Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Ed Chau, Chair
AB 874 (Irwin) – As Amended March 25, 2019

**SUBJECT**: California Consumer Privacy Act of 2018

**SUMMARY**: This bill would expand the "publicly available" information that is exempted from the definition of "personal information" (PI) in the California Consumer Privacy Act of 2018 (CCPA) to ensure that "publicly available" information includes any information that is lawfully made available from government records. This bill would also correct a drafting error in the definition of "PI" to clarify that PI does not include deidentified or aggregate consumer information. Specifically, **this bill would**:

1) Repeal language from the CCPA definition of PI that currently limits the types of information from federal, state, or local government records that are to be considered "publicly available" and therefore *not* PI. Among other things, this bill would repeal the CCPA provision stating that "[i]nformation is not 'publicly available' if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained."

2) Correct a drafting error in the CCPA by repealing a provision that erroneously states "publicly available" does not include consumer information that is deidentified or aggregate consumer information, to, instead, state that "PI" does not include such information.

**EXISTING LAW**:

1) Establishes the CCPA and provides various rights to consumers pursuant to the act. Subject to various general exemptions, a consumer has, among other things:

   - the right to know what PI a business collects about consumers, as specified, including the categories of third parties with whom the business shares PI, and the specific pieces of information collected about the consumer;

   - the right to know what PI a business sells about consumers, as specified, including the categories of PI that the business sold about the consumer and the categories of third parties to whom the PI was sold, by category or categories of PI for each third party to whom the PI was sold;

   - the right to access the specific pieces of information a business has collected about the consumer;

   - the right to delete information that a business has collected from the consumer;

   - the right to opt-out of the sale of the consumer's PI if over 16 years of age, and the right to opt-in, as specified, if the consumer is a minor; and,

   - the right to equal service and price, despite exercising any of these rights. (Civ. Code Sec. 1798.100 et seq.)

2) Generally requires under the CCPA that a business subject to the CCPA do all of the following, among other things: comply with the above requirements, provide various notices to those ends, and execute various requests upon receipt of a verifiable consumer request, as specified; and provide certain mechanisms for consumers to make their lawful requests, including a clear and conspicuous link titled "Do Not Sell My Personal Information" on the business's internet homepage to enable consumers, or a person authorized by the consumer, to opt-out of the sale of the consumer's PI. (Civ. Code Sec. 1798.100 et seq.)

3) Prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer's rights under the CCPA, as specified. (Civ. Code Sec. 1798.125(a)(1).)

4) Provides various definitions under the CCPA. The CCPA, of particular relevance for this bill defines "PI" to mean information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. PI includes certain specific types of information, if that information identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household. These include, for example:

   - Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers.

   - Characteristics of protected classifications under California or federal law.

   - Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.

   - Geolocation data.

   - Inferences drawn from any of the information identified in the definition of PI to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes. (Civ. Code Sec. 1798.140.)

5) Specifies under the CCPA's definition of "PI" that PI does not include "publicly available" information, as specified. The CCPA further specifies, in relevant part, that for these purposes, "publicly available" means information that is lawfully made available from federal, state, or local government records, if any conditions associated with such information [are followed]. Information is not "publicly available" if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained. "Publicly available" does not include consumer information that is deidentified or aggregate consumer information. (Civ. Code Sec. 1798.140(o)(2).)

**FISCAL EFFECT**: Unknown

**COMMENTS**:

1) **Purpose of this bill**: This bill seeks to broaden the CCPA's definition of "publicly available" information and otherwise correct a drafting error in the CCPA definition of PI. This bill is sponsored by a coalition of businesses led by the California Chamber of Commerce.

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

> The CCPA's expansive definition of "personal information" excludes information "that is lawfully made available from federal, state, or local government records, if [sic] any conditions associated with such information." [Civ. Code Sec.] 1798.140 (o)(2). That exemption does not apply, however, "if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained." *Id.* With this limiting language, the CCPA creates both practical and constitutional problems for businesses engaged in constitutionally protected activity.
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> As a practical matter, this limitation on government records is confusing and unworkable. It is unlikely that a business would be able to determine the purpose for which a government entity made information available to the public. Even assuming a business could ascertain this rationale, it is unlikely there would be any instances where a business would be deemed to use such information for the same purpose that the government made it public.
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> Although we are supportive of the strides made by the CCPA in giving consumers more control over their data – privacy must be balanced against other important societal values – like the free flow of public domain information. Real estate financing, local and national journalism, credit reporting, background checks, and even political campaigns all rely on access to state public records. For example, records of home sales are often made public, and that information is used for many purposes. If a California resident objected under the CCPA to a particular use of that information – such as its publication on a popular real estate website – it is anyone's guess whether that use would be deemed "not compatible" with the purpose for which the information was made publicly available by the government. […]
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> Further, as drafted, the restrictions the CCPA places on the sale of publicly available government records could violate the First Amendment. By removing information that is obviously in the public domain from the CCPA's scope, AB 874 will help to insulate the CCPA from constitutional attack in two significant ways. [Footnote omitted.] First, by excluding lawfully acquired public records from the CCPA's scope, AB 874 eliminates a heavy burden on protected speech. Second, the bill deletes the "compatible use" language, which creates an unjustified and impermissibly vague standard for determining when a business may disseminate information from public government records.
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> […]
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> The bill also corrects what term is meant to be defined in the fifth sentence in 1798.140(o)(2) from "Publically Available" to "Personal Information". The current language of the fifth sentence does not provide an incentive to conduct pro-privacy methods of data handling like deidentification or aggregation, and actually de-

incentivizes those activities by making those methods reincorporate potentially exempted "publicly available" information back into CCPA. This correction is line with what was believed to be the intent of the original authors, that deidentified and aggregated consumer information were methods of data handling that respected privacy, and thus appropriate to exclude form the CCPA.

3) **Drafting errors in the CCPA**: Last year, the Legislature enacted the CCPA (AB 375, Chau, Ch. 55, Stats. 2018), which gives consumers certain rights regarding their PI, including: (1) the right to know what PI that is collected and sold about them; (2) the right to request the categories and specific pieces of PI the business collects about them; and, (3) the right to opt-out of the sale of their PI, or opt-in in the case of minors under 16 years of age. The final version of the CCPA adopted by the Legislature was the byproduct of compromises made between business interests on the one side, and consumer and privacy interests on the other, to provide a legislative alternative to a ballot initiative on the same subject. Given the abbreviated deadline to formally adopt the CCPA in time for the proponents to remove their proposal from consideration, numerous drafting errors were contained in the legislation as initially adopted. Many of those errors (but not all) were addressed in a preliminary clean-up bill at the end of the 2017-2018 legislative session, in SB 1121 (Dodd, Ch. 735, Stats. 2018). Staff notes that this bill would correct and/or repeal two additional drafting errors in the CCPA. Both errors relate to the definition of PI.

   First, insofar as the definition states that PI does not include "publicly available" information, the CCPA was intended to state that "'publicly available' means information that is lawfully made available from federal, state, or local government records, *where any conditions associated with such information are followed*." As drafted by counsel, however, the CCPA definition of PI states, instead, that "'publicly available' means information that is lawfully made available from federal, state, or local government records, *if any conditions associated with such information*" [are followed] – thus omitting words that are needed to make the phrase complete. As discussed further in Comment 4, below, this bill would repeal this limiting language altogether, in an effort expand the CCPA definition of "publicly available" to simply include any information in federal, state, or local government records.

   Second, the CCPA's definition of PI was intended to state that "[f]or avoidance of doubt, consumer information that is deidentified or in the aggregate is not personal information." As drafted by counsel, however, the language erroneously states that "*publicly available*" (as opposed to "*personal information*") does not include consumer information that is deidentified or aggregate consumer information. Indeed, one of the original co-authors of AB 375 also seeks to correct this latter drafting error, as reflected in the introduced version of AB 1355 (Chau), which would replace the reference to "publicly available" with "personal information." (That bill is also before this Committee for consideration.) This bill, as amended March 25, 2019, would also correct that same error in similar fashion.

4) **Limitations placed by the CCPA on information in federal, state, or local government records that would be considered "publicly available" and, therefore, not PI for purposes of the CCPA**: Under the CCPA, "PI" excludes "publicly available information" – to a degree. This bill would amend the CCPA's definition of PI, which excludes publicly available information, to ensure that *any* publicly available information gleaned from federal, state, or local government records would be excluded from the definition of PI, without limitation. As a practical matter, under this bill, any information obtained from such

government records would not be "PI" and, therefore, the consumer to whom that information relates would not be able to exercise any rights to know, access, delete, or opt-out of the sale of that information under the CCPA.

The concern that this bill seeks to address is that the CCPA's limitations on the use of publicly available information are vague and could run afoul of the First Amendment, which protects the right of individuals to disseminate information. For example, in *Associated Press v. United States* (1945) 326 U.S. 1, 20, the Supreme Court declared that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public…." As stated in the more recent case of *Sorrell v. IMS Health, Inc.* (2011) 564 U.S. 552, 570, "[the Supreme Court] has held that the creation and dissemination of information are speech within the meaning of the First Amendment." (Citing in part, *Bartinicki v. Vopper* (2001) 532 U. S. 514, 527: If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.") Of course, the right of dissemination is not without limits – for example, one cannot freely disseminate another individual's medical health records. The CCPA itself stands for the proposition that an individual's PI (such as their social security number, their biometric information, or even their geolocation data or other information they hold privacy interests in) cannot be further disseminated or sold by businesses who collect that information for a business or commercial purpose, when the individual acts (*i.e.,* "opts-out" of the sale of their PI) to protect their privacy interests in that information.

Of course, not all information is "PI" for purposes of the CCPA. That being said, while the CCPA excludes "publicly available" information from the definition of PI to allow the continued dissemination of that information, it also has language narrowing what might otherwise be considered "publicly available." Specifically, under the CCPA, "publicly available" information is defined to "information that is lawfully made available from federal, state, or local government records." But, as noted in Comment 3, above, this exception is subject to a limiting clause which effectively states that information from government records is publicly available and not PI "if any conditions associated with that information" are followed. The definition then continues to further state that "[i]nformation is not 'publicly available' if that data is used for a purpose not compatible with the purpose for which the data is maintained and made available in the government records or for which it was publicly maintained." (Hereinafter "compatibility requirement.")

Staff notes that since the passage of the CCPA, various entities (including law firms) have raised concerns that the compatibility requirement of the CCPA is vague and inconsistent with the First Amendment. The compatible use concept reflected in this compatibility requirement is a privacy principle that indicates there should be limits on the use of private data for a purpose that would not be compatible with the original purpose with which it was shared. The problem, in this context, of applying that concept to determine what information would be considered "publicly available" when obtained from government records, is that government does not release records to the public under the California Public Records Act (CPRA) for any specific purpose. Indeed, government entities cannot question a requestor's motives or purposes for requesting the information they seek. Stated another way, the government's calculation in determining whether or not something can be released under the CPRA has nothing to do with the reasoning for the request. Once a government entity releases the information pursuant to a CPRA request, a determination has effectively been

made that the public's right to transparency in that record has outweighed any privacy interests that may lie in that information (or any confidentiality concerns, and so forth). At that point, the information is in the public domain and the public is generally free to redistribute it. Indeed, any additional limitations on that information could potentially violate First Amendment protections for the use of public records.

By removing any limiting language in the definition of "publicly available", and instead, redefining the term to mean any "information that is lawfully made available from federal, state, or local records," the bill would ensure that any information that is disseminated by a government entity as a public record can be further disseminated in line with the First Amendment. This change would address any vagueness concerns with the definition of "publicly available" and, ultimately, could help ensure that the CCPA's definition of PI is not overly broad and violate First Amendment speech protections.

5) **Related legislation**: AB 25 (Chau) seeks to clarify the CCPA's definition of consumer and how businesses may comply with a consumer's request for specific pieces of information in a privacy protective manner under the CCPA. This bill is pending hearing in this Committee.

AB 288 (Cunningham) seeks to establish laws governing "social media privacy" separate and apart from the CCPA's existing requirements for such companies that meet the "business" definition thresholds identified in the CCPA. Specifically, the bill would require a social networking service, as defined, to provide users that close their accounts the option to have the user's "personally identifiable information" permanently removed from the company's database and records and to prohibit the service from selling that information to, or exchanging that information with, a third party in the future, subject to specified exceptions. The bill would require a social networking service to honor such a request within a commercially reasonable time. The bill would authorize consumers to bring private right of action for a violation of these provisions, as specified. This bill has been referred to this Committee.

AB 523 (Irwin) seeks to address the sale of geolocation information by certain businesses, separate and apart from the CCPA's existing requirements and restrictions governing companies that meet the "business" definition thresholds identified in the CCPA and seek to sell their consumers' PI (which the CCPA defines to include geolocation information). This bill is pending hearing in the Assembly Communications and Conveyance Committee.

AB 846 (Burke) seeks to replace "financial incentive programs" provisions in the non-discrimination statute of the CCPA with an authorization for offerings that include, among other things, gift cards or certificates, discounts, payments to consumers, or other benefits associated with a loyalty or rewards program, as specified. This bill is pending hearing in this Committee.

AB 873 (Irwin) seeks to narrow the CCPA's definitions of "PI" and "deidentified" and to revise the CCPA's existing provision that prohibits the act from being construed to require a business to reidentify or otherwise link information that is not maintained in a manner that would be considered PI. This bill is pending hearing in this Committee.

AB 981 (Daly) would add numerous privacy protections to the Insurance Information and Privacy Protection Act (IIPPA), to reflect the CCPA. The bill would exempt entities subject

to the IIPPA, as specified, from the CCPA, with the exception of the CCPA's data breach section. This bill is pending hearing in this Committee.

AB 1035 (Mayes) seeks to require, under the Data Breach Notification Law, a person or business, as defined, that owns or licenses computerized data that includes PI to disclose any breach of the security of the system within 72 hours following discovery or notification of the breach, subject to the legitimate needs of law enforcement, as provided. This bill is pending hearing in this Committee.

AB 1138 (Gallagher) seeks to prohibit a person or business that conducts business in California, and that operates a social media website or application, from allowing a person under 16 years of age to create an account with the website or application unless the website or application obtains the consent of the person's parent or guardian before creating the account. This bill is pending hearing in this Committee.

AB 1146 (Berman) seeks to expand the CCPA exemptions to expressly exclude from the CCPA vehicle information shared between a new motor vehicle dealer and the vehicle's manufacturer, if the information is shared pursuant to, or in anticipation of, a vehicle repair relating to warranty work or a recall, as specified. This bill is pending hearing in this Committee.

AB 1355 (Chau) seeks to address a drafting error in the definition of PI to clarify that it does not include deidentified or aggregate consumer information. This bill is pending hearing in this Committee.

AB 1395 (Cunningham) seeks to prohibit a smart speaker device, as defined, or a specified manufacturer of that device, from saving or storing recordings of verbal commands or requests given to the device, or verbal conversations heard by the device, regardless of whether the device was triggered using a key term or phrase. This bill is pending hearing in this Committee.

AB 1416 (Cooley) seeks to expand the CCPA exemptions to specify that the act does not restrict a business's ability comply with any rules or regulations. The bill would also expand the CCPA existing exemptions, which already include that the act does not restrict a business's ability to exercise or defend legal claims, to instead specify that the act does not restrict a business's ability to collect, use, retain, sell, authenticate, or disclose PI: (1) in order to exercise, defend, or protect against legal claims; (2) in order to protect against or prevent fraud or unauthorized transactions; (3) in order to protect against or prevent security incidents or other malicious, deceptive, or illegal activity; (4) in order to investigate, report, or prosecute those responsible for protecting against fraud, unauthorized transactions, and preventing security incidents or other specified activities; or, (5) for the purpose of assisting another person or government agency to conduct the aforementioned activities. This bill is pending hearing in this Committee.

AB 1564 (Berman) would revise a requirement in the CCPA for businesses to make available to consumers "two or more designated methods" for submitting requests for information to be disclosed pursuant to specified provisions of the CCPA, including, at a minimum, a toll free telephone number and, if the business maintains an internet website, a website address. This bill is pending hearing in this Committee.

AB 1760 (Wicks) would restate the CCPA rights using similar terminology, expand those existing CCPA rights to include new rights, and replace the "opt-out" rights of consumers 16 years and older with an "opt-in" right, among other things. This bill is pending hearing in this Committee.

6) **Prior legislation**: AB 375 (Chau, Ch. 55, Stats. 2018) *See* Comment 3.

SB 1121 (Dodd, Ch. 735, Stats. 2018) *See* Comment 3. This bill ensured that a private right of action under the CCPA applies only to the CCPA's data breach section on and not to any other section of the CCPA, as specified, corrected numerous drafting errors, made non-controversial clarifying amendments, and addressed several policy suggestions made by the AG in a preliminary clean-up bill to AB 375.

**REGISTERED SUPPORT / OPPOSITION**:

**Support**

Association of National Advertisers
California Association Of Realtors
California Bankers Association
California Cable & Telecommunications Association
California Chamber of Commerce
California Land Title Association
California Mortgage Bankers Association
California News Publishers Association
California Retailers Association
Chamber of Commerce Alliance Of Ventura And Santa Barbara County
Computing Technology Industry Association
Consumer Data Industry Association
CTIA-The Wireless Association
Email Sender And Provider Coalition
Insights Association
Investment Company Institute
Motion Picture Association Of America
National Federation Of Independent Business
Sadler Consulting
Securities Industry And Financial Markets Association
Software And Information Industry Association
Technet
Thomson Reuters (Markets) LLC, d/b/a Refinitiv

**Opposition**

None on file

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