

**New York's "Disposal of Personal Records Law" Becomes Effective on December 6, 2006:  
Protection of Personal Information Moves to the Front of Legislative Agendas**

**July 25, 2006**

**BACKGROUND**

The rapid development of e-commerce in the past 15 years has resulted in new opportunities for criminals. Fraudulent access to a person's bank or credit card account can be obtained with little more than a name, address, and social security number. In an effort to prevent the misappropriation of sensitive personal information, federal and state governments are enacting legislation aimed at protecting personal data. These new laws place affirmative duties on businesses and organizations to protect documents that contain an individual's personal identifying information.

New York is the latest addition to the growing list of states choosing to regulate the disposal of personal data. On June 9, 2006, New York Governor George Pataki signed into law measures to protect the privacy of personal information. This legislation, known as the "Disposal of Personal Records Law," will become effective on December 6, 2006. This advisory focuses on the New York provisions as they reflect those already enacted or proposed in other states. However, there is enough disparity in the laws of various jurisdictions that businesses must be aware of all of their nuances.

**TYPES OF DOCUMENTS COVERED BY THE LEGISLATION**

A laundry list of "records" is covered by the statute. These records include, but are not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, and computer tapes/discs (N.Y. Gen. Bus. Law § 399-H(1)(B)).

**TYPES OF INFORMATION TO BE PROTECTED**

Perhaps in response to the ambiguity of existing federal regulations, New York has provided more precise definitions of the types of personal information to be protected. The New York statute covers "any information concerning a natural person which, because of name, number, personal mark, or other identifier, can be used to identify such natural person" (*Id.* § 399-H(1)(D)). The statute states that personal identifying information includes one or more of the following: social security number (SSN), driver's license number or non-driver identification card number, mother's maiden name, financial account number/code, debit card number/code, automated teller machine card number/code, electronic serial number, or personal identification number (PIN) (*Id.*).

## **ENTITIES COVERED AND THEIR OBLIGATIONS**

The New York law applies to “any natural person, or agent or employee of such person that is conducting business for profit” (*Id.* § 399-H(1)(F)). Therefore, the statute will not apply to government or nonprofit organizations. Under the statute, businesses may not dispose of a record containing personal identifying information unless it does one of the following: shreds the document, destroys the personal identifying information contained in the record, modifies the record to make the personal identifying information unreadable, or takes action consistent with commonly accepted industry practices to safeguard personal information (*Id.* § 399-H(2)).

## **PENALTIES FOR NONCOMPLIANCE**

Under the New York statutes, a business can incur a civil penalty of no more than \$5,000 per violation (*Id.* § 399-H(3)). A violation is defined as acts arising out of the same incident or occurrence (*Id.*). Additionally, a court may impose injunctive relief in order to halt any offending behavior (*Id.*).

## **OTHER JURISDICTIONS**

### **Federal**

The Fair and Accurate Credit Transactions Act of 2003 mandated that the Federal Trade Commission (FTC) promulgate regulations to ensure that consumers’ personal information is safeguarded. These regulations cover not only paper records but also electronic records or records of “other form” (16 C.F.R. § 682.1). Additionally, any compilations of such records are covered under these regulations (*Id.*).

The federal regulations aim to protect information that is a consumer report or is derived from a consumer report (*Id.*). The Fair Credit Reporting Act defines the term “consumer report” as any communication of information by a consumer reporting agency bearing on a consumer’s creditworthiness, character, personal characteristics, or mode of living when this information is used or expected to be used to establish credit, insurance, or employment eligibility (15 U.S.C. § 1681a(d)). It is important to note that although a consumer report is a limited type of documentation, the regulations also protect any information that is *derived* from such reports, regardless of what format that information is in.

The federal regulations apply to any person under FTC jurisdiction that, for a business purpose, maintains or possesses consumer information (16 C.F.R. § 682.2). Anyone covered under these rules must properly dispose of consumer information by taking reasonable measures to protect against unauthorized access in connection with its disposal (*Id.* § 682.3(a)). Examples of proper disposal include burning, pulverizing, or shredding so that the consumer information cannot be read or reconstructed (*Id.* § 682.3(b)(1)). Additionally, electronic data that contains consumer information must be destroyed or erased so that the consumer information cannot be read or reconstructed (*Id.* § 682.3(b)(2)).

### **Other States**

Many other states have already adopted laws to protect consumer information, including California, New Jersey, Texas, Georgia, and at least 13 other states. Most of the states' provisions mirror each other with respect to scope and applicability. However, there are some notable exceptions.

Some states, such as California, New Jersey, and Georgia, do not limit applicability of their laws to only businesses for profit. Instead, their laws apply to all businesses (sole proprietorships, partnerships, corporations, associations, or other groups) regardless of whether they are organized to operate at a profit (Cal. Civ. Code § 1798.80; N.J. Stat. Ann. § 56:8-161; Ga. Code Ann. § 10-15-1). Therefore, even charitable and religious organizations are required to properly dispose of personal identifying data in such jurisdictions.

Disparities in state laws also occur in the type of personal data protected by the laws. For instance, in addition to identification numbers (e.g. SSN, license number), the California provisions protect an individual's signature, address, telephone number, physical characteristics or description, education, employment and employment history, (Cal. Civ. Code § 1798.80). The Texas laws also protect an individual's unique biometric data, including fingerprints, voice prints, and eye images (Tex. Bus. & Com. Code Ann. § 35.48). The Georgia statutes go even further and protect an individual's photo image, account balances, and tax return data (Ga. Code Ann. § 10-15-1). With such disparities in what is covered by the state laws, businesses and organizations could find themselves forced to destroy or redact seemingly innocuous letters and photos as well as employment applications and resumes.

## **HOW WE CAN HELP**

As leaders in developing technological tools and best practices for managing e-discovery, Morgan Lewis Resources Legal Logistics offers winning solutions for your record retention needs. We have substantial experience in managing large-scale discovery projects and litigating discovery issues, so we understand both the legal risks and the practical challenges of record retention. Building on this experience and insight, we guide clients in developing record retention policies that are cost-effective, practicable, and legally defensible. Addressing record management issues can be a huge undertaking, but Legal Logistics can help you develop strategies that will pay for themselves through savings in record storage and retrieval costs and reduced litigation risk.

Our menu of services covers the full range of record retention needs. Our Discovery Management Center provides the tools and personnel to manage, review, and redact personal information from both paper and electronic records. We can assess your current record retention policies or help you develop a comprehensive record management program from the ground up. And we can train your personnel on best practices for both policy implementation and litigation response.

You may contact any of the Morgan Lewis attorneys listed below for more information about any of the issues discussed in this client advisory.

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