

PRIVACY & DATA PROTECTION

Professor David Bender
Summer Session IV 2009
6:00 pm – 8:20 pm, Tues. & Wed.
209 Bates Law Building

Office: 124 Bates Law Building

Phone: 713/743-1530

E-mail: dbender@uh.edu

Office Hours: Tuesday (July 14, 21, & Aug. 4) 4:00 pm – 5:30 pm ; Wednesday (July 8, 15, 22, & Aug. 5) 4:00 pm – 5:30 pm (or by appointment).

Course Objectives: This introductory course will cover the basic principles of privacy and data protection law. It will examine the policies underlying this still-nascent form of protection, and those areas of tort and Constitutional law pertinent to privacy. It will cover the substance of federal privacy statutes relating to surveillance, record-keeping, and health information. It will also cover some state privacy statutes, the privacy-related activities of the Federal Trade Commission, and the structure and substance of privacy law in the European Union. There are no prerequisites for this course.

Course Materials:

Required Text: Anita L. Allen, *Privacy Law and Society* (Thomson/West 2007).

Additional materials identified below to be downloaded from the Internet or the class web discussion board.

Course Requirements:

Attendance: Per the Law Center's attendance policy, students who miss more than two classes may be dropped. Please plan to arrive for each class on time.

Class participation: For the class to proceed in optimum fashion, student preparation and participation are necessary. Grades may be adjusted upward by one increment (e.g., from B to B+) based on quality class participation.

Cell phones/pagers: Please set to vibrate/silent mode for all classes.

Examination and grading: Grading will be based on a final examination, modified if appropriate on the basis of class participation as indicated above.

READINGS

NOTE: Readings are set forth below in the order in which it is anticipated they will be covered. The readings for each class after the first will be announced in the preceding class; readings for each class will also be posted in advance on the class web discussion board. Readings for seven of the ten classes will be from the Allen casebook. These readings are keyed below to headings in the Allen casebook, with casebook page references indicated in parentheses.

Readings for three of the ten classes (identified by I, II, and III in the left margin below) will be in the form of handouts, rather than from the Allen casebook. The handout readings will be available from the sources indicated below.

Readings are subject to change.

AN INTRODUCTION TO PRIVACY LAW

D. What "Privacy" means in the law (3 – 6)

E. Competing values (6 – 9)

1. PRIVACY IN TORT LAW

A. Origins of the right to privacy

Common law roots (11 – 15)

Warren & Brandeis (15 – 20)

Note: Four privacy torts (32 – 33)

Note: Why privacy matters (33 – 34)

Note: Mastering the doctrine (34 – 35)

B. The intrusion tort

ALI Restatement (2nd) of Torts § 652B (35)

Listening and looking (35 – 47)

Investigative journalism and the media (47 – 56)

C. The publication of private facts tort

ALI Restatement (2nd) of Torts § 652D (80)

Dredging up the past (80 – 89)

E. The appropriation tort

ALI Restatement (2nd) of Torts § 652 (112)

Common law liability for appropriation (112 – 119)

New York Misappropriation statute (119 – 121)

2. CONSTITUTIONAL PRIVACY

D. Fourth Amendment privacy

The Fourth Amendment (248)

The expectation of privacy principle (248 – 258)

House and curtilage (258 – 264)

Workplace searches (273 – 279)

Airport searches (315 – 324)

G. Ninth Amendment privacy

The Ninth Amendment (365)

- Justice Goldberg's Find (365 – 367)
- H. Fourteenth Amendment privacy
 - The Fourteenth Amendment (367 - 368)
 - Private lives, private choices
 - Sterilization, birth control and adoption (372 – 419)

3. FEDERAL PRIVACY STATUTES

- A. Federal government record-keeping (491 – 495)
 - Fair information practices (495 – 499)
 - The Federal Privacy Act (499 – 514)
 - The Freedom of Information Act (514 – 524; 528 – 532)
- B. Federal governance of state record-keeping
 - The Real ID Act of 2005 (560 – 564)
- E. Consumer financial privacy
 - Right to Financial Privacy Act of 1978 (591 – 594)
 - Fair Credit Reporting Act of 1970 (594 – 605)
 - The Fin'l Moderniz'n Act of 1999 (Gramm-Leach-Bliley) (605 – 608; 618 - 624)
- H. Regulating computer and Internet use
 - Legislation regulating the Internet (635 – 643)
 - Children's Online Privacy Protection Act of 1998 (COPPA) (643 – 653)
 - Child Online Protection Act of 1998 (653 – 657)
 - The CAN-SPAM Act of 2003 (657 – 661)
 - Responsibility for data security breaches (661 – 664)
 - Broken promises and misleading statements (664 – 666)
 - The Computer Fraud and Abuse Act of 1986 (666 – 669)

4. FEDERAL SURVEILLANCE LAW, 1st Segment

- Introduction (695 – 698)
- A. "Title III" and its successor, the ECPA, Title I, the Wiretap Act (704 – 705)
 - Intercepting and recording calls (705 – 721; 725 – 732; 737 – 747)
- B. The ECPA, Title II, the Stored Electronic Information Act
 - Government access to stored mail (751 – 759)

I. THE FEDERAL TRADE COMMISSION AND PRIVACY (Guest Professor: Holly Towle, Esq.)

[Casebook will not be used – materials can be downloaded from the links set forth below or from the class web discussion board.]

1. 15 U.S.C. §§ 44, 45 (selected portions of the Federal Trade Commission Act).
2. *In the Matter of GeoCities*, File No. 982 3051, Docket No. C-3850
<http://www.ftc.gov/os/1999/02/9823015cmp.htm>
3. *In the Matter of Guess?, Inc., and Guess.com, Inc.* File No. 022 3260

<http://www.ftc.gov/os/2003/08/guesscomp.pdf>

4. *In the Matter of BJ's Wholesale Club, Inc.*, File No. 042 3160

<http://www.ftc.gov/os/caselist/0423160/092305comp0423160.pdf>

5. *In the Matter of Reed Elsevier Inc. and Seisint, Inc.*, FTC File No. 052-3094
(<http://www.ftc.gov/os/caselist/0723055/080327complaint.pdf>)

In the Matter of Premier Capital Lending, Inc., FTC File No. 0723004
(<http://www.ftc.gov/os/caselist/0723004/081106pclcmpt.pdf>)

6. *United States v. Rental Research Services, Inc.*
(<http://www.ftc.gov/os/caselist/0723228/090305rrscmpt.pdf>)

II. STATE DATA PROTECTION STATUTES (Guest Professor: Holly Towle, Esq.)

[Casebook will not be used – materials can be downloaded from the links set forth below or from the class web discussion board]

1. Example of a state security obligation statute.

Tex. Bus. & Com. Code §§ 48.002, 48.102, 48.201

Calif. Civ. Code § 1798.81.5

Conn. CT LEGIS P.A. 08-167

2. Example of a state transmission statute.

Nev. R.S. Chapter 597

3. Example of a state statute regarding a particular type of data.

Calif. Civ. Code § 1798.90.1 (drivers license)

NY Gen. Bus. L. § 399-dd (Social Security Number)

Ill. Stat. C. 740 § 14/1 (Biometric Information Privacy Act)

4. Example of a state “privacy” statute.

Minn. Stat. Ann. Chap. 325M (Internet Privacy)

6. Examples of state security breach notice statutes

Tex. Bus. & Com. Code §§ 48.002, 48.103, 48.201

Calif. Civ. Code § 1798.82 (as amended)

Ore. Ch. 759, S.B. No. 583 (Consumer Identity Theft Protection Act)

7. Example of state regulations

Mass. 201 CMR

<http://www.mass.gov/Eoca/docs/idtheft/201CMR17amended.pdf>

4. FEDERAL SURVEILLANCE LAW, 2nd Segment

- B. The ECPA, Title II, the Stored Electronic Information Act (continued)
 - ISP liability for disclosing stored e-mail to police (759 – 763)
 - Private litigant liability for via overbroad e-mail subpoena (763 – 772)
 - Nat'l security letters and the PATRIOT Act “gag” requirement (777 -789)
- C. The ECPA, Title III, the Pen Register Act (789 – 797)
- E. Foreign Intelligence Surveillance Act of 1978
 - The FISA court's jurisdiction (816 – 818)
 - Pulling down the “wall” after the USA PATRIOT Act (818 – 828)

III. EUROPEAN UNION DATA PROTECTION LAW

[Casebook will not be used – materials can be downloaded from the links set forth below or from the class web discussion board]

1. *The European Union Data Protection Directive*, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, p. 31 (23 Nov. 1995).

http://ec.europa.eu/justice_home/fsj/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf

AND

http://ec.europa.eu/justice_home/fsj/privacy/docs/95-46-ce/dir1995-46_part2_en.pdf

2. *US/EU Safe Harbor Privacy Principles*, and *Frequently Asked Questions*, US Department of Commerce (14 March 2000), accepted by the EU in Commission Decision

1 July 2009

C(2000) 2441, of July 7, 2000 pursuant to Directive 95/46/EC of 24 October 1995, of the European Parliament and of the Council on the adequacy of the protection provided by the Safe Harbor Privacy Principles and related Frequently Asked Questions issued by the US Department of Commerce.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000D0520:EN:NOT>