



February 14, 2024

SIIA Written Testimony on HI SB 2686

We are writing to express the Software & Information Industry Association’s (SIIA’s) opposition to SB 2686 because of its First Amendment shortcomings. SIIA is a trade association representing roughly 375 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.

When California considered its signature consumer privacy law, the original version would have violated the First Amendment because it prevented entities from collecting, processing, and disseminating certain types of publicly available information (PAI). This is because the Supreme Court has made clear that “the creation and dissemination of information is speech for First Amendment purposes.” A state may not infringe these rights to protect a generalized interest in consumer privacy. These speech-related concerns were raised by SIIA and others, and since then, every piece of enacted privacy legislation provides an exemption for PAI as well as statutory exemptions to enable critical public functions. Without that language, these privacy laws would be facially unconstitutional.

SB 2686 has the same basic defects. A vibrant, free-flowing public domain where people can obtain accurate, timely information is essential to a functioning democracy and enables a variety of important activities. As drafted, SB 2686 would produce unintended and unworkable policy outcomes.

Personal information is disclosed pursuant to authorizations in federal law for a number of important reasons, including fraud prevention, legal compliance and enforcement of illegal activity, as part of loans, credit, and other financial transactions. All types of government employees have personal lives outside of their employment where personal information is used during the course of securing a loan, buying a car, or getting insurance. Personal information is also shared by companies with government entities for the purposes of child support enforcement, tax evasion, benefits assessment, and a host of other reasons including retirement benefit outreach to beneficiaries, health alerts, and constituent outreach.

Failing to exempt PAI in SB 2686 threatens to undermine all of these societally beneficial uses. As explained above, this approach is a marked departure from comparable privacy laws and creates implementation challenges – including lacking exemptions for legal compliance, fraud prevention, GLBA, HIPAA, DPPA, and FCRA-regulated data. In addition, the approach to PAI in the bill renders it content discriminatory, and thus unconstitutional. Protection of privacy is a legitimate legislative priority, but must be balanced against 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, if helpful.

Respectfully submitted,

Anton van Seventer
Counsel, Privacy and Data Policy
Software & Information Industry Association

