

Date of Hearing: April 2, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Rebecca Bauer-Kahan, Chair

AB 2388 (Joe Patterson) – As Introduced February 12, 2024

AS PROPOSED TO BE AMENDED

SUBJECT: Information Practices Act of 1977

SYNOPSIS

The Information Practices Act of 1977 (IPA) modeled after the Federal Privacy Act of 1974, is the primary privacy statute governing the collection, maintenance, and disclosure of personal information by California state agencies. The act has not been significantly updated since its enactment.

Over the past decade, it has become increasingly clear that not only is our right to privacy significantly eroded, our private information and activities are now being harvested and sold for a profit, not only by private companies but potentially by state agencies as well. According to a 2019 investigation by Motherboard (provided by the author), a Public Records Act (PRA) request uncovered the fact that California’s state agencies are also selling Californians’ personal information, without their consent, for financial gain. Specifically, the Department of Motor Vehicles (DMV) reported that in fiscal year 2013-14, the DMV received approximately \$42 million in revenue from selling the names, addresses, and car registration information to commercial requesters. By 2017-18, that figure increased to \$52 million.

This bill is attempting to address this finding by updating the IPA in three significant ways:

- 1. By updating the definition of “personal information” in the law to more closely align with the definition in the California Consumer Privacy Act (CCPA) and to reflect our current understanding of what constitutes personal information in the age of the internet.*
- 2. By expanding the current statute that limits prohibitions against state agencies selling Californians’ names and addresses for profit to include a prohibition against the sale of any personal information, as newly defined, by a state agency unless it is explicitly authorized in state statutes.*
- 3. By replacing the term “commercial purposes” with a more precise and accurate term for government entities – “financial gain.”*

The Committee has proposed several strengthening amendments, primarily around the definition of “personal information.” Those amendments are discussed in detail in this analysis.

This bill is author-sponsored and has no registered opposition. Oakland Privacy has taken a “support if amended position.” The proposed amendments should address the concerns raised in their letter.

SUMMARY: Prohibits a state agency from distributing, selling, or renting an individual's personal information for any purpose that has financial gain unless that action is specifically authorized. Specifically, **this bill:**

- 1) Defines "personal information" as any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver's license or state identification card number, vehicle registration information (including license plate number), insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information.
- 2) Prohibits a state agency from distributing, selling, or renting personal information for any financial gain unless specifically authorized by state statutes.

EXISTING LAW:

- 1) Provides, pursuant to the California Constitution, that all people are by nature free and independent and have inalienable rights. Among these the fundamental right to privacy. (Cal. Const. art. I, § 1.)
- 2) Establishes the Information Practices Act (IPA) of 1977, which generally enumerates the requirements applicable to state agencies that collect, maintain, and disclose personal information from California residents, including limitations on permissible disclosure, the rights of residents to know and access the information, and required accounting of disclosures of the information. (Civ. Code § 1798, et seq.)
- 3) States, in the IPA, that the "right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them." Further states these findings of the Legislature:
 - 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.
 - 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 § 1798.1.)
- 4) Requires that each state agency maintain in its records only personal information that is relevant and necessary to accomplish the purpose of the agency. (Civ. Code § 1798.14.)
- 5) Requires that each agency collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source. (Civ. Code § 1798.15.)

- 6) Prohibits an individual's name and address from being distributed for commercial purposes, sold, or rented by an agency unless such action is specifically authorized by law. (Civ. Code § 1798.60.)
- 7) Defines "personal information," for purposes of the IPA, as any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, the individual's name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. (Civ. Code § 1798.3(a).)
- 8) Defines "agency", for the purposes of the IPA, to mean every state office, officer, department, division, bureau, board, commission, or other state agency, except for the California Legislature, agencies within the judicial branch, the State Compensation Insurance Fund, and local agencies, defined to include: counties; cities, whether general law or chartered; cities and counties; school districts; municipal corporations; districts; political subdivisions; or any board, commission, or agency thereof; other local public agencies, or entities that are legislative bodies of a local agency as specified. (Civ. Code § 1798.3(b); Gov. Code § 6252(a).)
- 9) Requires each agency to keep an accurate accounting of the date, nature, and purpose of each disclosure of a record made pursuant to specified circumstances; and requires each agency to retain that accounting for at least three years after the disclosure, or until the record is destroyed, whichever is shorter. (Civ. Code §§ 1798.25 & 1798.27.)
- 10) Except as specified, endows each individual with the following rights: to inquire and be notified as to whether the agency maintains a record about them; to inspect all personal information in any record maintained by reference to an identifying particular of the individual; and to submit a request in writing to amend a record containing personal information pertaining to them maintained by an agency. (Civ. Code § 1798.30, et seq.)
- 11) Requires each state agency, when it provides by contract for the operation or maintenance of records containing personal information to accomplish an agency function, to cause, consistent with its authority, the requirements of the IPA to be applied to those records; and specifies that for purposes of enforcing penalties for violations of the IPA, any contractor and any employee of the contractor, shall be considered to be an employee of an agency. (Civ. Code § 1798.19.)
- 12) Defines "Personal information" under the California Consumer Privacy Act 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.
Personal information includes such information as:
 - a) Name, alias, postal address, unique personal identifier, online identifier, IP address, email address, account name, social security number, driver's license number, passport number, or other identifier.
 - b) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.

- c) Biometric information.
- d) Internet activity information, including browsing history and search history.
- e) Geolocation data.
- f) Professional or employment-related information. (Civ. Code § 1798.140(v).)

FISCAL EFFECT: As currently in print, this bill is keyed fiscal.

COMMENTS:

1) **Background.** In 2018, the Legislature enacted the California Consumer Privacy Act (CCPA) (AB 375 (Chau, Chap. 55, Stats. 2018)), which gave consumers certain rights regarding their personal information, such as the right to: (1) know what personal information that is collected and sold about them; (2) request the categories and specific pieces of personal information the business collects about them; and (3) opt out of the sale of their personal information, or opt in, in the case of minors under 16 years of age. Subsequently, in 2020, California voters passed Proposition 24, the California Privacy Rights Act (CPRA), which established additional privacy rights for Californians. With the passage of the CCPA and the CPRA, California now has one of the most comprehensive privacy laws in the country when it comes to protecting consumers' personal information. Since the passage of these two key laws, other states around the country have followed California's lead and adopted similarly stringent privacy laws.

However, as the state has moved to the forefront in strengthening an individual's right to protect their personal information from large, private companies through the passage of the CCPA and CPRA, it has not yet updated the laws that are designed to protect Californians' privacy from state and local government agencies. As discussed in detail in a later section, the state's IPA has remained largely untouched since it was first passed in 1977. Since its initial passage, the world has undergone a digital revolution. With the advent of the internet and advances in technology, it is no longer easy for people to decide which aspects of their lives should be publicly disclosed. As Alex Preston noted in *The Guardian* a decade ago:

We have come to the end of privacy; our private lives, as our grandparents would have recognised them, have been winnowed away to the realm of the shameful and secret. . . . Insidiously, through small concessions that only mounted up over time, we have signed away rights and privileges that other generations fought for, undermining the very cornerstones of our personalities in the process. While outposts of civilisation fight pyrrhic battles, unplugging themselves from the web. . . the rest of us have come to accept that the majority of our social, financial and even sexual interactions take place over the internet and that someone, somewhere, whether state, press or corporation, is watching.¹

Since the time this piece was published, it has become increasingly clear that not only is our right to privacy significantly eroded, but our private information and activities are now being harvested and sold for a profit. This commodification of personal information has been dubbed

¹ Preston, Alex. "The death of privacy." *The Guardian* (Aug. 3, 2014) available at <https://www.theguardian.com/world/2014/aug/03/internet-death-privacy-google-facebook-alex-preston>.

“surveillance capitalism” by social psychologist, Shoshana Zuboff. In an opinion piece for *The New York Times*, in 2021, Dr. Zuboff warned:

As we move into the third decade of the 21st century, surveillance capitalism is the dominant economic institution of our time. In the absence of countervailing law, this system successfully mediates nearly every aspect of human engagement with digital information. The promise of the surveillance dividend now draws surveillance economics into the “normal” economy, from insurance, retail, banking and finance to agriculture, automobiles, education, health care and more. . . .

An economic order founded on the secret massive-scale extraction of human data assumes the destruction of privacy as a nonnegotiable condition of its business operations. With privacy out of the way, ill-gotten human data are concentrated within private corporations, where they are claimed as corporate assets to be deployed at will.

The social effect is a new form of inequality, reflected in the colossal asymmetry between what these companies know about us and what we know about them.²

2) **Purpose of this bill.** What this bill is attempting to address is the realization that it is not only private businesses that are profiting from the sale of individuals’ personal information, but government agencies as well. According to a 2019 investigation by *Motherboard* (provided by the author), a Public Records Act (PRA) request uncovered the fact that California’s state agencies are also selling Californians’ personal information, without their consent, for financial gain. Specifically, the Department of Motor Vehicles (DMV) reported that in fiscal year 2013-14 the DMV received approximately \$42 million in revenue from selling the names, addresses, and car registration information to commercial requesters. By fiscal year 2017-18, the amount of revenue generated had grown to over \$52 million.³ The article goes on to note that a previous investigation that looked at DMVs across the country determined that data broker LexisNexis and credit reporting agency Experian appeared frequently on the list of companies that obtained information. In addition, that investigation also found that DMVs sold information to private investigators, “including those hired to find out if a spouse is cheating.” The author of the investigation does note in the 2019 article that it was unclear if the California DMV had recently sold data to these types of entities. Finally, the article notes that the California DMV told the authors that requesters may also include insurance companies, vehicle manufacturers, and prospective employers. In a response to the authors of the report, the California DMV stated:

The DMV takes its obligation to protect personal information very seriously. Information is only released pursuant to legislative direction, and the DMV continues to review its release practices to ensure information is only released to authorized persons/entities and only for authorized purposes. The DMV also audits requesters to ensure proper audit logs are maintained and that employees are trained in the protection of DMV information and anyone having access to this information sign[s] a security document.⁴

3) **Author’s statement.** According to the author:

² Zuboff, Shoshana. “You Are the Object of a Secret Extraction Operation.” *The New York Times* (Nov. 12, 2021) available at <https://www.nytimes.com/2021/11/12/opinion/facebook-privacy.html>.

³ Cox, Joseph. “The California DMV Is Making \$50M a Year Selling Drivers’ Personal Information,” *Motherboard Tech by Vice* (Nov. 25, 2019)

⁴ *Ibid.*

California continues to be a leader on privacy, making it imperative that state agencies uphold the same standards of personal data privacy. Our state has long been at the forefront of advocating for robust privacy protections, recognizing that safeguarding personal information is foundational to individual autonomy and dignity. Therefore, it is incumbent upon state agencies to not only comply with existing privacy laws, but also to exceed them in their commitment to protecting sensitive data entrusted to them by the public.

4) **The Information Practices Act of 1977.** The Information Practices Act of 1977 (IPA; Civ. Code § 1798, et seq.), modeled after the Federal Privacy Act of 1974, is the primary privacy statute governing the collection, maintenance, and disclosure of personal information by California state agencies. As outlined in the **EXISTING LAW** section previously, along with the substantive provisions of the IPA, the Legislature codified findings and declarations upon its passage justifying the need for the consistent limits on the maintenance and dissemination of personal information by government agencies (see #3 in that section).

Generally, the IPA places several conditions and restrictions on the collection, maintenance, and disclosure of the personal information of Californians held by state agencies, including a prohibition on the disclosure of an individual's personal information without the individual's consent except in specified circumstances. In addition, the IPA requires that along with any form requesting personal information from an individual, an agency provide notice of information pertaining to the individual's rights with respect to their personal information, the purposes for which the personal information will be used, and any foreseeable disclosures of that personal information.

The IPA also provides individuals with certain rights to be informed of what personal information an agency holds relating to that individual; to access and inspect that personal information; and to request corrections to that personal information, subject to specified exceptions. Finally, when state agencies contract with private entities for services, the contractors are typically governed by the IPA, with few additional privacy protections generally stipulated in the contracts themselves.

5) **How this bill would work.** As proposed to be amended, this bill would update the definition of "personal information" in the IPA to more closely conform to the more comprehensive definition included in the CCPA. Along with that updated definition, the bill proposes replacing the current statutory prohibition against selling names and addresses with the updated definition of personal information in order to expand the prohibition to include all information that could "identify, describe or is capable of being associated with a particular individual."

Finally, this bill amends the current law prohibition against state agencies selling, renting, or distributing the name and addresses of Californians for *commercial purposes* to clarify that *personal information* cannot be distributed, sold, or rented for *financial gain* unless specifically authorized by state statutes.

6) **Proposed amendments.**

Amendment #1 does the following:

Civ Code § 1798.3(a) would be amended as follows:

The term “personal information” means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, the individual’s name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. *“Personal information” means any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical characteristics or description, address, telephone number, passport number, driver’s license or state identification card number, vehicle registration information (including license plate number), insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information.*

Amendment #2 does the following:

Civ Code § 1798.60, as amended in AB 2388 would be further amended as follows:

An individual’s ~~name and address~~ *personal information as defined in Section 1798.3(a)* shall not be distributed, sold, or rented by an agency for any purpose that has financial gain unless that action is specifically authorized by law.

7) **Analysis.** *Definition of Personal Information.* As discussed previously, the IPA currently defines “personal information” to mean “any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual (Civ. Code § 1798.3(a)).” In addition to not explicitly including several more modern forms of personal information, this definition also seems to imply that the information must actively identify or describe a particular individual in order to qualify as “personal information.” In other words, even if, through processing or integration with other information, that information can ultimately identify a person, so long as the information is not maintained in a manner directly associated with an individual, it may not qualify as personal information under the current definition.

This bill, as proposed to be amended, would expand the definition of “personal information” in the IPA to include information that is not presently identifiable but could be re-identified. The expanded definition expressly includes types of information gleaned through technology that did not exist when the IPA was originally enacted. Given how much individual privacy has been eroded as the internet has evolved and how personal information is being sold and shared for a profit despite the implications and risks of sharing the information, it is in keeping with the state’s privacy goals to update the IPA’s definition of personal information to more closely align with California’s modern privacy laws.

Further, in their “support if amended” letter, Oakland Privacy notes:

The proposed change in the prohibition language that binds public agencies in the Information Practices Act of 1977 from “commercial purposes” to “financial benefit” would be a good change. By the nature of public agencies, relatively little of their activity can be strictly defined as purposefully commercial. However, any number of activities carried out for governmental purposes may convey a financial gain for the agency. We agree that selling or distributing the personal information of Californians by public agencies and receiving a

financial benefit for doing so is behavior that should be prohibited unless specifically authorized in law. The specific authorization allows the Legislature to make exceptions on a case-by-case basis when there is a public good and when appropriate privacy protections are put into place.

Oakland Privacy's conclusions that the current language centered around "commercial purposes" is inadequate, combined with the DMV investigation discussed at length above, makes a compelling case for clarifying the bill to prohibit state agencies from reaping any financial gain from continuing to commodify the personal information of Californians without explicit statutory authority.

Finally, the last few years, particularly since the fall of *Roe v. Wade*, this Committee has prioritized enhancing the state's privacy protections in order to ensure that vulnerable California residents and those coming to California for reproductive health and gender-affirming services are not put at risk due to the sharing or sale of their personal information. This bill clearly furthers those priorities.

8) **Related legislation.** AB 2677 (Gabriel, 2022) would have made changes to the Information Practices Act of 1977 (IPA), including expanding the definition of personal information to include information that is reasonably capable of identifying an individual, prohibiting an agency from using records containing personal information for any purposes other than those for which the information was collected or generated, and adjusting penalties for violations of the law to include discipline negligent violations and to eliminate injury-in-fact requirements for intentional disclosures of sensitive information. That bill was vetoed by the Governor. In his veto message, the Governor stated:

I commend the author for his commitment to data privacy and am supportive of expanding security protocols to further protect personal information collected by state agencies and businesses. However, I am concerned this bill is overly prescriptive and could conflict with the State's goal to provide person-centered, data driven, and integrated services. Additionally, this bill would cost tens of millions of dollars to implement across multiple state agencies that were not accounted for in the budget.

With our state facing lower-than-expected revenues over the first few months of this fiscal year, it is important to remain disciplined when it comes to spending, particularly spending that is ongoing. We must prioritize existing obligations and priorities, including education, health care, public safety and safety-net programs.

The Legislature sent measures with potential costs of well over \$20 billion in one-time spending commitments and more than \$10 billion in ongoing commitments not accounted for in the state budget. Bills with significant fiscal impact, such as this measure, should be considered and accounted for as part of the annual budget process. For these reasons, I cannot sign this bill.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Support if amended

Oakland Privacy

Opposition

None on file

Analysis Prepared by: Julie Salley / P. & C.P. / (916) 319-2200