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Security Breaches: Best Practices/Lessons Learned

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Agenda

- Defining the Problem
- Challenges to Effective Responses
- Prevention and Mitigation
- What's on the Horizon

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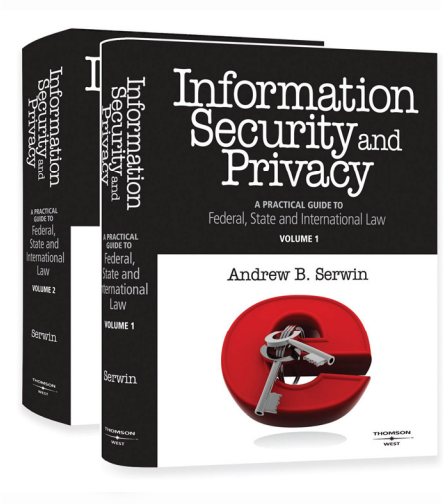
Information Security and Privacy: A Practical Guide to Federal, State and International Law



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Defining the Problem

- Legal Issues: addressing statutory requirements, privacy rights and potential lawsuits
- Business Issues: often times at least as critical as the legal issues with concerns re impact on business reputation, processes, customer relations, etc.

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"My wife ran off with the guy who stole my identity."

Why do These Incidents Occur?

- Sometimes completely accidental
- Sometimes related to identity theft -- the fastest growing crime in the United States
  - Stolen or fraudulently-acquired personal information enables identity theft
  - Black market for identity theft
  - Most sensitive data is social security number, financial information (including credit card #s), health information, passwords, pin numbers, etc.

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How Much in Losses are We Really Talking About?

- To an individual
- To a company, one example is:
  - A bank that issues a credit card may be compelled to monitor, cancel, and reissue that card
  - Estimates range between $10 and $50 per card
  - Multiply by number of cards involved

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What Type of Data Presents Privacy and Security Issues?

- Confidential Information
- Intellectual Property
- Personally Identifiable Information
  - Health
  - Financial
  - Other data that reveals sensitive information about individuals by itself or if combined with other information

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Notable Examples: ChoicePoint

- February 2005 allegation: Identity thieves posed as legitimate customers to access company's extensive consumer profile database
- FTC reportedly investigated company's compliance with federal law
- SEC reportedly investigated insider trading and adequacy of disclosures
- Secret Service, FBI and U.S. Postal Service involved
- Six class-action lawsuits filed in CA and GA

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Notable Examples: DSW Shoe Warehouse

- March 2005 Allegation: Data from 1.4 million credit cards used in 108 stores was reportedly stolen between November 2004 and February 2005
- Federal authorities, including Secret Service, investigated
- DSW established special help line for its customers
- Parent company disclosed the matter in a 10-K/A and 8-K filed in April 2005
- Disclosures occurred in the midst of parent's planning for the IPO of DSW
- Head of FTC, Deborah Platt Majoras, was among affected DSW customers

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Notable Examples: Heartland

- Late 2008: 100 million card transactions/month for 175,000 merchants
- Attack occurred while PCI review under way
- Heartland uncovered malware (the data-sniffing kind) that allowed thieves to capture credit or debit-card numbers, expiration dates, and in some cases the cardholder's name.

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Not Just U.S. —

- Undercover reporter for British Tabloid, Sun Newspaper, alleged Indian call center employee of Infinity eSearch sold personal data on 1,000 British customers for $5.40 apiece. (June 2005)
- Australian Television Program, *Four Corners,* reported on "black market in information held by Indian call centres" with information available at $10 apiece
- UK & Germany

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Challenges to Effective Responses

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Challenge #1

When must notice be given?

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Security Breach Notification Laws

- Enacted in 44 States (including NY, FL, PA, CA and IL)
- Generally, requires notice to affected individuals in the event of a breach in the security, confidentiality, or integrity of computerized personal information
- Typically does not apply to encrypted information (unless encryption key is compromised)
- Applies even if there is simply a reasonable belief that there was an acquisition of data

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State Identity Theft Laws

- Alaska
- Arizona
- Arkansas
- California
- Connecticut
- Delaware
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Minnesota
- Mississippi
- Missouri
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- Washington D.C.
- West Virginia
- Wisconsin
- Wyoming

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Certain Issues

- What good is encryption?
- Electronic v. non-electronic
  - North Carolina's law applies to non-electronic
- Is there a general duty?
- Is notice required if there is no likelihood of identity theft?

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Challenge #2

How quickly must notice be given?

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Challenge #3

Who must be notified?

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Who Must be Notified

- Affected individuals
  - Standard
  - Employees?
- Government / law enforcement?
  - Federal
  - State
- Business partners?
  - Pennsylvania: Specifically states that service provider to provide notice to its customer who in turn notifies individuals
  - Florida: Requires notice to business partners for which you maintain personal information
- Credit bureaus?
- Insurance company?

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Challenge #4

What form of notice must be given?

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Notice and More

- Letter via US First Class mail
- Many AGs, Consumer Groups, and Class Action Litigators pressure for more than just notice
  - Two or more years of credit monitoring are a typical requirement
  - Going beyond the minimum notification requirement is a good step to ward off class action and AG scrutiny

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Prevention and Mitigation

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Potentially Relevant Policies

- Privacy policies
- Employee policies
- Business partner policies (e.g., contract policies)
- Document retention policies (e.g., destruction of records containing sensitive personal information)
- Incident response policies

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Prevention

- Technologically
  - Protect your systems
  - Work with (certified) vendors and other parties like Visa
    - Visa's information security standards
    - ISO 17799 Information Security Programs
- Contractually
  - Two key contracts are merchant bank and POS vendor
  - Require certifications as a condition
- Internally
  - Implement appropriate policies
  - Educate employees about handling inquiries

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What is ''Reasonable Security''?

- Legislative history says there are no specific mandates; no bright lines
  - States there will be "compliance uncertainty"
  - Goal is to allow industry to exercise its own judgment
- "Reasonable" measures must be "appropriate to the nature of the information"
- This obligation expressly applies to contracts involving data sharing

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The FTC & States

- FTC Enforcement Actions reflect the FTC's view of "reasonable security"
- California, Massachusetts, others...

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Service Providers & Outsourcing

- Many outsourcing relationships involve the sharing of sensitive data
- An increasingly important issue for customers
  - Differentiating factor
  - Qualifying factor
  - Willingness to pay for improved security?
- Offshoring data security a particularly sensitive issue

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Rely on Contract Remedies?

- Security/privacy problems can create a host of business and legal problems
  - Financial loss
  - Harm to reputation
  - Bad publicity
  - Regulatory actions
  - Civil litigation
- To what extent will a contract adequately protect your company from these risks?

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Agreements: Due Diligence

- Prudent business practice
  - FTC recommends it
- Scope
  - Counterparty's security policies, capabilities, key personnel, and track record
- Method
  - Inspection?
  - Independent audit?
  - Check references
  - Media/litigation searches

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Agreements: Core Issues

- Information rights
  - Reporting obligations
  - Record-keeping obligations
  - Audit rights
    - Third-party
    - Corrective actions
- Allocation of risk
  - Limitations on liability
  - Exclusions
  - Insurance
- Compliance with laws
  - What if laws change
  - Increased costs?

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Agreements: Core Issues

- Risk of security breach
  - Preventive actions / security
  - Monitoring and detection obligations
  - If breach occurs
    - Obligation to notify counter-party
    - Cooperation obligations?
    - Inspection rights?
    - Obligation to notify third parties
    - Who pays for notices?
    - Who is liable for third-party claims?
    - Preservation and evidentiary issues

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What's on the Horizon

- HIPAA modifications
- Breach-Notice expanding internationally
- Litigation

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Amendments to HIPAA

- New EHR requirements
- New privacy requirements, including notice of security breach requirements
- HITECH Act

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Breach – Notice Expands

- Europe
- Canada
- Australia

All are considering formal breach-notice requirements although the spirit of existing laws might indicate an obligation to notify individuals

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Privacy Litigation

- Airlines cases
  - *Dyer v. Northwest Airlines Corporation, et al.*, 334 F.Supp.2d 1196 (D.N.D. 2004)
  - *In re American Airlines Privacy Litigation*, 3:04-MD-1627-D (N.D.Tex. 2005)
- Laptop case
  - *Guin v. Brazos Higher Educ. Service Corp., Inc.*, 2006 WL 288483 (D.Minn. 2006)
- No standing/no damages
  - *Bell v. Acxiom*, 2006 WL 2850042 (E.D.Ark. 2006)
- Ruiz v. Gap (April 13, 2009)
  - Increased Risk of ID Theft Not Damages

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California's Identity Theft Law - Remedial Measures

- California permits a person that has been a victim of identity theft to initiate a law enforcement investigation and obtain a police report
- Expedited judicial review of convictions is also permitted for victims of identity theft
- There are disclosure requirements regarding consumer reports and credit information if a person has had a credit application made in his name

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Practice Tips for Breach Issues

- Adopt plan
- Pay attention to suspicious activity or complaints
- Address these issues with your business partners
- Realize that multiple parties may have duty to disclose same incident
- Implement escalation procedures
- Comply with highest legal standard

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Privacy Takeaways

- Assess what information is being collected
- Think through the types of data you are collecting
- 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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Questions and Answers

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