

Date of Hearing: July 1, 2019

ASSEMBLY COMMITTEE ON TRANSPORTATION

Jim Frazier, Chair

SB 664 (Allen) – As Amended June 10, 2019

SENATE VOTE: Not relevant.

SUBJECT: Electronic toll and transit fare collection systems

SUMMARY: Clarifies the definition of a transportation agency for the purposes of restricting the use of personally identifiable information (PII) related to subscribers or users of electronic toll or transit fare collection systems, and for what purposes PII can be used, as specified.

Specifically, **this bill:**

- 1) Clarifies that the definition of a transportation agency, for the purposes of restricting the use of PII related to subscribers or users of electronic toll or transit fare collection systems, includes contractors and subcontractors employed for the purposes of billing, account settlement, enforcement, communications, or other activities related to the operation or management of an electronic toll or transit fare collection system.
- 2) Specifies that a contractor or subcontractor that uses PII for a purpose other than as identified by the transportation agency is solely liable for damages as specified.
- 3) Authorizes a transportation agency to use or provide PII for the sole purpose of operating and managing an electronic toll or transit fare collection system including, but not limited to, performing collection, account maintenance, account settlement, and enforcement activities.
- 4) Authorizes a transportation agency to use or provide PII, with affirmative consent, for the purposes of issuing public safety and travel alerts on or after January 1, 2020.
- 5) Authorizes a transportation agency to directly or indirectly communicate using PII about products or services offered by the agency or business partner, with affirmative electronic consent.
- 6) Restricts the penalty for a transportation agency to knowingly sell or otherwise provide PII to the following:
 - a) Not more than \$2,500 or actual damages per violation of existing PII protections, whichever is less;
 - b) If three or more times, not more than \$4,000 or actual damages per violation of existing PII protections, whichever is less; and
 - c) In the case when a plaintiff is a repeat toll violator, not more than \$4,000 regardless of the number of times the transportation agency violated existing PII protections.
- 7) Clarifies that a vehicle owner or user of a toll facility may need a second device to take advantage of a toll discount.

- 8) Clarifies that a transportation agency may provide a hard copy of its privacy policy to subscribers or an internet link to the policy on its website.
- 9) Deems a person guilty of evading or attempting to evade the payment of tolls or other charges if the transportation agency can provide plausible evidence of the person's failure to pay.
- 10) Declares that all of the above amendments apply retroactively to January 1, 2011, for transportation agencies that employ electronic toll collection systems and January 1, 2014, for those that employ electronic transit fare collection systems.
- 11) Determines that using the address of a vehicle's registered owner as provided by a state department of motor vehicles constitutes plausible evidence of making the best effort for delivery of a toll evasion violation.
- 12) Allows transportation agencies to include in the notice of a toll evasion violation sent to a violator other evidence besides a copy of photographic evidence on which the determination was reached by automated devices for any failure to meet occupancy requirements in a high-occupancy toll (HOT) lane.
- 13) Declares that the amendments included in this bill do not constitute a change in, but are declaratory of, existing law.

EXISTING LAW:

- 1) Defines a transportation agency for the purposes of restricting the use of PII related to the use of electronic toll or transit fare collection systems as the Department of Transportation, the Bay Area Toll Authority, any entity operating a toll bridge, toll lane, or toll highway in California, or any entity operating under contract with such an agency.
- 2) Authorizes transportation agencies to store specific account-related information such as an account holder's name, credit card number, vehicle information, and billing address; all other information must be discarded within four years and six months after the closure date of the billing cycle and after the bill has been paid and all toll violations, if applicable, have been resolved.
- 3) Prohibits transportation agencies from selling or disseminating PII about persons who subscribe to an electronic toll or transit fare collection system, with limited exceptions.
- 4) Requires transportation agencies to make every effort to purge data on closed accounts; in no case may data be stored longer than four years and six months after an account has been closed or terminated.
- 5) Defines the penalty for a transportation agency that knowingly sells or otherwise provides PII as the following:
 - a) \$2,500 or actual damages per violation of existing PII protections, whichever is greater; and

- b) If three or more times, \$4,000 or actual damages per violation of existing PII protections, whichever is greater.
- 6) Authorizes transportation agencies to provide aggregated traveler information derived from collective data that relates to a group or category of subscribers, provided that PII has been removed.
- 7) Implicitly finds a person guilty of evading or attempting to evade the payment of tolls or other charges only if the transportation agency provides a preponderance of evidence of the person's failure to pay.
- 8) Requires a transportation or processing agency to employ its best effort to obtain accurate information concerning the identity and address of a vehicle's registered owner for delivery of a toll evasion violation.
- 9) Requires transportation agencies that use electronic toll or transit fare collection systems to establish privacy policies and to provide those policies to subscribers.
- 10) Requires transportation agencies to include in the notice of a toll evasion violation sent to a violator a copy of photographic evidence on which the determination was reached by automated devices for any failure to meet occupancy requirements in a HOT lane.
- 11) Authorizes transportation agencies to share data with each other in order to comply with state interoperability requirements for electronic toll collection systems.

FISCAL EFFECT: Unknown.

COMMENTS: Agencies operating toll bridge or toll road facilities may employ an automatic vehicle identification system to facilitate toll collection, such as the FasTrak transponder that is commonly used in California. These systems, generally referred to as electronic toll collection systems, allow subscribers to prepay tolls thereby eliminating the need to stop and pay at a toll plaza. Subscribers set up an account with the tolling agency and provide PII, such as their name, address, and bank account information. In addition, many toll facilities use license plate reading technology to enforce toll collection.

In 2010, the Legislature passed and Governor Schwarzenegger signed into law SB 1268 (Simitian), Chapter 489, which established a framework guiding how a transportation agency may use the personal information of either an electronic toll collection subscriber or user of a tolled facility that employs an electronic toll collection system. The privacy protections enumerated in SB 1268 include:

- a) Prohibiting a transportation agency from selling or otherwise providing PII of any person that subscribes to or uses an electronic toll collection system;
- b) Requiring a transportation agency to establish a privacy policy and provide it to subscribers as well as post it on their website;
- c) Allowing a transportation agency to store PII for no more than four years and six months for purposes of billing, account settlement, or enforcement; and

- d) Allowing a transportation agency to provide PII to a law enforcement agency only pursuant to a search warrant.

SB 1268 defines a transportation agency as the California Department of Transportation, the Bay Area Toll Authority, any entity operating a toll bridge or toll highway within the state, or any entity under contract with any of the above entities. The bill also outlined the remedies available to a person whose PII was sold or otherwise provided to others in violation of the protections in law. AB 179 (Bocanegra), Chapter 375, Statutes of 2013, expanded these privacy protections to include users of electronic transit fare collection systems.

According to Senator Simitian at the time, SB 1268 was intended to do three things. First, it prohibited transportation agencies from selling or disseminating personal data for marketing or other inappropriate purposes. Second, it established a reasonable time limit for retaining personal data. And finally, SB 1268 set the fines for violations of its intended purpose. In Senator Simitian's fact sheet for the bill, he specifically described what he did not intend to prohibit with SB 1268, specifically, "A transportation agency, or its designee, from performing financial and accounting functions such as billing, account settlement, enforcement, or other financial activities required to operate and manage toll facilities; or a transportation agency from sharing data with another transportation agency solely to comply with interoperability specifications and standards regarding electronic toll collection devices and technologies pursuant to existing law."

Since the enactment of SB 1268, there have been several lawsuits related to transportation agencies' use of PII, particularly in their efforts to comply with federal and state interoperability requirements as well as in their enforcement activities. For example, there are several pending cases alleging numerous violations of SB 1268 protections, including sharing trip data between transportation agencies for interoperability and using a license plate number and violation date to obtain the name and address of the registered owner from the DMV.

This bill tries to address two objectives. First, it seeks to clarify the Legislature's intent in passage of SB 1268 related to the privacy protections for subscribers and users of toll facilities, and significantly limits the penalty provisions for agencies that violate those privacy protections. Second, this bill changes evidentiary standards for finding a person guilty of toll evasion, redefines what processes qualify as an agency's "best effort" to reach alleged toll violators, and makes other procedural changes that lean the process to the transportation agencies' favor.

According to the author, "Governments have charged tolls for the use of roads and bridges for hundreds of years. Comprehensive statute regulating toll facility operators has been codified in California law for at least two decades, and is updated as emerging technology impacts how fees for toll use and fines for toll violations are assessed, enforced and collected.

Over recent months, a growing list of litigants, some petitioning for class-action status, have filed claims against regional toll agencies and contractors throughout California, alleging violations that imperil billions in taxpayer dollars. While some lawsuits make broad assertions of federal and state constitutional violations which courts to date have largely brushed aside, plaintiffs point to millions of purported individual violations of Streets and Highways § 31490, established in 2010 through legislation authored by Senator Joe Simitian (SB 1268).

The well-documented intent of Senator Simitian's bill was to codify uniform standards across all of California's tolling agencies to protect against personally identifiable information of consumers being provided to companies or organizations for marketing or inappropriate uses. Senator Simitian's fact sheet details how the bill was crafted to not hinder a transportation agency from financial activities required to operate and manage toll facilities, including the sharing of data to ensure interoperability of toll collection devices and technologies.

Because the provisions of SB 664 apply retroactively and would impact pending litigation, it deserves scrutiny from lawmakers to ensure that its intent is in the public interest. Serious consumer injuries can and do occur when sensitive and private information is shared for marketing or inappropriate purposes.

However, SB 664 does not let corporations off the hook for failing to protect credit card data or give companies a free pass for profiting from a user's medical history. Instead, it defends the vital public interest in the operation and maintenance of a comprehensive transportation infrastructure.

Absent clear evidence that Californians are better off if billions of tax dollars are imperiled, SB 664 provides an important and necessary clarification of state law to continue allowing transportation agencies to use personal data efficiently and responsibly while maintaining appropriate prohibitions against the improper sharing of that information."

Writing in support, the Orange County Transportation Authority states, "SB 664 will clarify existing law to ensure toll operators statewide can meet interoperability requirements, enforce toll policies, and issue toll violations, without weakening existing privacy protections for the use of PII. Without these clarifications, the operation of toll facilities within the state will be jeopardized."

Writing in opposition, a law firm representing a certified class of motorists in active litigation in relation to the sections of code amended by this bill states, "This bill would purport to retroactively change statutory requirements and could deprive our clients of their right to restitution. The bill also could institutionalize bad practices of Fastrak and other private toll processors, or at a minimum, create a morass of further litigation about the meaning of its ambiguous terms."

Also writing in opposition, the Consumer Federation of California and many of its partner groups argue, "SB 664 drastically reduces motorists' privacy protections contained in a law that the legislature approved with bipartisan support in 2010. Lawmakers should reject any attempt to use retroactively applied changes to law as an end run against litigation that has been pending for years." Specifically, they call into question aspects of the bill that alter the written 'opt in' to third party sharing, as well as the way the bill "takes the teeth out of enforcement of privacy violations by imposing severe reductions in damage caps that will make it more profitable for an agency to sell PII to third parties than face the consequences of consumer privacy invasion." Finally, they point out that, "The changes in law in SB 664 are applied retroactively to 2011, and are designed to immunize local transportation agencies that are currently facing lawsuits for massive violation of [existing law]."

Committee comments: On the one hand, it is important that the state protect public funds used for the development and operation of transportation facilities from what some call unnecessary,

hindering class action lawsuits. It seems reasonable to ensure that the Legislature's intent when passing SB 1268, to protect the PII of subscribers to electronic toll collection systems while still enabling the transportation agencies to effectively operate their systems, is what is being carried out and that existing law is not being manipulated through the courts. Toll facilities can cost billions of dollars to construct, typically financed on expected revenues from the toll payers, and if litigation undermines the transportation agencies' ability to operate those facilities the impacts to the state could be dire.

On the other hand, there are definitely serious questions related to the length by which this bill appears to try and avoid pending litigation. Passing bills that retroactively apply to sections of code involved in active legal proceedings is a very dangerous practice and can jeopardize the public's trust in its government, and therefore ought to be undertaken with the utmost caution. In addition, the changes in evidentiary burden, the reduction in what constitutes best effort, and the capping of damages seem to stack the deck against the wrongfully-accused citizen and in the favor of the transportation agency.

Proposed amendments: Supporters of the bill argue that it is intended to clarify privacy protections in existing law. Beyond the privacy issues in the bill, SB 664 also makes amendments to procedural aspects of toll enforcement which appear to go well beyond what the Legislature has approved in the past. Given this, the author may wish to amend his bill to more effectively reflect Legislative intent and avoid significantly changing the reasonable requirements of existing statutory frameworks. Specifically:

- a) On page 13, line 20, strike out "~~or other~~". In 2018, the Legislature passed and Governor Brown signed into law AB 2535 (Obernolte), Chapter 435, which requires transportation agencies to include in the notice of a toll evasion violation sent to a violator a copy of photographic evidence on which the determination was reached by automated devices for any failure to meet occupancy requirements in a HOT lane. AB 2535 passed out of this committee and the Legislature with zero no votes. This bill is proposing to water this requirement down significantly by authorizing the agencies to use "other" evidence to determine failure to meet occupancy requirements, without specifying or even suggesting what other evidence may be appropriate. Given that the Legislature fully supported the requirement for photographic evidence last year, without opposition, it seems reasonable to keep this section of code in place for now.
- b) On page 13, line 30, strike out "~~for all purposes~~" and add –

“provided that prior to mailing such address is updated according to the National Change of Address database maintained by the United States Postal Service. The processing agency shall undertake additional efforts to locate an updated mailing address by using one or more commercially available skiptracing services in all of the following circumstances: (i) when the National Change of Address database identifies a partial match to a new address for which the United States Postal Service guidelines recommend additional research, (ii) when any item mailed to the address provided by the state department of motor vehicles is returned to the processing agency undeliverable as addressed, and (iii) when notices of violation pertaining to ten or more violations are sent to the same address without responsive action by a registered owner. If the commercially available skiptracing service utilized by the processing agency identifies an updated mailing address of a registered owner, the processing agency shall forward the notice to that updated mailing address, and the time for

the registered owner's compliance shall be reset based on the date of such forwarding. No penalty for any toll evasion violation (including any delinquent toll evasion violation) shall be collected unless the notice of such violation has been forwarded as set forth in this section."

And on page 14, line 22 add to the end of the sentence, "*provided that the processing agency complies with subdivision (b).*"

Currently, this bill "eviscerates the 'best efforts' requirement for motorists with inaccurate or incomplete DMV records and could cement bad policies and practices," as stated by opponents of the bill. These amendments define reasonable steps entities should use to ensure they are employing their "best effort" to notify a violator before charging increased fines and penalties for toll violations.

Double referral: This bill will be referred to the Assembly Privacy and Consumer Protection Committee should it pass out of this committee.

Previous Legislation: AB 2535 (Oberholte), Chapter 435, Statutes of 2018, requires transportation agencies to include in the notice of a toll evasion violation sent to a violator a copy of photographic evidence on which the determination was reached by automated devices for any failure to meet occupancy requirements in a HOT lane.

AB 179 (Bocanegra), Chapter 375, Statutes of 2013, expanded privacy protections currently afforded to electronic toll collection subscribers to include users of electronic transit fare collection systems.

SB 1268 (Simitian), Chapter 489, Statutes of 2010, imposed privacy protections on electronic toll collection systems.

REGISTERED SUPPORT / OPPOSITION:

Support

Bay Area Council
Bay Area Toll Authority
Foothill Eastern Transportation Corridor Agency
Golden Gate Bridge Highway and Transportation District
Nees Consulting
Neology
Orange County Business Council
Orange County Transportation Authority
Riverside County Transportation Commission
San Francisco Bay Area Planning and Urban Research Organization
San Francisco Bay Area Water Emergency Transportation Authority
San Joaquin Hills Transportation Corridor Agency
Self-Help Counties Coalition
State Building & Construction Trades Council of California
WSP USA Inc.

Opposition

California Alliance for Retired Americans
Consumer Action
Consumer Attorneys of California (unless amended)
Consumer Federation of California
Consumer Watchdog
Consumers for Auto Reliability & Safety
Gutride Safier LLP (unless amended)
The Utility Reform Network

Analysis Prepared by: Eric Thronson / TRANS. / (916) 319-2093