

Date of Hearing: April 8, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 814 (Levine) – As Introduced February 16, 2021

SUBJECT: Personal information: contact tracing

SUMMARY: This bill would prohibit data collected, received, or prepared for purposes of contact tracing from being used, maintained, or disclosed for any purpose other than facilitating contact tracing efforts, and would require this data to be deleted within 60 days, unless it is in the possession of a state or local health department. The bill would additionally prohibit law enforcement, as defined, from engaging in contact tracing. Specifically, **this bill would:**

- 1) Prohibit any data collected, received, or prepared for purposes of contact tracing from being used, maintained, or disclosed for any purpose other than facilitating contact tracing efforts.
- 2) Require all data all 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.
- 3) Prohibit any officer, deputy, employee, or agent of a law enforcement agency from engaging in contact tracing.
- 4) Authorize a person to bring a civil action seeking injunctive relief and reasonable attorneys' fees for any violation of the provisions above.
- 5) Define "contact tracing" to mean 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.
- 6) Define "data" to mean measurements, transactions, determinations, locations, or other information, whether or not that information can be associated with a specific natural person.
- 7) Define "law enforcement agency" to mean any of the of the following: a police department; a sheriff's department; a district attorney; a county probation department; a transit agency police department; a school district police department; the Department of Highway Patrol; the Department of Justice; or college or university police departments, as specified.
- 8) Make various findings and declarations.

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, Sec. 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. Sec. 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 Sec. 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:
 - 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;
 - 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
 - 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 Sec. 1798 et seq.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to ensure that data collected, received, or prepared for purposes of contact tracing shall not be used for any other purpose, and prohibits the involvement of law enforcement, as defined, in contact tracing. This bill is author-sponsored.
- 2) **Author's statement:** According to the author:

One of the primary concerns about contact tracing, outside of the threat of unauthorized data breaches, is that the data collected can be used for other purposes outside COVID-19 prevention efforts. Research shows that when individuals know their public health department is managing an app for contact tracing rather than a private technology company, they are more likely to participate. The public trusting the entity that conducts contact tracing is critical to maximizing participation to effectively prevent community spread of the virus. Despite commitments to protecting privacy, there is a lack of regulations and protections for the very new practice that has become critical so quickly. There have been cases including in Madera County where various law enforcement agencies are conducting contact tracing in their community. Immigrant communities, especially undocumented immigrants and communities of color are less likely to interact with law enforcement, regardless the purpose. AB 814 prohibits law enforcement employees from engaging in contact tracing and builds safeguards to protect Californians' personal information [so that it is] used only for contact tracing purposes.
- 3) **Mass contact tracing during the COVID-19 pandemic highlighted concerns with the practice:** After the COVID-19 pandemic hit the United States in early 2020, California become the first state to impose a statewide shelter-in-place order when Governor Newsom

ordered California's nearly 40 million residents to stay home on March 19, 2020. From early on, public health experts recommended that reopening the economy would need to coincide with a dramatic increase in the capacity to test for infection, so that infected individuals, including those who were asymptomatic, could be quarantined immediately. Researchers at Harvard University's Edmond J. Safra Center for Ethics suggested that safely reopening would require testing up to 30% of the population each day, but that with efficient targeting of testing toward those most likely to have been exposed, this figure could be reduced to a much more achievable 1%.¹ In order to better target testing efforts and to limit the necessity of population-wide stay-at-home orders, experts, including the California Department of Public Health (CDPH) and the United States Centers for Disease Control and Prevention (CDC), recommended widespread contact tracing as a lynchpin of recovery to resume normal daily activity.² Contact tracing refers to the process of identifying persons who may have come into contact with an infected person and has been central to public health responses to diseases such as Ebola, tuberculosis, measles, small pox, HIV, H1N1 influenza ("swine flu"), and SARS.

By May 22, 2020, the state had launched California Connected, California's comprehensive contact tracing program. The Administration described the program 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.³

Despite California's (and other states') investment in contact tracing, research shows that contact tracing efforts have been largely frustrated because many members of the public lack the adequate trust required to share sensitive information with public health officials. A Pew Research Center report from a survey conducted July 13-19, 2020 found that 41% of adults say they would not be likely to speak with a public health official by phone or text message about COVID-19, and nearly 30 % of American adults are not comfortable sharing the names

¹ Hart et al., *Outpacing the Virus: Digital Response to Containing the Spread of COVID-19 while Mitigating Privacy Risks*, Edmond J. Safra Center for Ethics, Harvard University, Apr. 8, 2020.

² See, e.g., California State Government, *Resilience Roadmap*, <https://covid19.ca.gov/roadmap/>, [as of Mar. 27, 2021]. Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): Contact Tracing*, <https://www.cdc.gov/coronavirus/2019-ncov/php/open-america/contact-tracing/index.html>, [as of Mar. 27, 2021].

³ 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 Mar. 26, 2021].

of people with whom they might have been in physical contact. Approximately half of US adults indicated that they were not comfortable sharing location data from their cellphone.⁴

The discomfort many members of the public feel about contact tracing is further exacerbated by 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.”⁵

By creating a statutory scheme for how data collected for contact tracing must be treated, and which entities can conduct contact tracing, this bill should address privacy and security risks related to those data and also build the public trust that is necessary for effective contact tracing.

- 4) **Ensures personal information collected for public health purposes is only used for that purpose:** This bill would prohibit any data collected, received, or prepared for purposes of contact tracing from being used, maintained, or disclosed for any purpose other than facilitating contact tracing efforts. The bill broadly defines data to mean “measurements, transactions, determinations, locations, or other information, whether or not that information can be associated with a specific natural person” and 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.”

Taken together, these definitions mean that even deidentified data, the type of data that normally evades privacy laws, would be regulated by this bill so long as it was collected as a means to control the spread of a communicable disease. The bill also makes no distinction between public or private actors, meaning that this prohibition would apply to contact tracing by the government and employers/commercial entities alike. While traditionally contact tracing has been conducted by the government, new technologies made contact tracing easily accessible to employers, many of whom sought to require employees to download “exposure notification applications” on their mobile phones in this past year.

Studies have found that many of the exposure notification apps lacked basic protections for the data and required or accessed sensitive personal information from users. The primary concern with this sort of contact tracing is that the apps can continuously collect sensitive data about users, including health information, precise location data, and the social interactions of the person. While this may provide a richer set of data, it comes with serious privacy and security risks that warrant appropriate regulation and standards. By way of example, Google and Apple led the charge with the development of sophisticated tracing technology that principally relies on Bluetooth technology and not on GPS data, which can pinpoint a person’s exact locations. However, after rolling out government-sponsored apps, some countries expressed serious concern that Google’s Android system, the most popular in

⁴ McClain and Rainie, *The Challenges of Contact Tracing as U.S. Battles COVID-19* (Oct. 30, 2020) Pew Research Center <https://www.pewresearch.org/internet/2020/10/30/the-challenges-of-contact-tracing-as-u-s-battles-covid-19/> [as of Mar.26, 2021].

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/> [as of Mar. 27, 2021].

the world, required users to “first turn on the device location setting, which enables GPS and may allow Google to determine their locations.”⁶

This bill would now create a statutory framework for protecting contact tracing data, which would apply to both traditional contact tracing and contact tracing technology, and both the public and private sector. It would strictly limit how contact tracing data may be used and also require that data be deleted after 60 days, unless that data is held by a public health department. A coalition of six organizations dedicated to protecting consumer privacy including the American Civil Liberties Union, Electronic Frontier Foundation and the Consumer Federation of America (hereinafter “privacy coalition”) writes in support that this bill includes important privacy protections, described as follows:

If a company collects a person’s personal data while acting as a government contractor for contact tracing purposes, AB 814 would stop that company from using it to target its own ads or selling it to a data aggregator. And if a public health agency collects the same data, AB 814 would stop them from transferring it to police or immigration officials. These protections support California’s pandemic response by addressing real concerns that would prevent some Californians from being willing to speak to contact tracers.

[...]

[T]his [also] bill sets a 60-day deadline to purge data collected for purposes of contact tracing (with an exception for state and local health departments). See Sec. 601(b). COVID-19 has a 14-day incubation period, so older information will not aid in addressing the current crisis. But that stale information can still be stolen, misused, and harnessed for inappropriate purposes.

A coalition of organizations including the California Chamber of Commerce, the Civil Justice Association of California, and the California Grocers Association, among others, oppose this bill unless amended to address a number of concerns. The coalition argues that the bill is overly broad in that it would “prohibit the use of data that was not solely collected, received, or prepared for [contact tracing]. AB 814 applies to all forms of contact tracing, even if just a pen and paper are used. For example, if sign-in sheets were “collected” for purposes of building security, but were later “received, or prepared” for purposes of contact tracing, then AB 814 would end up banning the use of sign-in sheets, or any other information for that matter, which may not be collected exclusively for the purpose of contact tracing.”

The coalition also contends that “if an employer asks an employee to write their phone number on a contact tracing form, that information is now swept into the definition of ‘data collected, received or prepared for contact tracing.’ However, the employer has the employee’s phone number in numerous files and for several reasons other than contact tracing.”

The coalition also argues that the requirement to delete data collected for contact tracing is in “direct conflict with existing law.” In support of this contention, the letter describes how

⁶ Singer, *Google Promises Privacy With Virus App but Can Still Collect Location Data* (July 20, 2020) *The New York Times*, <https://www.nytimes.com/2020/07/20/technology/google-covid-tracker-app.html> [as of Mar. 27, 2021].

data collected for contact tracing may be useful, by stating that there “are legitimate and important reasons why this information should not be deleted, including tracking the effectiveness of treatment; anticipating hot spots; or identifying whether specific communities are more impacted than others. With this definition, this information will be swept into what is considered contact tracing data and be required to be deleted within 60 days.” Importantly, the coalition notes that “Cal OSHA’s recent Guidance sets forward strict obligations for recording and reporting occupational injuries and illnesses for employees who contract COVID-19. California employers must record specific work-related COVID-19 illnesses on their Log 300s and keep those log 300s for 5 years in some instances and 30 years in others.”

Despite the coalition’s “oppose unless amended” position on this bill, Committee staff has not been provided with any amendments from the opposition to address their concerns. That being said, a number of the issues raised in the coalition letter could likely be addressed by minor clarifying amendments and the author should continue to work with the opposition to include helpful and clarifying changes in AB 814. For example, it does not appear to be the author’s intention to force an employer to delete an employee’s name and phone number from every file where the employer has that information, just because that information was collected for contact tracing. The intent is to only delete the information from the contact tracing file itself. Similarly, if Cal OSHA requires contact tracing information to be kept for longer, the author may create a simple carve out to the deletion requirement in this bill to comply with other statutory obligations.

- 5) **Prohibits law enforcement from contact tracing:** Traditionally, contact tracing is conducted through interviews of infected individuals to collect information regarding with whom they have come into contact since infection, and the nature of those contacts. Contacts deemed to be at risk of infection are then advised to take certain actions, such as testing and self-isolation, to avoid further transmission.

Contact tracing can be highly effective depending on the nature of the illness, particularly in situations in which an individual becomes contagious before they present symptoms. However, traditional contact tracing demands a robust workforce of trained personnel, and suffers from imperfect recollection and a long latency between initial reports of infection and action taken on the part of those at risk. To address these challenges over the past year, some rural counties turned to law enforcement to assist in contact tracing efforts. In mid April, ABC News reported that the Madera County Sheriff’s office had begun assisting the local public health department with contact tracing. ABC reported:

At a time when the lines of public safety and public health blur, a task force, comprised of law enforcement and health officials in Madera County, is actively combating the coronavirus.

“We deal with crime all the time, so we’re looking at COVID as the suspect,” said Madera County Sheriff Jay Varney.

[...]

Often a detective has the skills and resources to find contacts, Madera County Sheriff's Office spokeswoman Sarah Jackson said. However, cell phone data or other methods that would require a judge-issued warrant are not utilized.

Jackson said many deputies are bilingual in English and Spanish, a big asset in a county with many rural workers. Contactees are called by telephone as a nurse and a deputy arrive at a home of an infected person or someone in contact with them.⁷

News of Madera County's use of the sheriff's department for contact tracing coincided with news of some local governments sharing the names and/or addresses of people who had tested positive for COVID-19, and other reports throughout the country of local governments looking into relatively untested ways of tracking the spread of COVID, such as facial recognition technology, geolocation tracking, and fever detection cameras.⁸ In January of this year, a local newspaper reported that San Diego County had been releasing the addresses of COVID positive individuals to law enforcement for over nine months, while at the same time refusing to release public data that might provide insight into where the outbreaks in that county had happened.⁹

Reports such as these have seemingly undermined the public's trust in government and have blurred the lines between public health and law enforcement. Sharing the medical data and addresses of people who test positive likely created a chilling effect causing some people to avoid getting tested. Specifically, there is a concern that vulnerable populations such as homeless or undocumented individuals may not be willing to get tested if they fear their information will end up in the possession of law enforcement. Californians have a constitutionally protected right to privacy, and these practices arguably undermine a very basic tenant of privacy: when the government collects sensitive information about individuals for one purpose, it should not use that data for another purpose.

In support of this bill, the Western Center on Law and Poverty writes:

Contact tracing is an important tool to limit the spread of COVID19 and is most effective when complete data is provided. Trusted community members, like public health officials or community workers, are the best collectors of this data, especially for communities that are already over-policed. Immigrant communities and communities of color – the very communities disproportionately impacted by the pandemic – are less likely to willingly interact with law enforcement officials. In the current anti-immigrant climate, our legal aid partners report that immigrants are already afraid to seek health care, enroll in public assistance programs, or otherwise seek assistance. Similarly, many people of color have experienced negative interactions with police, even when law enforcement is called to help. If we are serious about slowing the spread of COVID 19 through contact tracing, we should use only those community workers that are already trusted.

⁷ <https://abc30.com/coronavirus-covid-19-madera-county-public-health/6109359/> [as of Mar. 27, 2021].

⁸ Guariglia, *Telling Police Where People With COVID-19 Live Erodes Public Health*, EFF (April 15, 2020) <https://www.eff.org/deeplinks/2020/04/telling-police-where-people-covid-19-live-erodes-public-health> [as of Mar. 27, 2021].

⁹ Marx, *County Distributes COVID Patients' Addresses to Police Agencies*, (Jan. 21, 2021) Voice of San Diego <https://www.voiceofsandiego.org/topics/government/county-distributes-covid-patients-addresses-to-police-agencies/> [as of Mar. 27, 2021].

Staff notes that when AB 660 (Levine, 2020) was heard last year in the Senate Judiciary Committee, the California State Sheriff's Association made various arguments in opposition, including arguing that the bill would not allow for contact tracing within jails or prisons, and may prohibit contact tracing of employees within law enforcement agencies themselves. Given the massive outbreaks within facilities in California, it is critical to ensure that measures to mitigate the spread of communicable diseases within such facilities are not unreasonably impeded. At the time of this writing the California Sheriffs have not weighed in on AB 814, but the author may still wish to consider a narrow exemption to this bill to allow for contract tracing within correctional facilities themselves.

- 6) **Enforcement:** This bill would allow an individual to bring a civil action for a violation of this bill for injunctive relief, and would require the court to grant any prevailing plaintiff reasonable attorney fees. The coalition, in opposition, argues that “AB 814 discourages any use of contact tracing by allowing predatory lawyers to visit ruin upon already fragile businesses and local governments amid a public crisis. The private right of action is unnecessary and denies our State the opportunity to use one of the most effective tools we have to stop the spread of COVID-19: contact tracing. This bill’s punitive approach to regulating this life-saving tool demonstrates to the people of California that we place an extremely low value on their lives by prioritizing the financial desires of lawyers. There are numerous other ways to ensure compliance of this bill while not relying on a new and excessive private right of action.”

As a general matter, laws without adequate enforcement mechanisms do little to protect the individuals they were intended to serve because individuals either lack a statutory mechanism by which to seek relief, or litigating a claim is cost prohibitive. It is important to note that money damages are not available for a violation of this bill’s provisions. The bill instead would allow an individual to ask the court to order that a person or entity engage in or stop a specified act. Importantly, the bill would require a court to grant a prevailing plaintiff reasonable attorney fees, which should allow individuals with insufficient means to pay-out-of-pocket for an attorney to still obtain legal counsel on a contingency basis.

Staff notes that this bill is double-referred to the Assembly Judiciary Committee, where it will be analyzed if passed by this Committee. Issues of liability and enforcement typically fall within the jurisdiction of that committee.

- 7) **Prior legislation:** AB 660 (Levine, 2020) was identical to this bill, and was placed on the Senate Appropriations Suspense file.

AB 1782 (Chau, 2020) would have comprehensively regulated technology assisted contact tracing, or TACT. This bill was placed on the Senate Appropriations Suspense file.

- 8) **Double-referral:** This bill has been double-referred to the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Access Humboldt
American Academy of Pediatrics, California

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Asian Americans Advancing Justice
California Immigrant Policy Center
Common Sense
Consumer Action
Consumer Federation of America
Electronic Frontier Foundation
Oakland Privacy
Privacy Rights Clearinghouse
Western Center on Law & Poverty, INC.

Opposition

Association of Claims Professionals
California Chamber of Commerce
California Grocers Association
California Retailers Association
California Trucking Association
Civil Justice Association of California
Insights Association
Internet Association; the
Internet Coalition
National Payroll Reporting Consortium
State Privacy and Security Coalition, INC.
Technet

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