telepathy—using the power of thoughts and emotion to drive our interaction with augmented reality (AR) and virtual reality (VR) headsets, or even type on virtual keyboards with our minds.

But brain wearables also pose very real risks to mental privacy, freedom of thought and self-determination. As these devices proliferate, they will generate vast amounts of neural data, creating an intimate window into our brain states, emotions and even memories. We need the individual power to shutter this new view into our inner selves.

Employers already seek out such data, tracking worker fatigue levels and offering brain wellness programs to mitigate stress, via platforms that give them unprecedented access to employees' brains. Cognitive and emotional testing based on neuroscience is becoming a new job screening norm, revealing personality aspects that may have little to do with a job. In China, train conductors of the Beijing-Shanghai line, the busiest of its kind in the world, wear brain sensors throughout their work day. There are even reports of Chinese employees being sent home if their brain activity shows less than stellar brain metrics. As companies embrace brain wearables that can track employees' attention, focus and even boredom, without safeguards in place, they could trample on employee's mental privacy, eroding trust and well-being along with the dignity of work itself.⁵

3. Protecting our neural data

This bill responds to the privacy concerns raised by these neurotechnologies by including "neural data" into the definition of sensitive personal information for purposes of the CCPA. Neural data is defined as information that is generated by the measurement of the activity of an individual's CNS or PNS that can be processed by, or with the assistance of, neurotechnology. "Neurotechnology" means a device, instrument, or a set of devices or instruments, that allows a connection with a person's CNS or PNS for various purposes, including, but not limited to, reading, recording, or modifying a person's brain activity or the information obtained from a person's brain activity.

⁵ Nita Farahany, *Wearable Brain Devices Will Challenge Our Mental Privacy* (March 27, 2023) Scientific American, <https://www.scientificamerican.com/article/wearable-brain-devices-will-challenge-our-mental-privacy/>.

According to the author:

The realm of science fiction has become our reality as corporations now possess the capability to gather and commercialize our neural data through consumer-facing neurotechnology. It's imperative that we establish robust safeguards to shield consumers' privacy. I fear a future where vast databases, housing millions of brain scans, may be utilized to gauge an individual's health or even unwillingly identify them.

We're engaged in a rapid race to keep pace with advancing neurotechnology. Consequently, California must initiate regulatory measures within this burgeoning industry.

Fortunately, the California Consumer Privacy Act (CCPA) furnishes a sturdy legal framework for privacy protection and consumer rights. Through the implementation of a few strategic amendments, such as those proposed in SB 1223, we can safeguard Californians' neural data against predatory use.

Industry groups in opposition, including the California Chamber of Commerce argue:

We have a concern about the breadth of technologies that could be included under the definitions of "neural data" and "neurotechnology" and have suggested amendments to tailor them to technologies that directly measure brain activity.

The fundamental challenge with the existing definitions is that they include references to the "peripheral nervous system" ("PNS") - all nerves in parts of the body other than the brain and spinal cord. There are two problems with these references. First, information about activity of the PNS simply is not capable of revealing someone's inner thoughts and mental processes, which this bill seeks to protect. Those result from activity of the brain, not the PNS. Many scientists argue that even information about brain activity does not and will not permit decoding complex thoughts, and recent research has described attempts to argue otherwise as alarmist.

4. Furthering the purpose and intent of the CPRA

Section 25 of the CPRA requires any amendments thereto to be "consistent with and further the purpose and intent of this act as set forth in Section 3." Section 3 declares that "it is the purpose and intent of the people of the State of California to further protect consumers' rights, including the constitutional right of privacy." It then lays out a series of guiding principles. These include various consumer rights such as:

- consumers should know who is collecting their personal information;
- consumers should have control over how their personal information is used; and
- consumers should benefit from businesses' use of their personal information.

Section 3 also includes a series of responsibilities that businesses should have. These include:

- businesses should specifically and clearly inform consumers about how they use personal information; and
- businesses should only collect consumers' personal information for specific, explicit, and legitimate disclosed purposes.

Section 3 also lays out various guiding principles about how the law should be implemented.

This bill provides stronger protections for this incredibly sensitive information. This allows for a fuller realization of the benefits intended by the law. Therefore, as it explicitly states, this bill "furthers the purposes and intent of the California Privacy Rights Act of 2020."

SUPPORT

NeuroRights Foundation (sponsor)
Colorado State Representative Cathy Kipp
Colorado State Representative Matt Soper
Colorado State Senator Mark Baisley
Colorado State Senator Kevin Priola

OPPOSITION

California Chamber of Commerce
Computer & Communications Industry Association
Technet

RELATED LEGISLATION

Pending Legislation:

AB 1824 (Valencia, 2024) provides that a business that receives personal information of a consumer due to a merger, acquisition, bankruptcy, or other transaction must comply with a consumer's direction to the original business in terms of the handling of their personal information. AB 1824 is currently in the Assembly Appropriations Committee.

AB 2877 (Bauer-Kahan, 2024) requires members of the PPA board to have qualifications, experience, and skills in the area of consumer rights. AB 2877 is currently in the Assembly Privacy and Consumer Protection Committee.

AB 3048 (Lowenthal, 2024) requires that internet browsers include an opt-out preference signal allowing consumers interacting with businesses online to automatically exercise their right to opt-out of the selling and sharing of their personal information. AB 3048 is currently in the Assembly Appropriations Committee.

Prior Legislation:

AB 947 (Gabriel, Ch. 551, Stats. 2023) includes personal information that reveals a consumer's citizenship or immigration status in the definition of "sensitive personal information" for purposes of the CCPA.

AB 1194 (Wendy Carrillo, Ch. 567, Stats. 2023) provides stronger privacy protections pursuant to the CCPA where the consumer information contains information related to accessing, procuring, or searching for services regarding contraception, pregnancy care, and perinatal care, including abortion services.

AB 1546 (Gabriel, 2023) would have extended the statute of limitations for actions brought by the Attorney General to enforce the CCPA to five years after the accrual of the cause of action. AB 1546 was held in the Senate Appropriations Committee.

AB 254 (Bauer-Kahan, Ch. 254, Stats. 2023) includes "reproductive or sexual health application information" in the definition of "medical information" and the businesses that offer reproductive or sexual health digital services to consumers in the definition of a provider of health care for purposes of the Confidentiality of Medical Information Act (CMIA).

AB 2089 (Bauer-Kahan, Ch. 690, Stats. 2022) includes mental health application information in the definition of "medical information" and the businesses that offer mental health digital services to consumers in the definition of a provider of health care for purposes of the CMIA.

AB 694 (Assembly Committee on Privacy and Consumer Protection, Ch. 525, Stats. 2021) made nonsubstantive and conforming changes to the CCPA to clean up the language amended in by the CPRA.

AB 375 (Chau, Ch. 55, Stats. 2018) established the CCPA.
