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For distribution to all members of the Joint Standing Committee on Judiciary

Delivered via email

Re: Serious Concerns with LD 1977

Dear Members:

We are writing to express the Software & Information Industry Association's (SIIA's) constitutional concerns with the current draft of LD 1977. By way of background, SIIA is a trade association representing over 380 companies reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information; creators of software and platforms used by millions worldwide; and companies specializing in data analytics and information services. Our mission is to protect the three prongs of a healthy information environment essential to that business: creation, dissemination and productive use.

SIIA supports meaningful data privacy protections for consumers and the overall intentions of LD 1977. We are concerned, however, that the current language exempting "publicly available information" renders the definition an unworkable—and likely unconstitutional—departure from best practices in comparable state privacy laws. This is because the Supreme Court has made clear that "the creation and dissemination of information is speech for First Amendment purposes."[1] The State may not infringe these rights to protect a generalized interest in consumer privacy.[2]

LD 1977's exemption for publicly available information currently indicates that:

"'Publicly available information' does not include:

> …
> 2. any inference made exclusively from multiple independent sources of publicly available information that reveals sensitive data with respect to an individual;
> …
> 4. publicly available information that has been combined with personal data; …"

As structured, the bill creates three main problems. The first problem is that the public domain that the First Amendment protects is a one-way ratchet. It extends beyond the publication of public domain information to the creation of inferences from such information and the formation of opinions. The bill subjects inferences from publicly available information to the consumer rights of deletion, do-not-sell, and similar requirements. Suppose, for example, an investigative reporter attempts to find out whether a fugitive named John Smith is living in Wisconsin, and cross-references court filings, real estate records,

[1] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).
[2] See generally *E. Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1081 (2000).

and newspaper articles to infer that Mr. Smith is living there. If the reporter infers that he is in fact living there, that is opinion. If the reporter confirms it, it becomes fact. In either case, the publisher of that information has a First Amendment right to disseminate it. An undifferentiated fear of the collection of public information will not sustain a regulation against the heightened First Amendment scrutiny that courts would apply.[3] Even if publicly-available information is exempted, it remains a violation of the First Amendment to restrict the transfer of inferences derived solely from this data.

Second, while public domain information can be combined with other, private information that can be regulated, personal information retains its First Amendment protection once removed from the context that created the consumer's reasonable expectation of privacy in that information. Thus, although publicly available information may be combined with non-public data subject to regulatory restrictions, this combination does not alter the status of nor reduce the First Amendment protection for the public data. Again, a hypothetical is helpful. Suppose, for example, in order to prevent e-commerce fraud, a firm provides a service where it cross-checks a consumer's delivery address against public records, and then compares that against credit card account information. A law that prevented the distribution of public record information outside the context of a credit card transaction would be unconstitutional. Unfortunately, this legislation as currently drafted would do just that.

* * *

Protection of privacy is a legitimate legislative interest, and SIIA supports efforts to provide meaningful protections for consumers while clarifying compliance requirements and protecting constitutionally guaranteed speech interests. We thank you very much for your consideration and would be happy to discuss any of these issues further with you.

Respectfully submitted,

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[3] *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-495 (1975) ("even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record").