

PRIVACY AGAIN

By Joshua Stein, Principal, Joshua Stein PLLC

In May the European Union adopted an extensive and burdensome new framework for privacy law, called the General Data Protection Regulation. It sometimes applies outside the European Union, for any company that does a certain level of business within Europe or with Europeans. The requirements and penalties in GDPR are severe, including payments of up to 4 percent of a violator's gross revenues. In the first week or so of GDPR's life, plaintiffs already filed suit, seeking billions of dollars of damages from large companies. So companies, including many American companies with any European connections at all, are paying attention.

All of this has led to widespread declarations and disclosures about on-line security, privacy protection, and security online. Tech companies are falling all over one another to express their commitment to privacy. Websites for companies doing international business now have new boxes to check to consent to things.

It is all a continuation and magnification of the blitz of disclosures triggered by previous privacy panics. For many years, we have all received annual privacy notices from banks, credit card companies, and others. They disclose that the banks, credit card companies, and others have our information and will use it in some ways. Surprise! How many people actually read those notices? And how many people will actually read the clearly written privacy notices now required by GDPR, as opposed to just clicking the consent box?

In today's world, it is just unrealistic to expect much privacy once you start to use the Internet to communicate or conduct business. Loss of privacy is almost by definition part of the essence of the Internet. You can hide some information by using web browsers designed for that purpose. But as soon as you start identifying yourself, that information will travel and get used. So anyone who truly wants to preserve privacy and anonymity needs to disconnect from the Internet.

GDPR represents a valiant and well-meaning effort to try to reclaim some privacy. Some of its measures and requirements may have gone overboard and just may not be practical. It imposes serious disclosure requirements, similar to the disclosure requirements that are so often part of every grand new legislative scheme to solve some problem. In the end these disclosure requirements just overwhelm the reader with information that will probably end up being ignored.

Banking, home mortgages, credit cards, home sales, and lead paint are a few of the many areas that have been legislatively "improved" through disclosure requirements that have made each of these areas completely incomprehensible to mere mortals.

GDPR piles on more of the same, as will whatever legislation follows the latest privacy scandals in the United States. The net effect of all this seems unlikely to create much improvement in actual privacy for actual people—just a lot more disclosures and consents.



In the world of real estate, we ought to look ahead to creeping (or ballooning) concerns about privacy. We should expect to see more constraints on information sharing, more requirements for consents, and more disclosures that will have to be made. New York City's tenant screening and window guard disclosures could look like child's play in a few years.

These growing privacy concerns will apply with greatest force when the real estate industry deals with individuals, such as residential tenants and guarantors of commercial leases. Here, we ought to start thinking harder about disclosing and obtaining consents to any investigations anyone might perform, in anticipation that the requirements that already apply will only become more extensive.

Perhaps apartment leases should contain the tenant's consent to disclosure of information about the tenant to lenders and prospective purchasers of the building. Without such a consent, maybe it will soon violate privacy law to share that information. Hence the need for disclosures and consents. And any such consents should apply not only at the inception of any legal relationship, but also allow the landlord (or whoever) to update whatever information it obtains, without having to go back to get another consent. Whether those prospective consents will be valid may, however, represent another discussion.

In real estate and elsewhere, we now need to deal with today's wave of concern about privacy. We also need to prepare for the next wave, perhaps larger. All of this will lead at least to more disclosures and more consents but not necessarily more privacy.

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