

Senate Commerce Committee

Aaron Jones 271-4063

HB 384-FN, prohibiting the sharing of location data.

Hearing Date: April 27, 2021

Time Opened: 10:08 a.m.

Time Closed: 10:55 a.m.

Members of the Committee Present: Senators French, Gannon, Bradley, Soucy and Cavanaugh

Members of the Committee Absent : None

Bill Analysis: This bill prohibits the sharing of location data by a mobile application developer, telecommunications carrier, or other person.

Sponsors:

Rep. Wuelper

Rep. M. Smith

Rep. Verville

Rep. Gould

Rep. T. Lekas

Rep. Wallace

Rep. Testerman

Who supports the bill: 32 people signed up in support of the bill. Full sign in sheet available upon request.

Who opposes the bill: 41 people signed up in opposition to bill. Full sign in sheet available upon request.

Who is neutral on the bill: Lieutenant Brian Strong (NH State Police), Richard Head (NH Judicial Branch)

Summary of testimony presented in support:

Representative Kurt Wuelper

- The intent of this bill is to give individuals control over the sharing of their location information.
- This bill would keep location information confidential between the user and the provider. Specifically, this bill prohibits the sharing, selling, and giving away of location information.
- Representative Wuelper said he doesn't give location information to his providers so that they can sell it to other vendors, such as travel agencies or cruise companies.
- Through the assemblage of digital information, Representative Wuelper said people no longer have privacy.

- Last year, a similar bill passed the House with bipartisan support. Also, a similar bill was introduced by Senator Shannon Chandley, but it was tabled as a result of the pandemic.
- Representative Wuelper said this bill is intended to be broad in scope.
- The provisions of this bill don't apply to emergency situations or law enforcement.
- A \$1,000 fine is imposed for every violation and a \$10,000 fine is imposed per person for repeated violations.
- Representative Wuelper agreed that a federal law might be beneficial; however, other states like California, Maine, and New York have introduced similar legislation.
- Representative Wuelper concluded that the residents of New Hampshire made it clear they wanted their privacy protected when they adopted a Constitutional Amendment several years ago.
- **Senator Gannon** asked if any lawyers had reviewed this bill to determine if it violated the Commerce Clause or interstate commerce restrictions.
 - **Representative Wuelper** replied that it hadn't been reviewed.
- **Senator French** asked Representative Wuelper if he knew how many billions of dollars were involved with the sale of information by telecommunications companies.
 - **Representative Wuelper** said he couldn't count that high.
- **Senator French** wondered if this bill would drive up the cost of basic services if the sale of information were prohibited.
 - **Representative Wuelper** responded that he wasn't sure because he didn't know the revenue streams of the telecommunications industry. He stated that privacy has a value that far exceeds the small cost increases that might occur.

Jason Hennessey

- As of 2019, all major mobile wireless carriers were found to be selling location information to intermediaries, which then sold that information to anyone they wanted to.
 - For example, T-Mobile has sold information to over 80 intermediaries.
 - Telecommunications providers agreed to end this practice; however, Mr. Hennessey said that hasn't happened yet.
 - To his knowledge, Mr. Hennessey said it isn't illegal for thefts, stalkers, or malicious actors to purchase or use this information.
- Location information can be used to intrude into everyone's private life. Additionally, aggregators can use location information to link people to one another.
- According to Mr. Hennessey, location information doesn't depend on a user enabling location access on their cellphone. Instead, location information can be tracked via cellphone towers.

- This bill would codify a common expectation that companies aren't permitted to widely share location information without consent.
- According to Mr. Hennessey, this bill is necessary because solutions in the marketplace aren't being offered.
- While telecommunications companies have stated they want federal legislation, Mr. Hennessey said they spent \$100 million to defeat legislative efforts in 2017.
- Mr. Hennessey believed this bill didn't violate interstate commerce because it operates only within the bounds of New Hampshire.
- Applications, such as Uber, wouldn't be affected by this bill as long as the request were made by a person.
- This bill wouldn't apply to first-party advertisers or friends sharing locations with one another. Instead, it would only apply to telecommunications companies and mobile application developers.
- Mr. Hennessey asked the Committee to amend the bill to ensure that consent requests were separate and distinct from other consents.
- **Senator Gannon** asked if his children could still be tracked even if they turned off their locators on their phones.
 - **Mr. Hennessey** said they could still be tracked because companies don't rely on any permissions that are on someone's phone.

Summary of testimony presented in opposition:

Representative Timothy Horrigan

- Representative Horrigan shared concerns over privacy; however, he believed this bill didn't adequately address this extraordinarily complicated issue.
- Representative Horrigan felt this legislation wasn't necessary because it should be addressed at the federal level. In addition, he was concerned that the sponsor never consulted anyone on whether the bill violated interstate commerce or not.
- If passed, this bill would deny residents, visitors, and businesses access to valuable online location-based services.
- Representative Horrigan said the technology industry was aware that consumers don't want to use products that don't respect their privacy.
 - For example, Apple has recently launched a new operating system that seeks to enhance privacy protections for users.
- Service providers often collect data anonymously in order to provide their service, then they sell it to others who want it.
- Representative Horrigan emphasized that the Legislature has a role in regulating the sharing of data; however, this bill would drive high tech companies out of the state, destroy jobs, and paralyze the growth of the gig economy.
- This bill could result in businesses and individuals paying millions of dollars in fines, even if they inadvertently violate the provisions of this bill.

- Finally, this bill doesn't provide rulemaking authority to either the executive branch or the Joint Legislative Committee on Administrative Rules (JLCAR).

Lisa McCabe, Director of State Legislative Affairs, CTIA

- This bill would further fragment consumer privacy laws since it's technology and sector specific.
- Additionally, this bill only applies to one type of information, location information, which only mobile application developers and telecommunications providers have access to.
- Consequently, this bill favors certain business models and competitors over others.
- Ms. McCabe said that consumer privacy protections should be applied consistently across all industry sectors and for all types of information.
- This bill would include a private right of action, which could expose telecommunications providers in New Hampshire to costly litigation. In addition, it could increase the cost of operating mobile applications and services in the state.
 - A recent study found that plaintiffs are unlikely to receive compensation or adjudicative relief in privacy-related lawsuits. In contrast, their attorney's benefit monetarily from these types of cases.
- Ms. McCabe concluded that it's better to address this issue through a holistic approach to ensure consumer protections are consistent and that no business model is favored over another.
- **Senator French** asked if there was any federal legislation being proposed to address this matter.
 - **Ms. McCabe** said that there are numerous bills in Congress that are taking a holistic approach to help address consumer privacy issues.

David Creer, Director of Public Policy, BIA of New Hampshire

- If passed, New Hampshire would stand out nationally for its location privacy requirements.
- For application services, such as Uber or Instacart, data is essential for their functionality.
- Under this bill, a consumer would be required to consent to their location being shared every time they use one of these applications.
- Small businesses frequently use this type of data to target local customers, not customers out-of-state.
- Mr. Creer concluded that this bill would place overly burdensome requirements on businesses and consumers.

Maura Weston, on behalf of the New England Cable and Telecommunications Association

- Members of the New England Cable and Telecommunications Association (NECTA), such as Atlantic Broadband, Comcast, and Charter, are committed to not selling the location data of their mobile customers.
- NECTA opposed the bill for four reasons.
 - First, the definitions and language contained within this bill are vague and overly broad.
 - For example, the term “telecommunications carrier” is inconsistent with other statutory definitions of the same term.
 - Second, this bill would impede the ability of businesses, providers, and consumers from engaging in basic commercial interactions and functions.
 - For example, necessary functions like payment processing, order fulfillment, or fraud protection would require intrusive and repeated consent requests.
 - Third, New Hampshire would be an outlier because even California doesn’t treat the sharing of data in this manner.
 - Finally, the existing online ecosystem has built its compliance around the Federal Trade Commission (FTC). NECTA members have relied on the FTC framework, which Ms. Weston said has protected consumers, provided necessary oversight, and allowed innovative services to proliferate. Often the FTC cooperates with state attorney’s general to enforce consumer protections. The FTC has brought over 500 privacy and data security enforcement actions against small and large companies.
- Ms. Weston emphasized that this bill would harm New Hampshire’s standing with surrounding states; impact business sectors, small businesses, and consumers alike; create a policy framework that isn’t found anywhere else in the \$21.5 trillion dollar telecommunications economy; and have a significant impact on competitiveness and innovation.
- **Senator Gannon** wondered if an opt-out option could be a possibility.
 - **Ms. Weston** said that the FTC requires an opt-in framework for very sensitive data; however, the framework is generally built around opt-out. States, such as California, have followed the FTC model. Ms. Weston said to shift gears way from the opt-out framework would be detrimental and inconsistent with federal law.

Christopher Gilrein, Executive Director, TechNet

- This bill would create friction between consumers and the state.
 - Mr. Gilrein said friction is the number of steps between when a consumer identifies what they want and how many steps it takes to get there.
 - For example, if Mr. Gilrein came to New Hampshire from Massachusetts, he would receive messages requiring him to opt-in to having his location

data processed. These requests would apply to his GPS, payment applications, digital trail maps, and even state park reservations.

- Consumers would get consent requests from frequently used applications and from third-party processors, such as payment processors, which typically operate silently in the background. Consequently, this could cause greater friction and lead to more consumer confusion.
- As others have stated, the bill provides a private right of action.
 - For small companies, it's possible that a consent request might not appear, especially if they don't have a compliance director or an extra developer to program it in.
 - As a result, Mr. Gilrein said there's a good possibility that more out-of-state law firms will file class action lawsuits against New Hampshire-based companies.

Kyle Baker, on behalf of The Internet Coalition

- The Coalition shared similar concerns that this bill created an overly broad prohibition on the sharing of geolocation data.
- Users can already view privacy policies and the settings of applications before they download them. Additionally, a user can decline to consent to having their location data shared.
- Once an application is downloaded, a user can choose not to share their information, limit location data access to certain services, or tailor location data systems to turn on or off at any time.
- This bill would impact popular ridesharing, mapping, educational, and weather applications.
- Mr. Baker concluded that this bill would create a patchwork of various mandates that would potentially conflict with existing state and federal laws. This would make it almost impossible for national and worldwide companies to operate across state lines.

Maya McKenzie, on behalf of the State Privacy and Security Coalition

- Ms. McKenzie said they appreciated the intent of the bill, but it's too vague and overly broad to be workable.
- When evaluating policies, the Coalition uses three criteria: first, it must improve consumer protections; second, it must be operationally workable; and finally, it must prevent frivolous litigation, while also providing consumers with an understanding of their rights.
 - According to Ms. McKenzie, this bill doesn't meet any of these criteria.
- Generally, states have aligned data sharing practices and operational workability with federal regulations, which govern notice and consent requirements. Ms. McKenzie said these practices also provide consumer protections.

- As others have mentioned, location information is used for background business functions.
 - For example, the state lottery application uses location information to determine if lottery functions can be offered to someone. This bill would potentially have a negative on this service.
- This bill only applies to the usage and sharing of data within the boundaries of cities and towns, not unincorporated areas.
- This bill might encumber voice activated applications that are used by the visually impaired.
- Finally, this bill would substantially increase litigation risk for mobile application developers, telecommunications carriers, and individual's if they shared information without consent.

Neutral Information Presented:

Lieutenant Brian Strong, Commander of the Special Investigations Unit, New Hampshire State Police

- Lieutenant Strong wanted to emphasize how important it's that law enforcement have the ability through criminal processes to retrieve location information.
- Based on his understanding, this bill wouldn't apply to law enforcement.

Richard Head, Government Affairs Coordinator, New Hampshire Judicial Branch

- Mr. Head said they had no position on the policy of the bill; however, they wanted the effective date changed to January 1, 2022.
- Under RSA 14:9-a, any law effecting judicial practice and procedure or eliminating criminal prohibitions, civil causes of action or remedies, or limitations of actions shall take effect January 1st in the year following passage.
- Also, changing the effective date is necessary to ensure that the Uniform Charge Table used by courts, law enforcement, and agencies is updated and precise. This system requires hundreds of changes.
- This bill would require five changes to the Uniform Charge Table.
 - First, there would need to be a description of the change made.
 - Second, the violation or violations would need to be described.
 - Third, the fine for the violation would be defined.
 - Fourth, differences between multiple violations would be established.
 - Finally, fines would be defined for each of the multiple violations.