

“The Federal Role in Privacy Protection”

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Cambridge Privacy Symposium
August 23, 2007

Overview

- Intro & background
- My role as Chief Counselor for Privacy in the (first?) Clinton Administration
- Privacy under George W. Bush
- Looking ahead to the next Administration
 - What to say in a Transition Team report on privacy?

I. My Background

- Currently, Professor of Law
 - Moritz College of Law, Ohio State
 - 2007 book for IAPP, CIPP exam
 - Faculty Editor, I/S “Privacy Year in Review”
 - Megan Engle, Carla Scherr here
 - A group of great law students trained in privacy
- Fellow, Center for American Progress
 - www.thinkprogress.org

II. Privacy in the Clinton Admin.

- 1999 to early 2001, Chief Counselor for Privacy in U.S. Office of Management & Budget
 - Led privacy policy for public & private sectors
 - Federal data: lead by example
 - Health care: HIPAA
 - Financial: GLBA
 - Surveillance: 2000 proposal on Patriot Act issues
 - Other issues & coordinating role

Federal Government Privacy

- 6/99 OMB memorandum to post clear privacy policies on agency sites
- 6/00 OMB memorandum presumption against cookies on federal sites & reports to OMB on privacy in the budget process
- 12/00 OMB memorandum on agency data sharing, including push for privacy impact assessments
- Federal CIO Council privacy committee

Medical Privacy Rule

- HIPAA statute in 1996
- Congress deadline for privacy law by 8/99
- Proposed rule 10/99
- 52,000 comments by 2/00
- Final rule 12/00
- Executive Order 12/00: limits on using health oversight records for law enforcement

Financial Privacy

- Clinton speech 5/99
- House bill with much of that 6/99
- Significant Administration push for privacy
- Gramm-Leach-Bliley 11/99
- Administration proposal for more, 4/00
- GLB regs written 2000

National Security & Surveillance

- John Podesta leadership on updating surveillance rules for the Internet age
- Asked me to chair W.H. Working Group
 - 14 agencies, all the 3-letter agencies
- Proposal to Congress summer 2000
 - Bring email privacy up to phone calls
 - Update on many issues later in Patriot Act
- Ah, politics! Congress objected, said too much surveillance
- Basis for my 2004 article on FISA

Some Other Privacy Actions

- Crypto policy change, 1999
- Genetic discrimination E.O., 2000
- NAS study on authentication & privacy
- Bankruptcy & privacy study, 1/01: public records and privacy
- Safe Harbor with Europe
- Network Advertising code, now in the news again
- Privacy archives at www.peterswire.net

Conclusion on This Period

- Leadership from senior officials, including the President & the Chief of Staff
- A policy-level official to coordinate across agencies and help overcome obstacles
- The timing was ripe – Internet bubble and privacy as a “hot” issue
- Result – updating of structures for handling PII in many sectors

III. Privacy Under George W. Bush

- During campaign, Bush supported privacy
 - Suggested opt in for marketing
- In April, 2001 Bush overruled his advisors and decided not to cancel HIPAA rule
- But, decision pretty early not to fill any White House role for privacy

Sept. 11 “Changed Everything”

- Bush speech to Congress: “we woke up in a different world in which everything was changed”
- Security as 1st (and 2^d, and 3^d) priority
- Essentially have had no privacy policy initiative from Executive Branch since that time
 - Recent DOJ internal oversight announcement
- Almost no involvement on data breach or other private-sector initiatives

Congress Has Acted Sometimes

- E-Gov Act of 2002
 - Required privacy impact assessments for new government computer systems
- Homeland Security Act
 - Congress insisted on statutory Chief Privacy Officer
- More CPOs for DOJ, ODNI, and other agencies

Congress Tried to Create More

- Intelligence Reform law in 2005 called for White House Privacy & Civil Liberty Board
 - Delay in naming members
 - Not clear much was accomplished
 - Lanny Davis resigned this spring due to W.H. edits of the supposedly independent report
- New Board in law enacted this summer
 - Full-time chair
 - Some subpoena power
 - Perhaps one limit on intelligence community surveillance

Flaws in Current Privacy Structure

- Information Sharing as major theme
 - Send PII among agencies
 - Get data out of silos so it can be useful
- But they silo privacy protection
 - CPOs are agency-by-agency
 - No W.H. or other coordinated way to design privacy protections
- Bad design for governing privacy problems
- “Privacy & Information Sharing in the War Against Terrorism”
 - Due diligence list for assessing new info sharing programs

The NSA Program(s)

- Other speakers have addressed the many privacy issues around
 - National security data collection
 - Data mining
 - Effects on communications of U.S. persons
- We are still in the dark
 - AG Gonzalez and we do not do warrantless wiretaps under “this program”
 - FBI Director Mueller & direct contradiction on whether one or more “programs”

Privacy in the Next Administration

- Backlog of policy issues
 - New issues & new info systems keep occurring
 - Should have sensible policy response to these
- Major topics
 - National/homeland security
 - Medical
 - FTC
 - Identity
 - Other emerging issues

National/Homeland Security

- *Lots* more collection
 - Pervasive computing & pervasive sensors
 - From known spies to unknown terrorists
- More focus on governance structures
 - WHPCLB, other oversight
 - Role of FISC and other courts
 - Immutable audit
- Due process at the moment we target an identified individual in the database
- Need a new, stable paradigm to replace 1978/FISA and 2001/Patriot Act

Medical Privacy

- HIPAA addressed shift from paper to electronic for health payments
- Next phase: electronic clinical records
 - EHRs: electronic health records, issues of how to run the hospitals, RHIOs, infrastructure
 - PHRs: personal health records, issues of how individuals go online to manage their records

The Policy Gap for EHRs

- Polls & focus groups show privacy & security as greatest obstacle to adoption of EHRs
- Lots of public support for “I’m on vacation and am unconscious in the ER and they can pull up my medical records”
 - Frequency: .000001 of health encounters
- The case to consumers often weak
- The case to providers, given reimbursement system, is often weak
- Benefits for system costs, quality, research, etc., much higher

How to Speed EHRs & PHRs?

- Let “the market” do it not a great answer in healthcare
 - Pricing & insurance very complex
 - 50% of the \$ are federal
 - Hard to get system benefits when a mediocre case for participation by patients & providers

Preemption as the Hardest Privacy Issue

- HIPAA is a baseline
 - Stricter rules in the states also apply
 - Makes it hard to run a 50-state system
- State laws are key for sensitive records
 - HIV/AIDs & other STDs
 - Mental health
 - Reproductive activity
 - Genetic
- If we harmonize on HIPAA, then we repeal all these important privacy protections
- Will require a serious process & federal leadership to fix

FTC & the Private Sector

- Spam, phishing, spyware, bots, cookies
 - Technology is key to protecting consumer privacy & security
- Proposal:
 - The FTC has Bureau of Economics to help with antitrust
 - Going forward, have a Chief Technology Officer or Bureau of Information Technology to provide strategic guidance on security, privacy & consumer protection

FTC & Privacy Legislation

- House hearing 2006 for Consumer Privacy Legislation Forum
 - Supporting federal, preemptive privacy law
 - Online and offline
 - Other issues in Congress instead this year
- Global companies, online companies already doing these privacy practices
- May see movement in next Administration

Identity & Authentication

- Identity theft a huge political driver for change
 - Real harm to real people
 - No magic bullet
- Real ID proposed rule moving ahead
 - Significant opposition in states & Congress
 - Test vote in immigration debate indicated that level of opposition

Identity & Authentication

- Politics of stronger authentication very hard
- Democrats:
 - Favor: national/homeland security; immigration
 - Oppose: computer security; voting; privacy
- Republicans:
 - Favor: national/homeland security; immigration
 - Oppose: NRA, religious groups, libertarians

Other Emerging Issues

- Location data
- Search privacy
- RFID & other pervasive sensors
- Biometrics
 - Tempting, but weaker in long run than most realize
 - Leave fingerprints on a glass or at checkout, \$5 to mimic
 - Once fingerprint is compromised, *really* hard to get a new finger
 - So, will need multi-factor authentication, and possibly legal rules around (mis)use of biometrics

Summary on Next Administration

- We have a backlog of PII issues that have not been solved
- We will have new issues emerging
- Better outcomes will require coordination among federal agencies, not silos
- Will need leadership at the political level
 - How to get electronic medical records *and* privacy
 - How to get NSA success *and* safeguards
 - How to do authentication/identity

Conclusion

- There is a growing community of people trained in building systems & institutions that have privacy & information security
- This conference is part of building that community
- Consider how you can contribute to these national issues, to build systems you are proud to have for your institution & your country
- Thank you

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