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PERSPECTIVE

California bill aims to make contact tracing feasible and safe

By Gerald Sauer

Contact tracing is universally recognized as a key weapon in the fight against the spread of the coronavirus pandemic, and it has been successfully implemented in countries around the world. In the United States, however, contact tracing is presently more concept than reality. People just don't trust the government with their personal information, and for good reason. Despite being protected by the nation's most stringent data privacy laws, Californians continue to witness a haphazard approach to their privacy by the very entities entrusted with their data.

How then can they be expected to feel sanguine about having their real-time location and health information tracked and shared with others? Proposed federal legislation introduced in the U.S. Senate on May 7 was ostensibly designed to protect personal data collected for purposes of contact tracing, but it is full of holes. S.3663, the COVID-19 Consumer Data Protection Act of 2020, would actually impose few meaningful restrictions on the use of collected data, would afford no private right of action for abuse, and would supersede state laws such as the California Consumer Privacy Act with respect to contact tracing data.

The CCPA is the gold standard for data privacy protection, but it exempts certain categories of personal information and entities from its provisions. Health care providers and other covered entities are not covered by the CCPA if they are governed by certain federal privacy, security, and data breach notification rules and maintain information in accordance with specified requirements under those rules. Provisions of the CCPA that afford consumers with right-to-know and opt-out rights do not apply to data collected for contact tracing. This leaves a significant gap in protection for a vital category of data.

Contact tracing works precisely because information is collected about more than one person. For that very reason, it raises a host of legal concerns. When a subject opts to participate in the contact tracing program, he or she necessarily allows his or her geolocation and proximity data to be tracked.



New York Times News Service

A drive-thru coronavirus testing site at Dodger Stadium in Los Angeles, June 29, 2020.

Friends, colleagues and acquaintances serendipitously show up on the government's radar screen, whether they've agreed to be traced or not.

Think of the Fourth Amendment implications of such tracking. Geolocation and proximity data could become weapons in law enforcement's arsenal, used to track down people suspected of crimes in direct contravention of more than two centuries of protections against unreasonable search and seizure. Without probable cause for a search warrant, law enforcement could potentially use geolocation data to build a case for probable cause against a criminal suspect. Proximity data could provide police with new tools for tracking cohorts against whom there isn't reasonable suspicion, simply by using other parties' location information.

Enter Assembly Bill 660, now wending its way through the California Legislature with a good chance of imminent passage. The bill would address many of the troubling issues left unresolved by the proposed federal law. AB 660 would ensure that contact tracing data is used for no other purpose than coronavirus contact tracing, it would build guardrails against criminal justice abuse of such data, and it would provide a critical private right of action for violations.

New Title 1.81.10, "Contact Tracing" would be added to the Civil Code for the express purpose of balancing "the right of the public to access relevant information about contact tracing efforts by public health entities while protecting

the privacy rights of individuals whose data is collected for contact tracing purposes." Section 1798.600 (a) would define 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."

In notable contrast with the federal bill, AB 660 would expressly bar law enforcement from collecting or accessing data collected for purposes of contact tracing. According to the Legislative Counsel's Digest, "The bill would prohibit an officer, deputy, employee, or agent of a law enforcement agency, as defined, from engaging in contact tracing." Section 1798.600 (b) would define "law enforcement agency" broadly not just as police and sheriff's departments but also district attorneys; county probation departments; the California Highway Patrol; the Department of Justice; and police departments associated with transit agencies, school districts and college and university campuses.

Except for data in the possession of a local or state health department, any data collected, received or prepared for contact tracing purposes would have to be deleted within 60 days. This is an important safeguard that should ease concerns about the unintended half-life of personal information and the risk that it could fall into the wrong hands. It should be noted, however, that there is nothing in the bill that would bar a state health agency from sharing contact

tracing information with a federal health agency — for alleged contact tracing purposes — with the attendant risk that it could end up in the hands of the FBI, ICE, Homeland Security, or another federal agency.

Most importantly, AB 660 would provide an individual right of action for abuses of its provisions. Relying on attorneys general to monitor and assess penalties for alternative uses of the information — especially to give a leg up to law enforcement in prosecuting suspected criminals — is unrealistic. Section 1798.603 of the bill would provide as follows:

(a) A person may bring a civil action for a violation of this title to obtain injunctive relief.

(b) A prevailing plaintiff in a civil action brought pursuant to this section shall be awarded reasonable attorney fees.

Will the California bill fix all problems associated with contact tracing? Unlikely. People will continue to be mistrustful of officials and wary of sharing their personal information. But with appropriate education, the proposed bill should go a long way toward easing concerns about how personal data will be used and help California residents feel comfortable doing their part to help eradicate the worst public health disaster in their lifetimes. ■

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