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COMMERCE AND TRADE Selling and Other Trade Practices: Provide Legislative Findings; Provide Definitions; Require Information Brokers to Give Notice to Consumers of Certain Security Breaches; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

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COMMERCE AND TRADE

Selling and Other Trade Practices: Provide Legislative Findings; Provide Definitions; Require Information Brokers to Give Notice to Consumers of Certain Security Breaches; Provide for Related Matters; Provide an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 10-1-910 (new), -911 (new), -912 (new)

BILL NUMBER: SB 230

ACT NUMBER: 163

GEORGIA LAWS: 2005 Ga. Laws 851

SUMMARY: The Georgia General Assembly found that identity theft is one of the fastest growing crimes in Georgia and that the privacy of Georgia citizens is greatly at risk due to the large amount of information collected from individuals every day. The Act requires information brokers that collect and maintain personal information on individuals to notify residents of Georgia if an unauthorized person acquired, or is reasonably believed to have acquired, their personal information through a breach of security. If the security breach compromises more than 10,000 residents' personal information, the information broker must notify all consumer reporting agencies that operate on a nationwide basis of the security breach.

EFFECTIVE DATE: May 5, 2005

History

Senators Bill Hamrick, Johnny Grant, and Jeff Mullis of the 30th, 25th, and 53rd districts, respectively, introduced SB 230 in response to recent security breaches of companies that sell individuals' personal information.¹ These breaches resulted in disclosure of confidential information and high profile media coverage exposing the damage consumers suffer as a result of the breaches.² The primary impetus of the bill was the highly-publicized security breach that occurred at ChoicePoint, "an Alpharetta-based company that collects personal data on nearly every American."³ ChoicePoint mistakenly provided consumers' personal information to fraudulent businesses claiming to buy the information for legitimate business purposes.⁴ The security breach led to the disclosure of names, addresses, Social Security Numbers, and credit information on at least 145,000 consumers.⁵ Senator Bill Hamrick, the bill's primary sponsor, stated that since companies such as ChoicePoint "are in the business of putting information in one place and having it readily available, there should be a high standard for who [has access to] the information."⁶

Another reason behind Senator Hamrick's introduction of the bill was that the federal and state laws in place covering data collection did not address information brokers specifically.⁷ Senate Majority Leader Bill Stephens emphasized that the bill had three aims: 1) to require that notice be given to consumers if their information is fraudulently obtained from an information gatherer, 2) to define what information is covered by the bill, and 3) to prescribe how notice should be given to consumers in a timely manner.⁸

1. See Electronic Mail Interview with Sen. Bill Hamrick, Senate District No. 30 (June 10, 2005) [hereinafter Hamrick Interview].

2. SB 230, as introduced, 2005 Ga. Gen. Assem; Sonji Jacobs, *Legislators Aim at Identity Theft*, ATLANTA J. CONST., Feb. 18, 2005, at A1.

3. Jacobs, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Lawmakers 2005* (GPTV television broadcast, Feb. 22, 2005) (remarks by Sen. Bill Hamrick) (on file with the *Georgia State University Law Review*).

7. Hamrick Interview, *supra* note 1.

8. *Lawmakers 2005*, *supra* note 6.

Bill Tracking of SB 230

Consideration by the Senate

Senators Bill Hamrick, Johnny Grant, and Jeff Mullis of the 30th, 25th, and 53rd districts, respectively, sponsored SB 230.⁹ The Senate first read the bill on February 22, 2005, and the Agriculture and Consumer Affairs Committee favorably reported the bill, by substitute, on February 25, 2005.¹⁰

The Bill, As Introduced

As introduced, the bill's main provision required agencies that own or license personal information to "disclose any breach of the security of the [data] system" to a resident of Georgia "whose unencrypted personal information or file was, or is reasonably believed to have been, acquired by an unauthorized person."¹¹ The bill required disclosure "in the most expedient time possible and without unreasonable delay."¹²

The bill defined an agency as "any person or entity who, for monetary fees or dues, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties."¹³ However, the bill specifically excluded governmental agencies "whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes," as well as licensed insurance agents or brokers.¹⁴

Senate Committee Substitute

The Agriculture and Consumer Affairs Committee offered a substitute that added legislative findings to the bill that stated that the

9. See SB 230, as introduced, 2005 Ga. Gen. Assem.

10. See State of Georgia Final Composite Status Sheet, SB 230, Feb. 22, 2005 (May 11, 2005).

11. See SB 230, as introduced, 2005 Ga. Gen. Assem.

12. *Id.*

13. *Id.*

14. *Id.*

privacy and financial security of consumers is at risk due to the common practice of information collection, and that identity theft is one of the fastest growing crimes in the State of Georgia.¹⁵ The legislative findings also recognized that “expeditious notification” of the misuse of information is important to minimize the damage to consumers.¹⁶

The Committee substitute replaced the word “consumer” from the original bill with “individual.”¹⁷ Also, where the bill as introduced used “agency,” the substitute used “investigative consumer reporting agency.”¹⁸ Since the definition of agency in the bill as introduced used “agency” and “investigative consumer reporting agency” interchangeably, the use of the latter in the substitute only provided clarification.¹⁹ Where the bill as introduced included a “licensed insurance agent or insurance broker” in the definition of an agency for purposes of the section, the substitute deleted that language.²⁰

The Committee substitute also added the following subsection that would have enacted the bill retroactively:

d) The duty of an investigative consumer reporting agency to disclose a breach of the security of the system under this Code section shall apply to all such breaches occurring on and after the effective date of this article and any breaches that occurred within six months immediately prior to the effective date of this article.²¹

15. See SB 230 (SCS), 2005 Ga. Gen. Assem.

16. *Id.*

17. Compare SB 230 (SCS), 2005 Ga. Gen. Assem., with SB 230, as introduced, 2005 Ga. Gen. Assem.

18. Compare SB 230 (SCS), 2005 Ga. Gen. Assem., with SB 230, as introduced, 2005 Ga. Gen. Assem.

19. Compare SB 230 (SCS), 2005 Ga. Gen. Assem., with SB 230, as introduced, 2005 Ga. Gen. Assem.

20. Compare SB 230 (SCS), 2005 Ga. Gen. Assem., with SB 230, as introduced, 2005 Ga. Gen. Assem.

21. SB 230 (SCS), 2005 Ga. Gen. Assem.

Passage by the Senate

The Senate passed SB 230, by substitute, on March 10, 2005, by a vote of 52 to 0.²²

Consideration by the House

The House first read SB 230 on March 11, 2005.²³ The House assigned the bill to the Committee on Judiciary Non-Civil, which drafted a substitute to SB 230 as passed in the Senate.²⁴

House Committee Substitute

Where the Senate Committee substitute used “investigative consumer reporting agency,” the House Committee substitute used “information brokers.”²⁵ In addition, where the Senate Committee substitute required notice “in the most expedient time possible and without unreasonable delay,” the House Committee substitute required notice “within ten days following such discovery or notification.”²⁶

Passage by the House

The House passed SB 230, by substitute, on March 29, 2005 by a vote of 151 to 0.²⁷

Conference Committee Report

The Senate disagreed with the House Committee substitute, but the House insisted on passing its version.²⁸ Therefore, on March 29,

22. See Georgia Senate Voting Record, SB 230 (March 10, 2005); State of Georgia Final Composite Status Sheet, SB 230, Mar. 10, 2005 (May 11, 2005).

23. See State of Georgia Final Composite Status Sheet, SB 230, Mar. 11, 2005 (May 11, 2005).

24. *Id.*; SB 230 (HCS), 2005 Ga. Gen. Assem.

25. Compare SB 230 (HCS), 2005 Ga. Gen. Assem., with SB 230 (SCS), 2005 Ga. Gen. Assem.

26. Compare SB 230 (HCS), 2005 Ga. Gen. Assem., with SB 230 (SCS), 2005 Ga. Gen. Assem.

27. See Georgia House of Representatives Voting Record, SB 230 (Mar. 29, 2005); State of Georgia Final Composite Status Sheet, SB 230, Mar. 29, 2005 (May 11, 2005).

28. See State of Georgia Final Composite Status Sheet, SB 230, Mar. 29, 2005 (May 11, 2005).

2005, the Conference Committee drafted a substitute bill.²⁹ The Committee recommended both the Senate and the House recede from their positions and that they adopt the Conference Committee substitute to SB 230.³⁰ On March 31, 2005, both the Senate and the House adopted the Conference Committee substitute, and it became effective on May 5, 2005.³¹

The Act

The main provision in the Conference Committee substitute, which became the Act, is similar to the preceding versions, with a few language changes:

Any information broker that maintains computerized data that includes personal information of individuals shall give notice of any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of this state whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The notice shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement . . . or with any measures necessary to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system.³²

This provision applies not only to information brokers, but also to people or businesses who maintain data on behalf of information brokers.³³ In that case, the person or business must notify the information broker if there has been a breach of the data's security.³⁴

After several language changes, the Committee finally agreed upon the term "information broker" because "consumer reporting agency"

29. *Id.*

30. CONFERENCE COMMITTEE ON SB 230, 2005 REPORT, at 1 (Mar. 2005).

31. See State of Georgia Final Composite Status Sheet, SB 230, Mar. 31, 2005 (May 11, 2005); State of Georgia Final Composite Status Sheet, SB 230, May 5, 2005 (May 11, 2005).

32. O.C.G.A. § 10-1-912(a) (Supp. 2005).

33. *Id.* § 10-1-912(b) (Supp. 2005).

34. *Id.*

appeared elsewhere in the Georgia code, and the Committee decided to narrowly define the new term so companies or industries that the State already regulates heavily were not drawn into the definition.³⁵ In the Act, the term “information broker” is defined as “any person or entity who, for monetary fees or dues, engages in whole or in part in the business of collecting . . . information concerning individuals for the primary purpose of furnishing personal information to nonaffiliated third parties.”³⁶ The term specifically excludes governmental agencies whose records are “maintained primarily for traffic safety, law enforcement, or licensing purposes.”³⁷

The Act defines a breach of security requiring consumer notification as the “unauthorized acquisition of an individual’s computerized data that compromises the security, confidentiality, or integrity of personal information of such individual maintained by an information broker.”³⁸ The Act does not consider good faith acquisition of personal information for the purposes of the information broker’s business a breach of security as long as they do not further disclose the information.³⁹ The personal information to which the Act pertains is a person’s first name, or first initial and last name, in combination with unencrypted or unredacted data such as a Social Security Number or credit card number.⁴⁰ The Act also states that even if the data is not in connection with an individual’s name, the Act applies if the information would be sufficient to perform identity theft.⁴¹ The Act does not apply to publicly available information from federal, state, or local government records.⁴²

35. See Hamrick Interview, *supra* note 1. Compare O.C.G.A. § 10-1-911(2) (Supp. 2005), with 1996 Ga. Laws 1030, § 1 at 1032 (codified at O.C.G.A. § 10-1-392(a)(2.3) (Supp. 2005)) (defining a “consumer reporting agency” or “agency” as “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties”). Georgia regulates consumer reporting agencies under the Fair Business Practices Act, and the State makes these agencies criminally culpable for unauthorized access to agency information. 1996 Ga. Laws 1030, 1047, § 1 (codified at O.C.G.A. § 10-1-393(b)(29) (Supp. 2005)).

36. O.C.G.A. § 10-1-911(2) (Supp. 2005).

37. *Id.*

38. *Id.* § 10-1-911(1) (Supp. 2005).

39. *Id.*

40. *Id.* § 10-1-911(5) (Supp. 2005)

41. *Id.*

42. *Id.*

The Act requires notice within “the most expedient time possible and without unreasonable delay,” as opposed to the proposed ten day requirement.⁴³ Because the Committee could not determine a realistic fixed amount of time that it was comfortable with, the Committee took the Act’s language regarding the required amount of time for notice from the California statute the Act mirrors.⁴⁴ As defined in the Act, notice to individuals can be written, electronic, or substitute notice through e-mail or posting if notifying individuals would be too costly or widespread.⁴⁵

The Act contains an added subsection that requires an information broker to notify other consumer reporting agencies which operate on a nationwide basis if the information broker discovers a breach in security that requires notification of more than 10,000 residents of Georgia at one time.⁴⁶ The Committee added this subsection because many consumer reporting agencies informed the Committee that when there is a breach of the security of a data system, the agencies receive many requests for consumer reports, and this requirement will better prepare them to anticipate and respond to those requests.⁴⁷ Finally, the Act does not require retroactive implementation.⁴⁸

Analysis

ChoicePoint, the information broker who experienced a major security breach that prompted the Act, is incorporated in California, and California law required it to notify consumers about the security breach.⁴⁹ Previously, California was the only state with a law protecting consumers from identity theft.⁵⁰ In drafting the Act, Georgia senators researched the California law and used it as a foundation for the Georgia law since California has tested it, and it

43. Compare O.C.G.A. § 10-1-912(a) (Supp. 2005), with SB 230 (HCS), 2005 Ga. Gen. Assem.

44. Compare O.C.G.A. § 10-1-912(a) (Supp. 2005), with CAL. CIV. CODE § 1798.29, .82 (Deering 2005); see Hamrick Interview, *supra* note 1.

45. See O.C.G.A. § 10-1-911(3) (Supp. 2005).

46. See *id.* § 10-1-912(d) (Supp. 2005).

47. Hamrick Interview, *supra* note 1.

48. Compare O.C.G.A. § 10-1-912 (Supp. 2005), with SB 230 (SCS), 2005 Ga. Gen. Assem., and SB 230 (HCS), 2005 Ga. Gen. Assem.

49. CAL. CIV. CODE § 1798.29, .82 (Deering 2005); see also *Lawmakers 2005* (GPTV television broadcast Mar. 10, 2005) (remarks by Sen. Bill Hamrick and Chriss Knight) (on file with the *Georgia State University Law Review*).

50. *Lawmakers 2005*, *supra* note 49 (remarks by Sen. Bill Hamrick).

has worked well there, although it is difficult to realistically tell if the California law is working since many instances of identity theft are not traceable.⁵¹ The sponsoring senators believed that since it was the California law that provided consumers with the notification of the leak of their information, and especially since the leak affected many Georgia consumers, Georgia should provide the same protection for its consumers.⁵²

The main difference between California's law and Georgia's law is that "[u]nlike California's sweeping law, which applies to any company or government agency that stores personal information on residents, the Georgia version only applies to 'information brokers' that collect and sell personal consumer data to third parties."⁵³ Privacy experts claim Georgia's law will fall short since many security breaches involve entities other than data brokers.⁵⁴ Lawmakers patterned the new Georgia law on the specific instances at ChoicePoint and LexisNexis and not on the reality that the majority of security breaches affect universities and financial institutions.⁵⁵

For instance, in 2001, one of the largest breaches of personal data in recent years occurred when the state agency that administers the Georgia HOPE Scholarship inadvertently exposed personal information on the Internet.⁵⁶ The Act would not apply to such a situation.⁵⁷ Senator Hamrick responded by stating that he crafted the bill narrowly so that it would have a better chance of surviving the 2005 legislative session, and that "it's either this or nothing right now."⁵⁸ He also believes the Act is "beneficial to consumers without being overly burdensome on businesses."⁵⁹ A broader bill that encompasses additional entities may be introduced in the next legislative session.⁶⁰

51. *Id.*; Telephone Interview with Beth Givens, Director, Privacy Rights Clearinghouse (May 12, 2005) [hereinafter Givens Interview].

52. *Lawmakers 2005*, *supra* note 49 (remarks by Sen. Bill Hamrick).

53. Patti Bond, *Georgia ID Theft Bill Too Narrow, Critics Say*, ATLANTA J. CONST., Mar. 24, 2005, at E1.

54. Givens Interview, *supra* note 51; *see also* Bond, *supra* note 53.

55. Givens Interview, *supra* note 51.

56. Bond, *supra* note 53.

57. *Id.*

58. *Id.*

59. Hamrick Interview, *supra* note 1.

60. *Id.*; *see also* Bond, *supra* note 53.

As early as 2006, Washington lawmakers may enact a federal law that would trump state laws relating to identity theft.⁶¹ Although this would create nationwide protection for consumers, the federal law may not be as strong as state laws that are in place or in the works.⁶² Meanwhile, other states are considering new legislation that will regulate information brokers because security breaches such as those at ChoicePoint and LexisNexis have revealed an unaddressed problem.⁶³

Another potential problem is that Georgia's law, like California's law, requires information brokers to report not only actual security breaches, but also suspected breaches.⁶⁴ If consumers receive several notices that thieves may have their information, yet nothing bad happens to them, they may eventually start to ignore the warnings.⁶⁵

Since this is an area of law heavily driven by technology, there will likely be new legislation in the years to come that will cover new issues and add entities not currently covered.⁶⁶

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61. Givens Interview, *supra* note 51; *see also* Bond, *supra* note 53.

62. Givens Interview, *supra* note 51.

63. Hamrick Interview, *supra* note 1. For example, Illinois, Texas, and New York are considering notification laws similar to California's law. Bond, *supra* note 53.

64. Bond, *supra* note 53; *see* O.C.G.A. § 10-1-912(a) (Supp. 2005); CAL. CIV. CODE § 1798.29, .82 (Deering 2005) (requiring an information broker to give notice if "personal information was, or is reasonably believed to have been, acquired by an unauthorized person").

65. Bond, *supra* note 53.

66. Hamrick Interview, *supra* note 1.