

Editorial

Bridget Treacy considers Volume 11, Issue 3 of Privacy & Data Protection, and the year ahead

As we contemplate the New Year, privacy issues seem guaranteed to remain at the forefront of our collective consciousness in 2011 and beyond. For those working in privacy related roles, now is the time to draw a deep breath and prepare for the busy year that lies ahead.

Recent weeks have witnessed a flurry of privacy related stories in the UK, including the first UK fines for breach of the Data Protection Act 1998. Hertfordshire County Council was fined £100,000 after staff accidentally faxed highly sensitive information to the wrong recipients, on two separate occasions. Employment services company, A4e Limited, was fined £60,000 following the theft of an unencrypted laptop from an employee's home, putting the data of 24,000 people at risk. Clearly both cases involved serious breaches. What stands out, however, is the fact that these first UK fines reflect the very ordinary circumstances of the majority of data breaches. There may have been a collective sense of relief across organisations that they were not the recipients of the first ICO fines, but the very commonplace nature of these breaches sends a strong message to all organisations to ensure that staff are aware of privacy policies, and are trained to follow them. Regulatory enforcement action, and the associated impact on reputation, will remain a key theme for 2011.

Looking beyond the UK, there is a growing sense of shared challenges in data protection. The growth of the digital economy, rapid technological developments and the reality of globalisation raise real challenges for privacy. We are witnessing not just a reassessment of the adequacy of current legal frameworks for safeguarding privacy, but a recognition that these challenges must, of necessity, be addressed from a wider perspective.

In the US, there have been two important recent developments. The Federal Trade Commission released a Proposed Framework for Businesses and Policymakers entitled "Protecting Consumer Privacy in an Era of Rapid Change". This Staff Report is open for consultation and comment until 31st January 2011, with the FTC committed to issuing a final report during 2011. The key theme of the Report is that existing approaches to protecting consumer privacy, including a heavy reliance on industry self regulation, need to be reviewed given the rapid pace of technological change.

In reviewing mechanisms for protecting privacy, the FTC recognises that its long favoured 'notice and choice' mechanisms have led to 'incomprehensible' privacy notices that people do not read or understand. The other

cornerstone of their approach to privacy has been to focus on consumer harm, which is now thought by many to overlook newer privacy concerns.

In response to feedback from stakeholders at a series of roundtables conducted during 2010, the FTC proposes a new framework to govern the use of consumer data in a commercial context. The approach builds on 'notice and choice' and the harm-based model and proposes a framework with three key components: (i) organisations should adopt 'privacy by design' and build privacy into the core of their operations; (ii) choice should be more informed, meaningful and more streamlined, and not required for a limited set of commonly accepted data practices; and (iii) data practices should be more transparent. Of particular interest to a European reader is the FTC's promotion of the principles that data collection should be limited to that needed for a specific business purpose, data should be retained only for as long as necessary to fulfil a specific purpose and then securely disposed of, and that there should be a focus on data accuracy and data security.

In addition, the Department of Commerce Internet Policy Task Force has issued a Green Paper recommending a new framework for addressing online privacy. These initiatives include the promulgation of enforceable codes of conduct, the adoption of a set of Fair Information Practice Principles, the creation of a Privacy Office within the Department of Commerce, and the renewal of US commitment to leadership in the global privacy debate.

That this fundamental re-thinking of US regulation of online consumer privacy is taking place at the same time as the European Commission's own review of the Directive is presumably more than merely a coincidence and is certainly helpful. The digital era has made privacy issues global, requiring global solutions.

So, while legislators and regulators ponder privacy protection, what does 2011 hold for the privacy professional? 2011 will be a year in which organisations will adopt a more strategic approach to privacy and data governance. It will be a year of opportunity for those seeking new and more challenging privacy roles. There is a discernable trend towards the creation of senior privacy roles within organisations, and there is a dearth of experienced privacy leaders.

Bridget Treacy
Hunton & Williams
btreacy@hunton.com
