

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 660 (Levine)
Version: August 11, 2020
Hearing Date: August 13, 2020
Fiscal: Yes
Urgency: No
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SUBJECT

Personal information: contact tracing

DIGEST

This bill provides 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. The bill requires such data to be deleted, as specified, and prohibits the involvement of law enforcement, as defined, in contact tracing.¹

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. But the scale at which it must be conducted raises serious privacy concerns and calls for stronger protections of individuals.

This bill places protective limitations on contact tracing in California. It provides 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. The bill requires such data to be deleted within 60 days, except for data held by state or local health departments. The bill also prohibits the involvement of law enforcement agencies in contact tracing. The bill authorizes a civil action seeking injunctive relief for a violation of its provisions. A prevailing plaintiff in such an action is entitled to reasonable attorneys' fees.

¹ This analysis is of the bill as amended on August 11, 2020. Such amendments were taken in response to Committee and stakeholder concerns.

This bill is author-sponsored. It is supported by the American Academy of Pediatrics, California, the Western Center on Law and Poverty, and a variety of other community organizations. It is opposed by various law enforcement organizations and rural counties, including the California State Sheriffs' Association and the Madera County Board of Supervisors.

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) 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.)

- 6) Provides consumers the right to request that a business that collects a consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected. A business must provide the information upon receipt of a verifiable consumer request. (Civ. Code § 1798.100(a), (c).)
- 7) Requires a business that collects a consumer's personal information to, at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice, as specified. (Civ. Code § 1798.100(b).)
- 8) 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).)
- 9) Provides consumers the right to request that a business that collects personal information about the consumer, or that sells that information, to disclose to the consumer certain specified details. (Civ. Code § 1798.110(a), 1798.115(a).)
- 10) 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. (Civ. Code § 1798.120.)

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) Provides 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.
- 3) Requires data collected, received, or prepared for purposes of contact tracing to be deleted within 60 days, except for data in the possession of a local or state health department.

- 4) Prohibits an officer, deputy, employee, or agent of a law enforcement agency, as defined, from engaging in contact tracing.
- 5) 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 COVID-19 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 COVID-19; 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.”² 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.

² 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/> [as of Aug. 9, 2020]. All further Internet citations are available as of August 9, 2020.

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 has 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.³

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 have rolled out contact tracing programs, a landslide of complaints and concerns surrounding the security and confidentiality of contact tracing has ensued.⁴ Many concerns arose in response to the dramatic rise in technology-assisted contact tracing, commonly using digital applications. Officials using these methods have been 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

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

⁴ 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-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>.

about themselves or their children, hampering contact tracing efforts.⁵ The fears of members of the public is only further hindered with reports of contact tracing scams. According to a recent Los Angeles County Department of Consumer and Business Affairs *Scam Alert*, “[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.”⁶

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.”⁷ 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 collected, and what could be done with that information.⁸ 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.”⁹ 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:

⁵ 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>.

⁶ *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/>.

⁷ *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>.

⁸ 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>.

⁹ *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>.

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.¹⁰

This bill attempts to create that framework. 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 the California Department of Public Health (CDPH), as of June 20, 2020, there have been more than 5,000 deaths and more than 170,000 total cases resulting from COVID-19. 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, who are advised to self-quarantine - limiting the spread of the virus.

This May, CDPH launched "Connected California," a statewide, comprehensive contact tracing program and public awareness campaign. Successful contact tracing requires the sharing of significant personal information, including a person's name, address, phone number and other personal identifying data. While this information will be required to successfully stop the spread of the coronavirus, there is growing concern about this data potentially being used for non-healthcare related purposes.

...

AB 660 will help protect the data privacy of California immigrants and build public confidence in the contact tracing program needed to save the lives and protect the public from further spread of COVID-19.

The bill provides that any 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. This type of clear guidance and protection arguably instills confidence that data collected in connection with contact tracing will not be misused. To further assuage these legitimate privacy concerns, the bill requires data collected, received, or prepared for purposes of contact tracing to be deleted within 60 days, except for data in the possession of a local or state health department. A recent

¹⁰ 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>.

Kaiser Family Foundation survey found that individuals' trust in contact tracing managed by their state or local health department was nearly double that if contact tracing was run by other entities, such as private tech companies.¹¹

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 that data can be used for other purposes or combined with other data. For example, it is arguably a problematic practice, and a breach of a user's reasonable expectations, to allow such information to be used for other business purposes, such as profiling consumers or marketing to them, or for the information to be provided to other public entities, including federal authorities, for any purposes other than stemming the spread of a communicable disease. This bill establishes straightforward safeguards in response to such concerns. 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.

The bill also 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 recent 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."¹² 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.¹³

Writing in support, the American Academy of Pediatrics, California, states:

California is home to over 11 million immigrants, including an estimated 2 million undocumented immigrants. These individuals have been disproportionately impacted by COVID-19 leaving the children of these communities without support systems. In addition, this population is less

¹¹ 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/>.

¹² 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>.

¹³ 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/>.

likely to seek medical aid because of their immigration status. According to the CDC, hispanic or Latinos are four times as likely to be hospitalized than non-Hispanic white persons as a result of COVID-19. Immigrant communities and communities of color are also less likely to willingly interact with law enforcement officials, regardless of context. Successfully limiting the spread of the coronavirus will require all COVID-19 positive Californians to participate in contact tracing programs, including undocumented individuals.

This sentiment is echoed by others in support of the bill, including the Latino Coalition for a Healthy California and Jewish Family Services of Los Angeles. There is documented distrust in immigrant communities with regard to interactions with police in any context.¹⁴

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 stay-at-home orders or other 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.”¹⁵

However, those in opposition believe that such a prohibition is problematic. Writing in opposition, the Madera County Board of Supervisors states:

State assistance with contact tracing was not available for months, which is now a welcome respite for some of our local staff, however the delay in availability was an unacceptable risk for our residents. Further, members of law enforcement in rural counties are already familiar with operating in an emergency operations disaster environment, as well as potential confidentiality of information gathered.

The California State Sheriffs’ Association writes in opposition:

Given the unprecedented times we face regarding COVID-19, contact tracing may serve a significant role in stopping the spread of the virus and protecting the public health. Law enforcement officials are routinely trusted with sensitive information and if they are expected to play a role in determining who in the general public may have come into contact with

¹⁴ 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>.

¹⁵ 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/>.

a person who has been exposed to, or tested positive for, COVID-19, this bill would hinder that scenario.

Law enforcement in opposition also argue that the bill does not allow for contact tracing within jails, and by extension prisons, and may undermine contact tracing of employees within law enforcement agencies themselves. Given the massive outbreaks within facilities in California, it is certainly imperative to ensure that measures to mitigate the spread of communicable diseases within such facilities are not unreasonably impeded. The author has committed to engaging with stakeholders to address these issues.

SUPPORT

ACLU of California
American Academy of Pediatrics, California
Asian Americans Advancing Justice - California
California Association for Bilingual Education
Californians Together
Children's Defense Fund - California
Common Sense Media/Kids Action
Consumer Federation of America
Electronic Frontier Foundation
Jewish Family Service of Los Angeles
Latino Coalition for a Healthy California
Los Angeles Center for Law and Justice
Privacy Rights Clearinghouse
Western Center on Law & Poverty

OPPOSITION

California State Sheriffs' Association
Madera County Board of Supervisors
Rural County Representatives of California
Tuolumne County Board of Supervisors

RELATED LEGISLATION

Pending Legislation:

AB 685 (Reyes, 2020) requires employers to provide specified notifications to employees and specified state entities when they are aware of the exposure of their employees to COVID-19. This bill is currently in the Senate Appropriations Committee.

AB 1782 (Chau, 2020) regulates public entities and businesses engaging in technology-assisted contact tracing (TACT). It provides clear guidelines on who can engage in TACT, what information can be collected, and how long it can be kept. It implements use and disclosure limitations. The bill requires the affirmative, informed consent of a user before any data can be collected or used and prohibits any discrimination based on participation in TACT. This bill is set to be heard by this Committee on August 13, 2020.

Prior Legislation: None known

PRIOR VOTES:

This bill was recently gutted and amended. As such, all prior votes on the bill are irrelevant.
