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ABA Privacy & Information Security Committee

Monthly Update for October 2011

November 3, 2011

1:00 – 2:00 pm EST

Speakers

Kurt Wimmer

Libbie Canter

Lindsey Tonsager

Covington & Burling LLP, Washington, D.C.

Moderator: Aryeh Friedman, Chief Privacy Officer & Sr. Compliance Counsel, Dun & Bradstreet

Congressional Action

- Rep. Bono Mack's Subcommittee held two Internet privacy hearings in October:
 - Understanding Consumer Attitudes About Privacy
 - Protecting Children's Privacy in an Electronic World
- The House Judiciary Committee approved an amendment to the VPPA.
 - If enacted, consent to the sharing of video usage information could be obtained electronically in advance of the disclosure.

Congressional Action (cont'd)

- Sens. Ron Wyden and Mark Kirk call for ECPA reform.
- A group of House GOP members urged the House Appropriations Committee to withhold funding for a centralized health care database, citing patient privacy.
- Rep. Ed Markey has asked Amazon to respond to privacy questions related to the Silk browser and Kindle Fire; Electronic Frontier Foundation said it does not have concerns.
- Sen. Rockefeller sent letters to Visa and Mastercard about their reported plans to use customers' purchasing information for behavioral advertising.
- Reps. Joe Barton and Ed Markey sent letter to Facebook about its data storage and retention practices.

FTC Enforcement

- *In re Google Inc.* – FTC approved a final administrative consent agreement with Google in connection with Buzz.
- *FTC v. Frostwire* – Under proposed stipulated final order for permanent injunction with the FTC, filed Oct. 7 in the U.S. District Court for the Southern District of Florida, a developer of peer-to-peer file-sharing applications may not use default settings likely to cause consumers' files to be shared without their knowledge.

FTC Enforcement (cont'd)

- Public interest groups have asked FTC to investigate:
 - Online Doritos marketing campaign aimed at teenagers.
 - Verizon Wireless opt-out policy change to location data practices.
- Sen. Rockefeller requested a report from FTC on security implications of facial recognition technology.
 - Report would follow December facial recognition workshop.
- Bipartisan Senate group urged FTC and DOJ to investigate “stalking apps” — mobile phone applications that allow people to stalk others.

MMA Releases Mobile Application Privacy Policy Guidelines

- Draft framework released that suggests privacy policy language for mobile apps, but recommends that language should be tailored to a company's own needs and jurisdictional requirements.
- The major areas covered by the proposed policy language include:
 - what types of information the application collects and uses
 - whether the application collects “precise real-time location information”
 - whether third parties can view or gain access to the information collected
 - what a user's opt-out rights are
 - what the company's data retention policy is
 - whether the application and the developer's privacy practice comply with COPPA
 - the security procedures; and
 - when and how the developer will notify users of changes to its privacy policy.
- Public comment period on the draft framework closes Nov. 18.

Data Breaches and Incidents

- SEC Division of Corporation Finance released guidance recommending disclosures relating to financial impact of data breaches and other cybersecurity incidents.
- Litigation
 - *Anderson v. Hannaford Bros. Co.* – First Circuit finds that data breach plaintiffs may recover out-of-pocket mitigation expenses.
 - *Gaffney v. TRICARE Management Activity* – Class action complaint filed against TRICARE and the Department of Defense in connection with unauthorized disclosure of medical records and personal information of approximately 4.9 million patients.

Data Breach - Recent Incidents

- Sony Inc. discovered new hacking attempt involving approximately 93,000 online entertainment user accounts.
- SEC informed employees that brokerage account information and other personal data was provided by a contractor to unauthorized parties; vendor denies unauthorized access.
- Children's health system Nemours says that it cannot locate three computer backup tapes with unencrypted patient billing and employee payroll data of approximately 1.6 million individuals.
- Emory Healthcare notified 7,300 patients of a data breach.
- Stanford released a statement blaming the subcontractor of an outside vendor for causing patient data to be posted online. Standard is defending itself from a putative class action alleging violations of the California's Confidentiality of Medical Information Act

Other Litigation

- *E.R. James Real Estate Servs. LLC v. Spinell* – District Court finds that employee use of personal computer supports unauthorized access claim under CFAA.
- *Goodman v. HTC America, Inc.* – Class action claims that AccuWeather smartphone app tracks and shares geographic location data.
- *Cohen v. Facebook, Inc.* – District Court dismissed a putative class action against Facebook alleging that the company violated users' rights of publicity by using their names and pictures for its Friend Finder service.
- *Pitt v. Kmart Corp.* – Class action claims that Kmart violates the FCRA by running background checks on applicants without first obtaining permission.

Cybersecurity

- NIST announced release of three new publications on Oct. 25
 - A draft Bluetooth security guide
 - Draft guidelines for improving the security of wireless local area networks (WLANs)
 - A final definition of cloud computing
- Outlook for Cybersecurity Legislation
 - Oct. 4 - White House Cybersecurity Coordinator Howard Schmidt says he has “a high level of confidence that something will move forward.”
 - Oct. 18 - Lieberman says he remains optimistic about the possibility of getting cybersecurity legislation to the floor this year.
 - Oct. 19 - Administration officials and key senators meet on Capitol Hill and reach agreement on need for prompt legislative action.
 - Oct. 26 - Rep. Jim Langevin calls for Congress to move forward with cybersecurity legislation.

State Law Developments

- California enacts E-Reader Law that creates warrant requirement for government agencies to access book purchase records.
- California amends Song-Beverly Credit Card Act.
 - Creates specific exception for collection of personal information (such as a zip code) during a credit card transaction.
 - Responds to *Pineda v. Williams Sonoma* decision, which held that a zip code is personal information under Song-Beverly.
- Conflicting decisions involving New Jersey Truth-in-Consumer Contract, Warranty and Notice Act.
- California enacts law that blocks employers from using credit reports to evaluate employees or applicants, making California the seventh state with such a law on the books.

Health Privacy

- OCR official says that release of final omnibus HIPAA Rule could be early 2012.
- Litigation
 - *IMS Health Inc. v. Ayotte* – District court implemented Supreme Court decision; reinstated April 2007 finding that New Hampshire law banning sale of prescription drug information identifying doctors violated the First Amendment.
 - *Sargese v. Horizon Healthcare Servs. Inc.* – New Jersey Psychological Association alleged that health insurance plans that require New Jersey psychologists to disclose confidential patient information violates state law.
- ONC approved recommendations for proposed State 2 criteria for the “meaningful use” of electronic health records

Health Privacy (cont'd)

- HHS will audit whether federal grant recipients comply with informed consent and privacy mandates when conducting federally funded genetic research.
 - OIG plans to issue a report in fiscal year 2012
- Federal advisory panel says that more harm than good could come out of HHS proposal to revamp human subject protection regulations.
 - Proposed rule was released July 26.
 - Comments on proposed rule were due Oct. 26.
- ONC awarded \$1.2 million contract to improve patient choice policies.

Marketing

- *Hafke v. Rossdale Group LLC* – Court holds that Michigan law is preempted by the federal CAN-SPAM Act.
- *Giovanniello v. ALM Media LLC* – Second Circuit finds that Connecticut’s two-year limitations period for claims involving unsolicited faxes applies to a parallel federal TCPA claim.

International

- ICO Commissioner Christopher Graham warned that nearly half of the one-year grace period for implementing cookie consent obligations has elapsed.
- German data protection authorities tell Facebook that it has until November 7 to make compliance changes to its facial recognition software.
- The British Columbia government Oct. 4 introduced a bill to update and expand government data-sharing, but at the same time increased the authority of the Office of the Information and Privacy Commissioner to oversee such efforts.
- European Commission formally warned Germany and Romania that they have two months to implement the European Union's Data Retention Directive.

International (cont'd)

- European Network and Information Security Agency (ENISA) releases guide of 36 recommendations to protect security of critical information infrastructures through public-private partnerships.
- British Columbia issues guidelines to assist organizations and public bodies using social media sites to lawfully conduct background checks of prospective employees.
- Alberta and British Columbia privacy commissioners call for legislation to ensure that companies implement adequate security systems.
- French regional court affirmed suspension of SOX whistleblower hotline that had been audited and approved by the CNIL.
- Norway's data protection authority will likely cancel service that helps individuals delete unwanted personal data posted on websites across the world.

Federal Government Privacy and Security

- Privacy Act – Senator Akaka introduced legislation to strengthen privacy protections for PII contained in government records.
- GAO report found that DHS faces “key challenges” in implementing a framework to ensure that its data-mining systems provide the necessary privacy protections.
 - DHS considers terminating part of its counterterrorism data search program.
- Proposed rule would require federal government contractors who work with government records or handle PII to complete privacy training before being allowed access to records.
- GAO rejected GSA attempt to address data security concerns in a cloud computing procurement solicitation by limiting the foreign countries where vendor servers could be located.
- The IRS is expanding pilot program to provide special identification numbers for use by victims of identity theft to file tax returns.

Other

- Stanford researcher unveiled Internet privacy study on “leakage.”
- Government access to information
 - *Doe v. SEC* – Northern District of California held that SEC may subpoena Google for identity and contact information of Gmail account owner.
 - IRS Counsel recommended withdrawal of administrative summons to ISP seeking contents of customer e-mail because of Stored Communications Act concerns.
- 7th Circuit finds that FCRA preempts state common law claims.
- 3rd Circuit permits Fourteenth Amendment breach of privacy claim to go forward in connection with videotaping of female deputy sheriff.
- LA councilman questions whether Google Apps for city employees meet data security requirements.