



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

HB 3284: Contact Tracing & Exposure Notification Privacy

Supplemental information for Senate Judiciary Work Session 5/25/21:

HB 3284 – 5/24/21 Work session testimony outline

Chair Prozanski and members of the committee,

My name is Kimberly McCullough, legislative director for the Oregon Department of Justice.

Thank you for the opportunity to speak to you again regarding HB 3284. There have been a few developments related to this bill, and I know that you have received numerous emails about a potential amendment. My hope is to shed some light on both why that amendment was initially drafted at our request, and also why we are now asking you to pass the bill in its current form.

COVID has presented a number of novel issues for this legislature to consider, and this bill addresses one of them: privacy in the context of contact tracing and exposure notification. There are a number of other COVID-related issues that it is important for the public and this body to carefully consider, but which are not covered by this bill.

For example, we could go down a very deep rabbit hole related to vaccine policy and its intersection with privacy. There are important issues to discuss related to vaccines and access to places of employment, schools, daycares, businesses, public venues, and more. And in the privacy world, many of these conversations are now focused on vaccine credentialing, which is the verification of a person's vaccine status. While these are very important conversations to have, this bill is not about vaccines or vaccine credentialing.

This bill is about making sure that personal information that is collected for the purpose of contact tracing and exposure notification is protected, and that it is not used for any secondary purpose.

Washington's legislature recently passed a bill that relates to COVID-19 health data, and at the last moment it was vetoed by Governor Inslee. When we heard about the veto, we were informed that it was related to provisions in the bill that may relate to vaccine policy and vaccine credentialing.

While we knew that our bill was different from Washington's, we were worried that we might run into the same problems here. And because our bill was never about vaccines, but there was one line of our bill that mentioned vaccines, we asked for an amendment to be drafted to strike that line from the bill. The idea was simply to make it clear that this bill isn't about vaccine policy or vaccine credentialing.

When members of the public raised concerns about this, it caused us to regroup and think things over again. Ultimately, we have concluded that the amendment is not needed. This is because our bill is materially different from Washington's and is narrow enough not to present the same problems.

What is needed, however, is some clarification for the record.

First and foremost, the personal health data that is protected by this bill is data that has been collected for contact tracing and exposure notification purposes.

The definition of "personal health data" is defined starting at line 23 of page 2 of the A-Engrossed bill. The definition has three parts. "Personal health data" means:

- "Information that is collected for the purpose of tracking, monitoring or tracing exposures to or infections by SARS-CoV-2 or development of disease conditions caused by or related to COVID-19"; AND
- "Identifies or can reasonably be used to identify a resident individual"; AND
- "Associate[s] the resident individual's personal identity with" several data points that are listed out as (i) to (vi).

It's crucial here to note that this is a compound sentence that uses the conjunctive "and" to join the three conditions that must be met for data to qualify as personal health data. The first condition limits the data covered by this bill to data collected for contact tracing and exposure notification purposes.

Second, this bill requires covered entities to establish and implement policies that prevent personal health data from being used for discriminatory purposes. That provision can be found on lines 2-3 of page 4. We didn't include a definition of discriminatory purpose in this bill, but our intent is that this term be defined to mean discrimination as it is already defined under Oregon law. We have numerous ways that protected classes in Oregon are protected from discrimination. This provision is intended to require covered entities to follow those existing nondiscrimination laws.

This provision is not intended to create any new protected classes, but instead, cause covered entities to have anti-discrimination policies on the books, as this will help to ensure that discrimination does not happen.

With these two items clarified, we'd like to provide some fact scenarios to explain how this law will apply:

- A private entity creates an application or website to track exposure to COVID and provide exposure notification.
 - This is covered by the bill.

- A private entity collects personal health data to track exposure to COVID and provide exposure notification.
 - This is covered by the bill.
- The entities in the prior two examples collect vaccine status information as part of the data they collect for contact tracing and exposure notification purposes.
 - This is covered by the bill.
- A place of employment collects data for contact tracing and exposure notification purposes and/or collects vaccine status information.
 - This is not covered by the bill, as it excludes data collected in the employment context.
- Medical providers and health insurance companies collect protected health information.
 - This data is not covered by the bill, as it is already covered by HIPPA and the bill includes an exemption for HIPPA-covered data.
- Public health entities collect and use health data.
 - This data is not covered by our bill, as this data is already covered by state laws related to use and protection of data by public health entities, and public health entities are exempted from the bill.
- A business, school or daycare requires proof of vaccination in order to grant access to facilities or programs.
 - While this presents interesting questions about privacy and vaccine credentialing, this is not covered by our bill.
- A business or other entity offers an incentive to individuals to become vaccinated or a gift to individuals who have been vaccinated.
 - Again, while this presents interesting questions related to privacy and vaccine credentialing, this is not covered by our bill.

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