

Senate Judiciary Committee

Matthew Schelzi 271-3266

SB 255-FN, relative to the expectation of privacy.

Hearing Date: February 17, 2023

Time Opened: 2:30 p.m.

Time Closed: 3:14 p.m.

Members of the Committee Present: Senators Carson, Gannon, Abbas, Whitley and Chandley

Members of the Committee Absent: None

Bill Analysis: This bill creates a new chapter detailing a consumer expectation of privacy.

Sponsors:

Sen. Carson

Sen. Innis

Sen. Soucy

Sen. Rosenwald

Sen. Chandley

Sen. Ricciardi

Rep. Edwards

Rep. Filiault

Rep. McGough

Rep. Luneau

Who supports the bill: Senator Carson (District 14), Rep. McGough (Hills. 12), Ryan Harkins (Microsoft), Jim Hatem (State Farm), Rick Fabrizio, Senator Innis (District 7), Senator Rosenwald (District 13), Senator Soucy (District 18), Dan Watkins, and Roberta Boudman.

Who opposes the bill: Curtis Howland, Maureen Hardy, and Jesse Medeiros.

Who is neutral on the bill: Brandon Garod (NH DOJ), Andrew Kingman (State Privacy and Security Coalition), Chris Gilrein (TechNet), Henry Veilleux (CTIA), Matt Schwartz (Consumer Report), and Mercedes Subhani.

Summary of testimony presented in support:

Senator Carson introduced SB 255-FN, and stated she drafted an amendment to this bill. She said this bill seeks to create a new chapter regarding an expectation for consumer privacy. She noted a state constitutional amendment was passed two years ago emphasizing that citizens do have a right to privacy. She said individuals today produce twenty-five times the amount of online data that they did in 2010, but New Hampshire citizens have no rights to control their personal data. Sen. Carson emphasized that businesses have no obligation to steward data they hold or respect the wishes of consumers when they ask that their personal information not be

distributed. She said SB 255-FN would establish the right of consumers to protect their data and the responsibility of businesses, they deal with, to respect their customer's privacy wishes. This bill would grant consumers the right to access, correct, delete, and obtain a copy of personal data. It also would allow consumers the right to opt out of the processing of personal data for certain purposes. She said this bill also established a framework for controlling and processing personal data and established responsibilities and privacy protection standards for the various businesses that control and or process personal data. She said SB 255-FN is modeled after legislation that passed in Virginia, Colorado, and Connecticut. Many of the stakeholders and industries that conduct business in New Hampshire have evaluated and worked on this model. Sen. Carson said this bill is the result of years of work and discussions which were necessary to provide rights for consumers, while minimizing disruption to commerce. This bill clearly established consumer rights, created obligations on the part of controllers, who have the relationship with the consumer, and obligations for processors or those who process data on behalf of the controllers.

Ryan Harkins, Senior Director of Public Policy with Microsoft, said this bill would provide important new privacy protections for New Hampshire consumers while enabling industry to continue to use data in responsible and innovative ways. Mr. Harkins stated that Microsoft has asked for comprehensive privacy legislation in the United States since 2005. He said Microsoft has noticed a growing distrust in the public towards technology and towards their industry, and over the last two decades, those concerns have only grown. He said the only way to start earning that trust back is to pass new laws.

Mr. Harkins said the United States has traditionally taken a different approach to regulating privacy, as compared to other nations. He said the European Union has long had a comprehensive privacy law in place that addresses all privacy issues across all industries. The United States has taken a sectoral approach, which lead to narrow privacy laws, such as HIPAA or CAPP. However, he noted it has become apparent that this patchwork approach no longer works. Congress has been unable to pass any comprehensive privacy laws, but at least five states have passed comprehensive privacy laws. Mr. Harkins stated that any comprehensive privacy law must contain several elements to provide consumers with real and credible privacy protections. The first is that any privacy law must apply to modern online data sets, particularly identifiable data, such as data stored with a cookie ID or an IP address. Mr. Harkins complimented the language of SB 255-FN for applying to modern data sets. He said SB 255-FN also provided a sufficiently robust definition of de-identified data. De-identified data is exempted from the bill. In order for data to be de-identified, it must meet a rigorous standard, which can be seen in SB 255-FN.

The second element that would provide consumers with real and credible privacy protections is the rights that are necessary to empower them to control their data. Mr. Harkins complimented the language of SB 255-FN describing how it allows individuals to have power over their data. SB 255-FN allows consumers the right to opt out of certain sensitive processing activities, such as data sales, targeted advertising, and consumer profiling. He stated support for the language that requires companies to comply with opt-out requests. This would create a place where consumers can go and

press one button to opt out of being tracked and targeted from all websites. Mr. Harkins stated support for personal opt-in consent, which would require consent to collect, use, and share sensitive information.

Lastly, Mr. Harkins believed that any privacy bill must impose an affirmative obligation on companies to be responsible stewards of the data they collect. SB 255-FN would impose data minimization requirements, which requires that the minimum amount of necessary data be collected for a specified purpose. It would also prohibit companies from engaging in unlawful data discrimination. He said SB 255-FN is consistent with other state laws, global data protection laws, European Unions' general data protection regulation, and past United States privacy laws. SB 255-FN proposed primary obligations of this bill apply to controllers and complementary obligations on service providers. Mr. Harkins expressed that his concerns have been addressed in the amendment presented by Sen. Carson which would strengthen the bill from a consumer protection standpoint.

Rick Fabrizio, Director of Communications and Public Policy for the Business & Industry Association, said BIA supports SB 255-FN which would provide reasonable protections for businesses and consumers through a comprehensive data privacy law. He noted SB 255-FN was crafted with industry input and is sound legislation. He said BIA would like to see some improvements in this bill. He said SB 255-FN should exempt smaller business from this law, and it should more clearly state the definition of child. The phrase "known child" raised concern for unintended liabilities. He believed a change in the effective date to Jan. 1, 2025 would allow more time for businesses to put protocols in place.

Sen. Carson noted the amendment she introduced changed the effective date to Jan. 1, 2025.

Summary of testimony presented in opposition: None.

Neutral Information Presented:

Brandon Garod, a Senior Assistant Attorney General at the New Hampshire Attorney General's Office and the Chief of the Consumer Protection and Antitrust Bureau, said that the intent of this bill has their full support. He believed there are areas of concern in the enforcement of this bill. He said the ability for consumers to control who uses that information is in line with the goals of the Attorney General's Office. Mr. Garod stated that SB 255-FN provided a framework for consumer privacy; however, he believed that the current version of this bill should not be the final version. He said if this bill were passed into law today, given the current makeup of the Consumer Protection and Antitrust Bureau, this would be an impossible bill to enforce. The Consumer Protection and Antitrust Bureau is responsible for the review and response to thousands of consumer complaints that are received each year. They are also responsible for investigating proposed mergers in the state. He believed that

this entirely new chapter would only add onto the responsibilities of the Consumer Protection and Antitrust Bureau which could not be effectively enforced without additional resources. He said the additional resources would take the form of additional staff, additional attorneys and at least one more investigator.

He noted the Attorney General's Office is also limited in data privacy expertise. He expressed concerns with the language on page 8, line 20, regarding RSA 507-H:6, which is relative to controller responsibilities. He noted this is the primary source of consumer complaints for the Bureau. He said controllers of data would have to, "limit the collection of personal data to what is adequate, relevant and reasonably necessary in relation to the purposes for which such data is processed, as disclosed to the consumer." He said that the vague language of the bill makes it almost impossible to enforce and determine what is adequate, relevant, and reasonably necessary. He said that he is open to working with the legislators to draft clear language as to what the limit is on the amount of personal data controllers can collect without violating this law.

He then addressed page 9, section III, "a controller shall provide consumers with a reasonably accessible, clear and meaningful privacy notice," which he pointed out the statute does not specifically say at what point in time the company is required to issue a notice to the consumer. He urged the Committee to add language that established clarity at what point a company, that is using someone's data, is responsible for sending out a notification to consumers. He then addressed page 16, section IV, "Nothing in this chapter shall be construed as providing the basis for, or be subject to, a private right of action for violations under this chapter." He stated that RSA 358-A anticipated a sharing of enforcement responsibilities to enforce the Consumer Protection Act between the Attorney General's Office and consumers. Without this specific language, consumers can go into court and advocate for their own rights. By taking away the private right of action, it places the enforcement of this statute one hundred percent on the Attorney General's Office. He said this section only amplified his concerns about the lack of resources his Department would have if this bill were passed.

Lastly, Mr. Garod noted an inconsistency on page 16, sections, II and III which deal with the attorney generals issuing of notice prior to bringing an action if there's a potential violation of this chapter. He stated that under roman numeral II, "The attorney general shall, prior to initiating any action for a violation under this chapter, issue a notice of violation to the controller if the attorney general determines that a cure is possible." He said factors under which they can determine if a cure is possible in section III are not in line with the prior section; thus, creating inconsistencies.

Senator Abbas asked if an amendment were added to SB 255-FN to allow a private right of action, should there be a notice requirement to the Attorney Generals Office, that the complaint is being pursued.

Mr. Garod said yes, because it would be consistent with the current notice requirement under RSA 358-A. He said currently when someone files a private right of action, under RSA 358-A, they are required to give the Attorney General's Office notice of the action.

Senator Whitley asked if Mr. Garod was working on an amended fiscal note to reflect the necessary resources to enforce this bill.

Mr. Garod said that he did not have a fiscal note at this point but would be happy to submit one.

Andrew Kingman, the State Privacy and Security Coalition, appreciated Senator Carson's sponsorship of SB 255-FN. He said this bill is a sensible approach to privacy at the state level. He said the bill did a fair job of providing consumers increased control over their personal data and imposes obligations on businesses to analyze and mitigate risks. He said it also required businesses to obtain consent to process sensitive data.

Chris Gilrein, represents TechNet, noted they supported a federal data privacy bill. He appreciated the legislation put forward by Sen. Carson. He said the benefit of this bill is transparency. He said the rights and responsibilities of companies are clear and laid out in statute. He said the global privacy control language in the bill is concerning and other states have delayed implementation. He said it's difficult to see how this aspect of the bill would be operationalized, how it would interact with VPN, and how it would work on a mobile device. He said through Colorado rulemaking they might uncover things that should be built into the law. He believed more data would come out, and believed the global privacy control language aspect of the bill should have a delayed implementation.

Henry Veilleux, represents CTIA which is the trade association for the wireless industry, he said privacy laws are largely a national and international issue. However, he believed inaction on the federal level is causing states to act on data privacy. He said his organization would be happy to work with the sponsor of this bill to strengthen it.

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Date Hearing Report completed: February 17, 2023