

Date of Hearing: April 19, 2022

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 1917 (Levine) – As Amended March 10, 2022

SUBJECT: Personal information: contact tracing

SUMMARY: This bill would, subject to certain exceptions, prohibit law enforcement, as defined, from conducting contact tracing, as defined, and would authorize a person to bring a civil action to obtain injunctive relief for a violation of these provisions. Specifically, **this bill would:**

- 1) Prohibit any officer, deputy, employee, or agent of a law enforcement agency from engaging in contact tracing, except that an employee of a law enforcement agency may conduct contact tracing of employees in the same agency.
- 2) Authorize a healthcare worker who is not a correctional officer to conduct contact tracing in a jail or prison.
- 3) Authorize a person to bring a civil action seeking injunctive relief and reasonable attorneys' fees for any violation of the provisions above.
- 4) 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.
- 5) Define "data" to mean measurements, transactions, determinations, locations, or other information, whether or not that information can be associated with a specific natural person.
- 6) 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.

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 increase public trust in the contact tracing process and protect public health by prohibiting employees of a law enforcement agency from conducting contact tracing except when contact tracing their own employees. This bill is author-sponsored.

- 2) **Author's statement:** According to the author:

California is home to over 11 million immigrants including an estimated 2 million undocumented immigrants. These individuals have been disproportionately impacted by COVID-19 and are less likely to seek medical aid because of their immigration status. COVID-19 has disproportionately affected communities of color. The death rate for Latino people is 15% higher than the statewide; the case rate for Pacific Islanders is 77% higher than statewide; and the death rate for Black people is 18% higher than statewide. 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. 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.

- 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 were 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 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

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].

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/>

The discomfort many members of the public feel about contact tracing was further exacerbated by reports of contact tracing scams. According to a 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 clarifying which entities may conduct contact tracing, this bill seeks to build the public trust that is necessary for effective contact tracing.

- 4) **Narrower version of two bills by the same author:** AB 660 (Levine, 2019), as introduced, dealt with building energy efficiency standards. It was subsequently amended in the Senate to regulate the practice of contact tracing. As amended on August 11, 2020, AB 660 would have prohibited any data collected, received, or prepared for purposes of contact tracing from being *used, maintained, or disclosed for any purpose other than contact tracing*, and would have required all data collected to be deleted within 60 days, as specified. The bill would have additionally prohibited a law enforcement official from engaging in contact tracing. That bill was placed on the Senate Appropriations Suspense file.

As introduced the following year, AB 814 (Levine, 2020) was nearly identical to AB 660 in its final form. A coalition of organizations including the California Chamber of Commerce, the Civil Justice Association of California, and the California Grocers Association, among others, opposed AB 814 unless amended to address a number of concerns. The coalition argued that the bill was 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 argued that the requirement to delete data collected for contact tracing is in “direct conflict with existing law.” In support of this contention, their letter described how 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.”

Staff notes that the introduced version of AB 1917 does not include any limitation on the use of data collected for contact tracing and does not impose a deletion requirement, and thus appears to avoid the concerns raised by the coalition to AB 814. In addition, while law enforcement agencies had not weighed in at the time this Committee analyzed and heard AB 814, the Committee did counsel the author to consider a narrow exemption to the bill to

[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].

allow for contract tracing within correctional facilities themselves. By allowing law enforcement to conduct contact tracing among employees and additionally clarifying that health care workers may conduct contact tracing among inmates, it is clear that with this bill, the Author heeded this Committee's advice.

- 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 during the height of the pandemic, 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.⁶

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.⁷ In January of 2021, 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

⁶ <https://abc30.com/coronavirus-covid-19-madera-county-public-health/6109359/> [as of Mar. 27, 2021].

⁷ 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].

refusing to release public data that might provide insight into where the outbreaks in that county had happened.⁸

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, Oakland Privacy writes:

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 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.

The COVID-19 pandemic is ebbing, but not over, and it seems inevitable that other contagious viruses and bugs may cause us problems in the future, whether localized or across the entire world, as with COVID-19. Our inter-connected world is effective at turning a localized outbreak into an international one at lightening speed, and growing contacts between wildlife and humans as well as research laboratories across the world working with large amounts of specimens, suggest that our recent pandemic is just one that we may face in the coming decades.

We should use what we have learned during COVID-19 to be better prepared for coming outbreaks. One thing we have learned is that mistrust extends and worsens pandemics. So it is vital that necessary functions for disease containment be performed by the most trusted actors that we have. Using law enforcement is a path to lack of success in contact tracing due to the significant mistrust factor for swaths of Californians.

⁸ 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].

- 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.

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 814 (Levine, 2021) was substantially similar to AB 660 and was held under submission in the Senate Appropriations Committee.

AB 660 (Levine, 2020) would have prohibited 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, and would require the 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. AB 660 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

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

Opposition

None on file

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