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Privacy in the United States:
Constitutional and Regulatory Framework

Robert R. Belair
Oldaker, Biden & Belair
Privacy Consulting Group
Washington, DC
bbelair@obblaw.com
(202) 496-3445

What is Privacy?

- Behavioral privacy: The interest in engaging in certain intimate behaviors (such as reproductive activities), free from governmental or other control
- Surveillance privacy: The interest in being free from governmental or other organized surveillance where/when the individual has a “reasonable expectation of privacy”
- Information Privacy: A person’s interest in controlling the use of personal information about the person.

What Interests Are Protected by Information Privacy?

- Promoting due process and fairness in eligibility and administrative decisions
- Avoiding stigma, embarrassment, humiliation
- Promoting candor in critical relationships
 - Husband-wife
 - Lawyer-client
 - Doctor-patient
- Promoting trust in institutions

Does Privacy Have Constitutional Roots?

- No explicit right of privacy in the US Constitution (but explicit privacy rights in many state constitutions)
- Supreme Court has found privacy rights in the “penumbra” of explicit constitutional rights
 - First Amendment: Associational rights
 - Fourth Amendment: A reasonable expectation of privacy in certain places or situations

Does Privacy Have Constitutional Roots?

- Fifth Amendment: A zone of privacy guarding against personal intrusion
- Ninth Amendment: An unenumerated right retained by the people
- Fourteenth Amendment: Privacy as a due process right

Is Information Privacy Protected in the Constitution?

- Constitutional case law is thin and frequently adverse
 - Paul v. Davis 424 US 693 (1976): Criminal history record information
 - US v. Miller 425 US 435 (1976): Personal account information
 - Whalen v. Roe 429 US 589 (1977): Prescription drug information
 - Reno v. Condon 528 US 141 (2000): Drivers Privacy Protection Act information
 - LAPD v. United Reporting 528 US 32 (1999): Criminal history record information
 - Bartnicki v. Vopper 532 US 514 (2001): Information of public or general interest
 - New Jersey v. Reid (A-105-06) (2008): IP address information under N.J. and US constitutions

Is Information Privacy Protected by Common Law?

- Breach of fiduciary duty
- Breach of an implied promise of confidentiality
- Prosser's four privacy torts
 - Information
 - Public disclosure of private facts
 - False light
 - Misappropriation

Does US Law Embrace Fair Information Practice Principles?

- The Fair Information Practice Principles: revised and expanded
 - No secret systems
 - Purpose and use standards
 - Robust notice to persons whose data is in the system
 - Subject access, correction and dispute rights
 - Choice/consent

Does US Law Embrace Fair Information Practice Principles?

- Confidentiality (secondary use)
- Security
- Data Quality
- Accountability
- Enforcement
- Collection limitation (?)

What Are the Important Federal Information Privacy Statutes?

- Fair Credit Reporting Act (PL 91-508)
- Family Educational Rights and Privacy Act of 1974 (PL 93-380)
- Privacy Act of 1974 (PL 93-379)
- Fair Debt Collection Practices Act (PL 95-109)
- Right to Financial Privacy Act of 1978 (PL 95-630)

What Are the Important Federal Information Privacy Statutes?

- The Cable Communications Privacy Act of 1984 (PL 98-549)
- The Computer Matching and Privacy Protection Act of 1988 (PL 100-503)
- The Video Privacy Protection Act of 1988 (PL 100-618)
- The Drivers Privacy Protection Act of 1994 (PL 103-322)
- The Telecommunications Reform Act of 1995 (PL 104-104)

What Are the Important Federal Information Privacy Statutes?

- The Health Insurance Portability and Accountability Act of 1996 (PL 104-191)
- The Children's Online Privacy Protection Act of 1998 (PL 105-208)
- Title V of the Gramm-Leach-Bliley Act (PL 106-102)
- The Fair and Accurate Credit Transactions Act of 2003 (PL 108-159)
- Genetic Information Non-Discrimination Act of 2008 (PL 110-233)

CONCLUSION

- Are there differences between the US approach to information privacy and the EU or APEC approach to information privacy?
- What is the most significant weakness in the US system? In the EU system?
- Do those differences create a stronger or weaker privacy regime in the US?