STATE OF NEW YORK

8448

IN SENATE

June 3, 2020

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Internet and Technology

AN ACT in relation to the collection of emergency health data and the use of technology assisted contact tracing to aid during COVID-19; and providing for the repeal of such provision upon the expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. For the purposes of this act:

1. "Covered entity" means any person, including a government entity:

(a) that collects, uses, or discloses emergency health data, as defined in this act, electronically or through communication by wire or radio; or

(b) that develops or operates a website, web application, mobile application, mobile operating system feature, or smart device application for the purpose of tracking, screening, monitoring, contact tracing, or mitigation, or otherwise responding to the COVID-19 public health emergency.

2. "De-identified information" means information that cannot reasonably identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular individual. A covered entity that uses de-identified information:

(a) has implemented technical safeguards that prohibit re-identification of the individual to whom the information may pertain;

(b) has implemented business processes that specifically prohibit re-identification of the information;

(c) has implemented business processes that prevent inadvertent release of de-identified information; and

(d) makes no attempt to re-identify the information.

3. "Emergency health data" means data linked or reasonably linkable to an individual or device, including data inferred or derived about the individual or device from other collected data provided such data is still linked or reasonably linkable to the individual or device, that concerns the public COVID-19 health emergency. Such data includes:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(a) Information that reveals the past, present, or future physical or behavioral health or condition of, or provision of healthcare to, an individual including:

(i) data derived from the testing or examination;

(ii) whether or not an individual has contracted or been tested for, or an estimate of the likelihood that a particular individual may contract, such disease or disorder; and

(iii) genetic data, biological samples and biometrics; and

(b) Other data collected in conjunction with other emergency health data or for the purpose of tracking, screening, monitoring, contact tracing, mitigation, or otherwise responding to the COVID-19 public health emergency including:

(i) geolocation data, when such term means data capable of determining the past or present precise physical location of an individual at a specific point in time, taking account of population densities, including cell-site location information, triangulation data derived from nearby wireless or radio frequency networks and global positioning system data;

(ii) proximity data, when such term means information that identifies or estimates the past or present physical proximity of one individual or device to another, including information derived from Bluetooth, audio signatures, nearby wireless networks, and near field communications;

(iii) demographic data;

(iv) contact information for identifiable individuals or a history of the individual's contacts over a period of time, such as an address book or call log; and

(v) any other data collected from a personal device.

4. "Technology assisted contact tracing" means technology that sends a steady supply of information, including location information, movement, social encounters, phone numbers, and health data, to a central authority.

5. "Personal information" means 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.

6. "Process" means any operation or set of operations that are performed on personal data by either automated or not automated means.

§ 2. Any entity creating, developing, or marketing technology assisted contact tracing to aid during the COVID-19 public health emergency must disclose the following information at a fourth grade reading level or below and in the language the entity regularly uses to communicate with the individual:

1. The individual's right to opt-in. (a) A covered entity shall obtain freely given, specific, informed, and unambiguous opt-in consent from an individual to:

(i) process the individual's emergency health data; and

(ii) make any changes in the processing of the individual's emergency health data.

(b) It shall be unlawful for a covered entity to collect, use, or disclose emergency health data unless:

(i) the individual to whom the data pertains has freely given, specific, informed, and unambiguous consent to such collection, use, or disclosure; or

(ii) such collection, use, or disclosure is necessary and for the sole purpose of:

(A) protecting against malicious, deceptive, fraudulent, or illegal activity; or

(B) detecting, responding to, or preventing security incidents or threats; or

(iii) the covered entity is compelled to do so by a court order or other legal obligation.

(c) To the extent that a covered entity must process internet protocol addresses, system configuration information, URLs of referring pages, locale and language preferences, keystrokes, and other personal information in order to obtain individuals' freely given, specific, informed, and unambiguous opt-in consent, the entity:

(i) shall only process the personal information necessary to request freely given, specific, informed, and unambiguous opt-in consent;

(ii) shall process the personal information solely to request freely given, specific, informed, and unambiguous opt-in consent; and

(iii) shall immediately delete the personal information if consent is withheld.

2. The individual's right to privacy. (a) All data collected for the purpose of tracking, screening, monitoring, contact tracing, or mitigation, or otherwise responding to the COVID-19 public health emergency shall be collected at a minimum level of identifiability reasonably needed for tracking COVID-19. For a covered entity using proximity tracing or exposure notification this includes changing pseudonyms or temporary anonymous identifiers at least once in a twelve hour period.

(b) A covered entity shall not process personal information beyond what is adequate, relevant, and necessary for the completion of the transaction disclosed to, affirmatively consented to, and requested by the individual.

(c) A covered entity shall not collect, use, or disclose emergency health data for any purpose not authorized under this act, including:

(i) commercial advertising, recommendation for e-commerce, or the training of machine learning algorithms related to, or subsequently for use in, commercial advertising and e-commerce;

(ii) soliciting, offering, selling, leasing, licensing, renting, advertising, marketing, or otherwise commercially contracting for employment, finance, credit, insurance, housing, or education opportunities in a manner that discriminates or otherwise makes opportunities unavailable on the basis of data; or

(iii) segregating, discriminating in, or otherwise making unavailable the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation (as such term is defined in section 301 of the Americans with Disabilities Act of 1990), except as authorized by a state or federal government entity for a public health purpose.

3. Covered entity privacy policy. (a) A covered entity shall provide to the individual a privacy policy, prior to or at the point of collection of emergency health data:

(i) detailing how and for what purpose the covered entity collects, uses, and discloses emergency health data;

(ii) describing the covered entity's data retention and data security policies and practices for emergency health data; and

(iii) describing how an individual may exercise rights under this section.

(b) A covered entity must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying emergency health data when the initial purpose for

collecting or obtaining such data has been satisfied or within two years of the individual's last interaction with the covered entity, whichever occurs first. A covered entity in possession of emergency health data must comply with its established retention schedule and destruction guidelines.

(c) A covered entity shall create transparency reports, at least once every 90 days, that include:

(i) the number of individuals whose emergency health data the covered entity collected or used;

(ii) the categories of emergency health data collected, used, or disclosed;

(iii) the purposes for which each category of emergency health data was collected, used, or disclosed;

(iv) the number of requests for individuals emergency health data, including information on who the emergency health data was disclosed to; and

(v) the number of instances where emergency health data was produced, in whole or in part, without prior, explicit consents by the individuals specified in the request.

4. Time limitation on retention. (a) Emergency data collected for the purpose of tracking, screening, monitoring, contact tracing, or mitigation, or otherwise responding to the COVID-19 public health emergency shall be deleted within 30 days, except that proximity tracing or exposure notification data which shall be automatically deleted every 14 days.

(b) A covered entity that stores data for longer than 30 days must re-engage consent every 30 days. Data shall automatically delete in 30 days unless consent is properly re-engaged.

(c) This subdivision shall not apply to de-identified information.

5. Access rights. (a) Emergency health data shall be shared only as necessary to provide the service requested by an individual.

(b) A covered entity may share aggregate, de-identified data with public health authorities solely for the limited purposes for which information can be collected in the first place. No information shall be shared with law enforcement without a valid court order, subpoena, or search warrant.

(c) A covered entity shall not disclose emergency health data to a third party unless that third party is contractually bound to the covered entity to meet the same privacy and security obligations as the covered entity.

(d) No covered entity in possession of emergency health data may disclose, redisclose, or otherwise disseminate an individual's emergency health data unless:

(i) the subject of the personal information or the subject's legally authorized representative consents in writing to the disclosure or redisclosure;

(ii) the disclosure or redisclosure is required by state or federal law; or

(iii) the disclosure is required pursuant to a valid warrant, court order, or subpoena issued by a court of competent jurisdiction.

(e) Individuals shall have the right to access the emergency health data collected on them and correct any inaccuracies.

(i) A covered entity must comply with an individual's request to correct emergency health data not later than 30 days after receiving a verifiable request from the individual or, in the case of a minor, the individual's parent or guardian.

(ii) Where the covered entity has reasonable doubts or cannot verify the identity of the individual making a request under this paragraph, the covered entity may request additional information necessary for the specific purpose of confirming the identity of the individual. In such cases, the additional information shall not be processed for any purpose other than verifying the identity of the individual and must be deleted immediately upon verification or failure to verify the individual.

§ 3. 1. A covered entity shall implement reasonable measures to ensure confidentiality, integrity, and availability of data.

2. A covered entity that collects an individual's emergency health data shall implement and maintain reasonable security procedures and practices, including administrative, physical, and technical safeguards, appropriate to the nature of the information and the purposes for which that information will be used, to protect that information from unauthorized use, disclosure, access, destruction, or modification.

3. A covered entity shall limit access to emergency health data to authorized essential personnel whose use of the data is reasonably necessary to operate the program and record who has accessed emergency health data, the date of access, and for what purposes.

§ 4. 1. All covered entities shall be subject to data protection audits evaluating the technology assisted contact tracing utilized and the development processes, including the design and training data, for statistical impacts on classes protected under section 296 of article 15 of the executive law, as well as for impacts on privacy, and security that includes at a minimum:

(a) a detailed description of the technology assisted contact tracing, its design, its training, data, and its purpose;

(b) an assessment of the relative benefits and costs of the technology assisted contact tracing in light of its purpose, taking into account relevant factors including data minimization practices; the duration for which personal information and the results of the data analysis are stored; what information about the technology assisted contact tracing is available to the public; and the recipients of the results of the technology assisted contact tracing;

(c) an assessment of the risk of harm posed by the technology assisted contact tracing and the risk that the technology assisted contact tracing may result in or contribute to inaccurate, unfair, biased, or discriminatory decisions impacting individuals; and

(d) The measures the state agency will employ to minimize the risks described in paragraph (c) of this subdivision, including technological and physical safeguards.

2. The audits required by this subdivision shall be made available to the public.

§ 5. 1. An individual may bring a private right of action in a court of competent jurisdiction to enforce any right under this act or to enjoin any violation of this act.

2. The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, to enforce the provisions of this act. In an action brought by the attorney general, the court may award injunction relief, including preliminary injunctions, to prevent further violations of and compel compliance with this act; civil penalties up to twenty-five thousand dollars per violation or up to four percent of annual revenue; other appropriate relief, including restitution, to redress harms to individuals or to mitigate all substantial risk of harm; and any other relief the court determines.

§ 6. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed January 1, 2023.