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California Delete Act: Dichotomy Between Privacy and Public Interest

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ABSTRACT

In an age where personal data is easily accessible and editable, it's crucial to consider the implications of digitizing such information. Safeguarding this data is essential, leading to the necessity of privacy tools. Companies handling data often both acquire and sell it, and compliance regulations drive them to prioritize data protection. Despite available options, consumers fear unauthorized access and prefer data deletion over potential future access via the cloud. Methods like overwriting, permanent destruction, or physical removal of stored data offer reliable options for ensuring sensitive information doesn't end up in the wrong hands.

The first state in the United States that created an accessible data deletion mechanism allowing consumers to place an application for deletion of personal data held by data brokers is California. The California Delete Act (SB 362 Bill) was introduced on October 10, 2023, to impose registration and disclosure requirements in addition to existing mechanisms that support requests of data deletion by way of a central deletion mechanism. While this Act is considered a key step towards enhancing consumer privacy protection, one cannot help but question the necessity behind the introduction of such a mechanism and whether it truly does strike the right balance between protecting privacy of consumers against the interest of data brokers.

Keywords: *California Delete Act, Data Protection, Data Privacy, Data Deletion, Data Brokers, Privacy Rights.*

I. INTRODUCTION

In an era where access and modification of personal data has become as easy as withdrawing money from an ATM, one cannot help but ponder over the ramifications of enhanced ease of access associated with the digitization of personal data. Tools of data privacy thus become imperative tools in the process of securing and shielding both sensitive and protected data. Organizations that help in implementing tools of data protection are often those very companies that acquire or sell data. Compliance regulations imposed on organizations push them to be

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responsible to take necessary measures for ensuring protection of private user data.³ However, despite multiple data protection options, consumers often live in the fear that their data might be accessed by unauthorised personnel and would rather have the data deleted than have it exist somewhere on the cloud for it to be accessed in the future.⁴ In such instances, data deletion or erasure is a great option for ensuring that sensitive information do not fall into unwanted hands. Data deletion or erasure methods are inclusive of but not limited to overwriting of existing data, permanent destruction or physical destruction of the data storage. The first state in the United States that created an *accessible data deletion mechanism* allowing consumers to place an application for deletion of personal data held by data brokers is California.⁵ The California Delete Act (SB 362 Bill) was introduced on October 10, 2023, to impose registration and disclosure requirements in addition to existing mechanisms that support requests of data deletion by way of a central deletion mechanism.⁶ While this Act is considered a key step towards enhancing consumer privacy protection, one cannot help but question the necessity behind the introduction of such a mechanism and whether it truly does strike the right balance between protecting privacy of consumers against the interest of data brokers.

II. THE NEED TO ESTABLISH ACCESSIBLE PERSONAL DATA DELETION MECHANISMS

(A) Data deletion as a personal right

The California Consumer Privacy Act, 2018 (CCPA) grants California Residents with the right to request for their personal information to be deleted under specific conditions when⁷:

- (i) The personal information has been collected by a business directly from the consumer.
- (ii) There exists no necessity for the business or the service provider to retain the personal information.

³ Chhetri TR and others, 'Data Protection by Design Tool for Automated GDPR Compliance Verification Based on Semantically Modeled Informed Consent' (2022) 22 Sensors 2763

⁴ Jordan G, Leskovar R and Marič M, 'Impact of Fear of Identity Theft and Perceived Risk on Online Purchase Intention' (2018) 51 Organizacija 150

⁵ Privado.ai, 'Ca's Delete Act Impact, 23andMe Data Breach Concerns, UK Ico's GDPR Complaint Approach' (*LinkedIn*, 12 October 2023) <[⁶ Ibid](https://www.linkedin.com/pulse/cas-delete-act-impact-23andme-data-breach-concerns-uk-icos#:~:text=The%20California%20Delete%20Act%20was,auditing%20obligations%20on%20data%20brokers.> accessed 21 December 2023</p></div><div data-bbox=)

⁷ Goldman E, 'An Introduction to the California Consumer Privacy Act (CCPA)' [2018] SSRN Electronic Journal 4; CCPA 2018, s.1798.100

Thus, Californian citizens have an inherent right to request for their data to be deleted.⁸ The CCPA also provides that businesses are required to comply with the request of the consumer and delete their personal information by way of⁹:

- (i) Permanent deletion or complete erasure of personal information on their existing system (archived or the back-up systems are exempted)
- (ii) Deidentifying any stored personal information; or
- (iii) Aggregating consumer information.

(B) Purpose of data deletion mechanisms

Despite data protection methods, consumers have often sought for complete deletion of their personal data. This is because their personal sensitive data includes their personal health information and their personally identifiable information. Such data is often submitted to their banks, hospitals, business or financial agencies.¹⁰ While companies are bound to not misuse the data provided them, they are permitted to share the data submitted to them to a limited extent. Thus, data deletion mechanisms would ensure that the data so submitted is completely erased or removed from the organization's hold and cannot be used elsewhere.¹¹

(C) Regulation of data deletion mechanisms

Provision of data deletion mechanisms under legal frameworks are not uncommon. There are multiple data deletion mechanisms that exist around the world all of which are governed by policies and regulations. For instance, the General Data Protection Regulation 2016 (GDPR) established by the European Union introduced the "right to be forgotten". This right permits an individual to have their personal data erased.¹² Data subjects are also granted the right to obtain from their controller, any data that they might have acquired. This implies that, any organization that controls the use of a consumer's data must without undue delay, erase the data so acquired if specific circumstances are met.¹³ Similarly, under the Virginia Consumer Data Protection Act 2023, (VCDPA) the right of deletion is broader than what is provided under the CCPA wherein it even applies to personal information which a business has collected from consumers or which businesses have collected about consumers from other sources or organizations.¹⁴ The VCDPA

⁸ Ibid

⁹ Ibid; CCPA 2018, s. 1798.148; CCPA Regulations, s. 999.313 d (2)

¹⁰ Tsesis A, 'Data Subjects' Privacy Rights: Regulation of Personal Data Retention and Erasure' (2019) 49 Wake Forest Law Review 435

¹¹ Ibid

¹² Politou E and others, 'Backups and the Right to Be Forgotten in the GDPR: An Uneasy Relationship' (2018) 34 Computer Law & Security Review 1247

¹³ Ibid 1248

¹⁴ Erin, 'Virginia Consumer Data Protection Act (VCDPA) Guide' (*Matomo*, 28 September 2023)

provides for consumers to place a request of personal data deletion, subject to the limitations placed under s.59.1-578.¹⁵

(D) Necessity for data brokerage

a. Importance of data brokerage

Most discourses on privacy rights focus on the responsibility and onus to diligently handle sensitive consumer information placed on data brokers, as a result of which, the important role played by data brokers is often ignored. Data brokers provide crucial and valuable data to businesses that lay out customer preferences, needs and wants.¹⁶ In order to obtain this information, data brokers often access public sources such as online data bases that hold such information.¹⁷ On the basis of such consumer data provided to them, businesses then go on to curate products, services and other forms of customer access that helps not only the business but also the society as a whole.¹⁸ For instance, details on patient's medical histories and symptoms provide valuable information towards invention of important medicines and medical procedures. It is thus important that the restrictions imposed on data brokers are thus not excessive, in order to provide them with the required flexibility to obtain information so required and necessary.¹⁹

How data brokers operate varies by jurisdiction. Attempts to regulate data governance on a global level are also underway. While mechanisms like the GDPR by the EU do exist, several countries are still in talks of how to establish a common data deletion mechanism that regulates cross-border data deletion for consumers.²⁰

b. Permissible data brokerage in California

The definition of a data broker in California is laid down under s. 1798.99.80(d) of California's Data Broker Law CCPA. The definition covers all businesses that sell or deal with the sale of personal information obtained about consumers with who the businesses do not have any direct relationship.²¹ The definition of "collect" under the CCPA s.1798.140(c)(e) is a very broad definition and is not confined to only the obtainment of personal information directly from

<<https://matomo.org/blog/2023/09/vcdpa/>> accessed 21 December 2023

¹⁵ VCDPA 2023, s.59.1-578

¹⁶ Birckan G and others, 'Effects of Data Protection Laws on Data Brokerage Businesses' [2018] ICST Transactions on Scalable Information Systems

¹⁷ Ibid 2-3

¹⁸ Ibid 3,5-6

¹⁹ Ibid

²⁰ Mishra S, 'The Dark Industry of Data Brokers: Need for Regulation?' (2021) 29 International Journal of Law and Information Technology 397

²¹ CCPA 2018, s. 1798.99.80(d)

consumers but also extends to the receiving of personal information from third parties. This definition is very crucial to data brokers since in most cases, data brokers are never directly involved with the consumers.²² Data brokers can this collect any data, even personal information so long as they are a registered body with the state attorney general and subject the said collected data and collection mechanisms to regular audits.²³

(E) Balancing privacy interests in data deletion against the need for data brokerage

a. Objective of the California Delete Act

The California Delete Act requires the CCPA to create and establish an accessible data deletion mechanism by January 1, 2026. This mechanism will allow the Californian consumers to submit one single verifiable consumer request to have their data deleted across all data brokers holding their data.²⁴ From August 1, 2026, onwards the Delete Act would require data brokers across California to access the CCPA's online deletion system at least once every 45 days for the purpose of reviewing and processing new deletion requests.²⁵ Data brokers would also be required to delete any newly obtain personal information collected about consumers in California who have submitted relevant deletion requests once in 45 days, unless otherwise requested by the consumer or where an exemption applies.²⁶ Data brokers will also be prohibited from selling and sharing any such acquired information about the consumer's personal data in the future.²⁷ Additionally, consumers will also be required to direct the service providers and contracts (where applicable) to honour the deletion requests.²⁸

b. Protection awarded to privacy under California Delete Act

The California Delete Act expands the reporting obligations of data brokers under the CCPA. Data brokers are now required to undergo independent audits every three years and furthermore provide the following information annually to the California Privacy Protection Agency:²⁹

1. The name of the entity, their email and website addresses. These are currently the only

²² CCPA 2018, s.1798.140(c)(e)

²³ Ibid; Baik J (Sophia), 'Data Privacy Against Innovation or against Discrimination?: The Case of the California Consumer Privacy Act (CCPA)' (2020) 52 *Telematics and Informatics* 101

²⁴ California S of, 'CPPA Applauds Governor Newsom for Approving the California Delete Act' (*California Privacy Protection Agency*) <<https://cppa.ca.gov/announcements/2023/20231011.html>> accessed 21 December 2023

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid; Bracy J, 'California Governor Signs Delete Act into Law' (*California governor signs Delete Act into law*, 11 October 2023) <<https://iapp.org/news/a/california-governor-signs-ca-delete-act-into-law/>> accessed 21 December 2023

²⁸ Ibid

²⁹ Nagle C, 'California's "Delete Act" Takes Aim at Data Brokers' (*Davis+Gilbert LLP*, 21 September 2023) <<https://www.dglaw.com/californias-delete-act-takes-aim-at-data-brokers/>> accessed 21 December 2023

requirements of disclosure expected.

2. Brokers are also required to submit metrics pertaining to the number of CCPA consumers requests as well as deletion requests submitted under the Delete Act, which have been complied with, denied (whole or in part), if it has been denied, then the basis for the denial for that particular year, and the number of days taken to respond to the requests submitted to them.
3. Brokers are also required to disclose whether they have collected personal information of minors, the precise geolocation of consumers and details pertaining to reproductive healthcare data.
4. Data brokers are required to submit a link to the webpage of their website to explain how consumers can exercise their consumer rights under the CCPA.
5. From January 1, 2029, onwards, data brokers are also required to disclose any third-party audits they have undergone in compliance with the Delete Act and whether in the most recent year, an audit and related materials have been submitted to the California Privacy Protection Agency.

A brief reading of the bill does assure consumers with ample protection under the Delete Act concerning their obtained data. Additionally, obligation placed on data brokers also puts minds at ease towards ensuring responsibility and accountability over such data obtained.

c. Failure to discern between erasure and deletion may negate the objective of the Act.

Indeed, the Data Deletion Act does provide wide protection to consumers towards deletion of their data and prohibition of any further sale, licensing or processing of their data. However, as the title suggests, the Act focuses on the *deletion of data*. Data deletion is the simple process of deleting a file and placing it in the Recycle Bin or trash, or in this case, the removal of data from specific storages.³⁰ Thus, in data deletion, when a file is removed, the storage entity will get rid of the pointers to the file and the storage occupied by that file will then be open to storage of new files or data. Data deletion, however, is not the complete deletion of the actual file but only the address. **This process merely makes the file invisible and inaccessible to the user, but the file still resides somewhere on the storage device or cloud.**³¹ Thus, the very process of

³⁰ 'The Difference between Erasure & Delete' (*Creative.onl*) <<https://www.creative.onl/data-erasure/#:~:text=is%20data%20erasure%3F-,Data%20erasure%20is%20the%20process%20of%20overwriting%20data%20so%20that,cannot%20be%20recovered%20by%20anyone.>> accessed 21 December 2023

³¹ Ibid

data deletion mechanism may not serve the purpose it intended to serve which is to remove the data from every accessible point of recovery. In contrast to data deletion mechanisms, data erasure process is the method and process of overwriting existing data stored in any business storage through use of binary or other random patterns. What this does is, it helps in complete destruction and sanitisation of any data or sensitive information. This process of data deletion results in complete destruction of data and is aimed at eradicating any information and rendering it completely unusable and shielded from any form of access both by the original consumer as well as outsiders.³² While this is the intended effect that the Data Deletion Act intends to provide, the term “deletion” used by the Act may just create a loophole that only removes the acquired data but does not prevent all forms of access. Words like ‘erasure’ or ‘destruction’ of data must be included to ensure that, the data is not recoverable anymore.

d. Inadequate coverage of data broker interests under the California Delete Act

As discussed above, data deletion would imply that data brokers or any other companies would no longer be able to access data that were once collected. s.1798.99.85 (3)(b) permits data brokers to deny a request for data deletion under specific criteria, one of which is where the request for data deletion covers data that is exempt from deletion.³³ However, there is no clarity provided by the bill on whether such an exemption also applies to data that is being used for research and development at the time of submission of deletion request. For instance, details pertaining to medical and health issues of patients would play a crucial role in determining the statistics involved in medical procedures. Removal of such data while in the midst of usage puts several research and development at risk. This creates an air of ambiguity as to the nature of exemption that is allowed to reject a data deletion request submitted by a consumer. If the law were to be interpreted to favour the consumer, the very objective of data brokerage could also be undermined. The bill must be further carefully worded to discuss what category of data deletion requests would be denied and what qualifies as data exempt from deletion.

III. CONCLUSION

Arguably, the Data Deletion Act is indeed a step in the right direction towards protecting the interests of consumers’ privacy, however, issues such as the failure to use words like ‘erasure’ and ‘destruction’ of data may reduce the impact the Act set out to create by create unwarranted loopholes. Additionally, there is no clarity on what data may be exempt from deletion and at

³² Ibid

³³ California Delete Act 2023, s.1798.99.85 (3)(b)

what stage. The discussion in the aforementioned section clearly shows that the fine balance between securing the interests of the public at large through data brokerage of relevant and important information and the privacy interests of consumers have not exactly been met under the Act. It is hoped that further deliberation would ease the discrepancies observed.

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