Addressing Trends... Sharing Solutions

THE WEB CONFERENCE SERIES FOR CORPORATE COUNSEL

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The Changing Data Privacy Landscape

The Web Conference Series for Corporate Counsel

May 22, 2007

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- 2006 Year In Review available at Foley.com/webconference
- Today's summary in July *InsideCounsel*
- Advance copy for today's participants

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Today's Panelists

Andrew Serwin

Partner, Foley & Lardner LLP

- Member of the firm's IP Litigation, Trademark & Copyright, Information Technology & Outsourcing and Entertainment & Media groups
- Advises media and Internet companies on licensing, domain name, privacy and IP issues
- Frequent commentator, columnist and writer on technology and legal issues

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Today's Panelists

Pamela Johnston

Partner, Foley & Lardner LLP

- Member of White Collar Defense & Corporate Compliance, Securities Litigation, Enforcement and Regulation groups
- Focuses in the areas of government enforcement actions, white collar criminal litigation, and complex civil litigation
- Former federal prosecutor in criminal and civil divisions for 14 years

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Today's Moderator

Robert Vosper
Editor, *InsideCounsel*

- *InsideCounsel* is the leading publication exclusively for general counsel and other in-house counsel
- Editorial mission – be the business and management tool for the corporate legal department
- Dedicated to the exploration of the relationship between in-house counsel and the law firms that serve them

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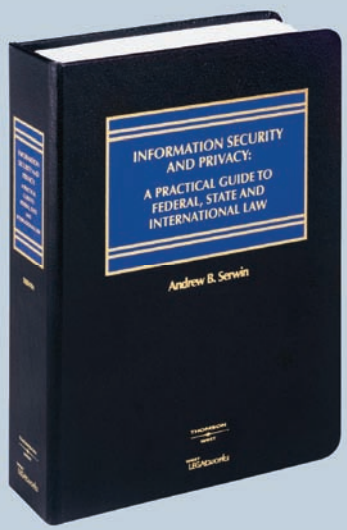

Information Security and Privacy: A Practical Guide to Federal, State and International Law

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Privacy

- General Principles:
  - Notice
  - Choice
  - Onward Transfer
  - Access
  - Security
  - Data Integrity
  - Enforcement

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Live Meeting Poll

Poll Question #1

Which of the following types of personally identifiable information does your company collect, utilize or maintain in its files or on its computer system (including customer and/or employee data)?

- **Names, addresses and email addresses**
- **Social security numbers**
- **Credit card or bank account numbers**
- **Health information/records**
- **Dates of birth**
- **More than one of the above**
- **More than two of the above**

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Privacy

- Ultimately Four Issues:
  - What information do you collect
  - What do you do with the information
  - When can't you disclose it
  - When must you disclose it

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Privacy -- Breach

- When there's been a breach of data or privacy:
  - What you are obligated to do
  - Controlling the message -- when to go beyond what is required
  - When to involve law enforcement

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Federal Privacy Statutes

- Children's Online Privacy Protection Act (COPPA);
- Gramm-Leach-Bliley (financial);
- Electronic Communications Privacy Act;
- Identity Theft and Deterrence Act;
- Health Insurance Portability and Accountability Act (medical); and
- Others (FCRA, FACTA)

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Electronic Communications Privacy Act
(18 U.S.C. § 2510 *et seq.)*

- There are two portions of the ECPA
  - The Wiretap Act; and
  - The Stored Communications Act
- This is a temporal distinction

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Electronic Communications Privacy Act
(18 U.S.C. § 2510 *et seq.)*

- Wiretap Act and Councilman.
  - Prohibits “interception” of “electronic communications”.
    - "electronic communication" "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photooptical system that affects interstate or foreign commerce,"
  - Does not include electronic storage as does the definition of “wire communications” or the storage definition of the Stored Communications Act.

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Electronic Communications Privacy Act
(18 U.S.C. § 2510 *et seq.)*

- Applies mostly for businesses in the employee context.
- Two potential exceptions:
  - protect the provider, another provider, or a user, from fraudulent, unlawful or abusive use of such service; or
  - a person employed or authorized, or whose facilities are used, to forward such communication to its destination

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Electronic Communications Privacy Act
(18 U.S.C. § 2510 *et seq.)*

- Amended definitions of “wire communication” are important to note.
- Additional restrictions upon “public” providers.

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State Employee Email Monitoring Laws

- Assessing your policy before an emergency occurs
- Connecticut
  - Requires notice and posting of notice of the employer's monitoring policies
- Delaware
  - Requires that notice be given every day to the employee
- Certain exceptions apply for investigations
- Civil penalties are available
- *Fischer v. Mt. Olive Lutheran Church*

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Federal Disclosure Statutes

- Communications Assistance for Law Enforcement; and
- The Patriot Act
- The DMCA

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FTC's Security Suggestions

- GLB specific
  - following a written contingency plan to address any breaches of physical, administrative or technical safeguards;
  - checking with software vendors regularly to obtain and install patches that resolve software vulnerabilities;
  - using anti-virus software that updates automatically;
  - maintaining up-to-date firewalls, particularly if broadband Internet access is used; and
  - providing central management of security tools for employees and passing along updates about any security risks or breaches
- **assume that you'll need to access the policies and notices after hours and when no one is available – plan ahead**

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FCRA/FACTA

- What is FACTA?
- It is an amendment to FCRA
- Identity theft
  - Credit fraud rules
    - Credit hold
    - State laws also impact
- Data Destruction Rules
  - June 1, 2005
- Applies to certain information regarding employees.

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FACT Act and Credit Card Numbers

- A number of new laws went into effect on 1/1/07 regarding credit card receipts.
  - The FACT Act prohibits displaying more than the last 5 numbers or the expiration date.
  - Certain state laws are more restrictive.

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Bankruptcy Reform Act of 2005

- Recent amendments to 11 U.S.C. § 363 impact your privacy policy
  - eToys/Martha Stewart issue

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The FTC and Privacy

- FTC has an announced privacy agenda
  - Stepping up enforcement of Spam laws
  - Increasing assistance to victims of identity theft
  - Enforcing company's privacy promises is also a focal point of the FTC's agenda
  - Enforcing federal laws
- Additional guidance is available via consent orders posted on the FTC website

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The FTC and Privacy

- Tower Records
  - Claimed to have reasonable security in shopping cart area
  - Had a security issue that permitted customer information to be revealed
- CartManager International
  - Third Party provider misrepresented
- BJ's Electronics
  - Inadequate data security on wireless networks with credit card information

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The FTC and Privacy

- Sunbelt Lending Services
  - Violation of the Safeguard Rule, including for the failure to assess risks and implement safeguards to control these risks, train and oversee employees, monitor the network for vulnerabilities
- DSW
- ChoicePoint
- CardSystems, Inc
  - Inadequate data security was an unfair practice

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International Issues

- SOX
  - Whistleblower issues and foreign data protection regimes
- Employee issues

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California's Online Privacy Protection Act (Cal. Bus. & Prof. Code § 22579)

- Applies if "personal information" is collected through the website
- A website must then:
  - Have a privacy policy that discloses the type of information collected;
  - Describes the process, if any, for consumers to change their information;
  - Describe the process for consumers to receive notice of material changes to the policy; and
  - Identify its effective date
- Format requirements

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Live Meeting Poll

Poll Question #2

Are you worried that a breach of data security involving your company's private data will occur in the next 12 months?

- **Yes**
- **No**

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Notice of Security Breach Legislation

- Common issues
  - when notice must be given;
  - the form of the notice;
  - who must notice be given to;
  - the scope of federal preemption; and
  - the effect of existing security policies

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Notice of Security Breach Laws
(Cal. Civ. Code §1798.82)

- Triggered if there is a breach of a data security; and
- A consumer's personal information is implicated
- Applies even if there is simply a reasonable belief that there was an acquisition of data
- Law enforcement concerns

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Notice of Security Breach Laws
(Cal. Civ. Code §1798.82)

- Direct notice typically required, though substitute notice is permitted in certain instances

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Notice of Security Breach Laws

- Issues to watch out for
  - What good is encryption?
  - Electronic v. non-electronic
    - North Carolina's law applies to non-electronic
  - Is there a general duty?
  - Who else must notice be given to?
  - What form of notice?
  - Is notice required if there is no likelihood of identity theft?

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Notice of Security Breach Issues

- 35 other states, the City of New York, (and the OCC) have enacted laws or rules
  - Including: Arkansas; Connecticut; Delaware; Florida; Georgia; Illinois; Indiana; Louisiana; Maine; Minnesota; Montana; Nevada; New Jersey; New York; North Carolina; North Dakota; Rhode Island; Tennessee; Texas and Washington
- Ohio Attorney General action

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Handling A Breach

- Preserve evidence, particularly items that are written over such as back-up tapes or logs
- Try to determine if you are experiencing an intrusion or theft
- Determine your obligations
- Consider contacting law enforcement

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When To Contact Law Enforcement

- Most companies are reluctant
- If you have an intrusion or a malicious internal breach, that's when law enforcement is most useful
- Time is of the essence – evidence is evaporating
- Try the feds first – more equipped to handle
  - FBI and Secret Service have agents dedicated to these intrusion and malicious theft cases
  - Feds can refer to local depts with same skills

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Live Meeting Poll

Poll Question #3

Would you favor Congress passing a comprehensive federal statute that would preempt all state notice laws regarding breaches of consumer data if it required all companies to disclose all breaches of data security to consumers?

- **Strongly favor**
- **Slightly favor**
- **Neutral**
- **Slightly disfavor**
- **Strongly disfavor**

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Restrictions Upon the Collection of SSNs (Cal. Civ Code § 1798.85)

- Companies cannot:
  - Post or publicly display SSNs;
  - Print SSNs on identification cards;
  - Require people to transmit SSNs over the internet unless it is encrypted or the connection is secure;
  - Use a SSN as a login unless a password is also required; or
  - Print it on materials unless legally required

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Social Security Number Laws

- Alabama
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia
- Hawaii
- Illinois
- Indiana
- Louisiana
- Maryland
- Michigan
- Minnesota
- Missouri
- Nevada
- New Jersey
- New Mexico
- New York
- North Carolina
- Oklahoma
- Oregon
- Rhode Island
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- Wisconsin

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California's Data Security Law
(AB 1950 Cal. Civ Code § 1798.81.5)

- Broad law that applies across the board, even to non-electronic data
- The law is triggered if a business owns unencrypted personal data regarding a California resident
- Businesses and third-parties who receive data must have "reasonable" security measures and procedures
- Sliding scale

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California's Data Destruction Law

- Consumer records must be destroyed if they contain personal information, when the records are no longer needed
- This obligation applies whether the record is in electronic form, or not
- Destruction is accomplished through:
  - shredding;
  - erasing, or
  - otherwise modifying the personal information in those records to make it unreadable or undecipherable through any means

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Other Data Security/Destruction Laws

- SOX
- FACT Act
- Arkansas
- California
- Colorado
- Indiana
- Minnesota
- Montana
- Nevada
- New Jersey
- New York
- North Carolina
- Rhode Island
- Tennessee
- Texas
- Utah
- Vermont
- Washington

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California's Restrictions on Direct Marketing (Cal. Civ. Code §1798.83)

- If a business discloses "personal information" to third parties, and knows or reasonably should know that the third parties used the personal information for the third parties' direct marketing purposes, then the business is under certain document retention and disclosure requirements

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California's Restrictions on Direct Marketing (Cal. Civ. Code §1798.83) What is Personal Information?

- Name and address
- Electronic mail address
- Age or date of birth
- Names of children
- Electronic mail or other addresses of children
- Number of children
- The age or gender of children
- Height
- Weight
- Race
- Religion
- Occupation
- Telephone number
- Education
- Political party affiliation
- Medical condition
- Drugs, therapies, or medical products or equipment used
- The kind of product the customer purchased, leased, or rented
- Real property purchased, leased, or rented
- The kind of service provided
- Social security number
- Bank account number
- Credit card number
- Debit card number
- Bank or investment account, debit card, or credit card balance.
- Payment history
- Information pertaining to the customer's creditworthiness, assets, income, or liabilities

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California's Restrictions on Direct Marketing (Cal. Civ. Code §1798.83) The Importance of Opt-Outs

- If there is an opt-out mechanism then the requirements do not apply

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Pretexting – Federal Crime

- New federal felony (18 USC 1039):
  - Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by—
    - (1) making false or fraudulent statements or representations to an employee of a covered entity;
    - (2) making such false or fraudulent statements or representations to a customer of a covered entity;
    - (3) providing a document to a covered entity knowing that such document is false or fraudulent; or
    - (4) accessing customer accounts of a covered entity via the Internet, or by means of conduct that violates section 1030 of this title, without prior authorization from the customer to whom such confidential phone records information relates.
  - Illegal to knowingly and intentionally sell, buy or transfer confidential phone records information

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State Pretexting Laws

- California
- Florida
- Georgia
- Illinois
- Maryland
- Michigan
- New York

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Privacy Litigation

- *In re Northwest Airlines Privacy Litigation*, 2004 U.S. Dist. LEXIS 10580 (D.C. Minn. June 6, 2004)
- *Dyer v. Northwest Airlines Corporation, et al.*, 334 F.Supp.2d 1196 (D.N.D. 2004)
- *JetBlue*

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Privacy Takeaways

- Assess what information is being collected
- Think through the types of data you are collecting
- Cut back on what you keep, if you can
- Truncate credit card numbers on receipts
- Determine what laws apply to your company based upon the information it collects, where it does business and the identity of its customers

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Privacy Takeaways

- Make sure that employees understand that they do not have an expectation of privacy in their use of your e-mail and electronic systems.
- Have after-hours access to your policies and notices
- Consider what security systems you have in place and what securities measures you are requiring third parties to have.
- Consider restrictions upon the use of removable media.
- Make sure your privacy policy makes the necessary disclosures.

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Privacy Takeaways

- Reserve the right to modify your privacy policy
- Ensure that employees are aware of your policies
- Assess whether you have a responsibility to report a data security incident
- Consider what security systems you have in place and what securities measures you are requiring third parties to have
- Determine if you are sending or receiving data to countries that have higher privacy and security standards

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