Spring 2021

Prof. Selbst   Law 484. Information Privacy and Data Protection   May 13, 2021 AM

Final Examination
OPEN BOOK
(4 hours + 10 minutes for downloading/uploading)

Be sure to avoid making any remarks that will jeopardize your (or anyone else's) anonymity either on the exam or in any other context, before the exam grades are posted. Any questions during or after the exam should be addressed to the Records Office or Dean Martí.

1. This is an open book, open note examination. You may use your casebook, assigned course materials, class PowerPoints, and any notes and outlines you have prepared. You may not watch the recorded lectures or search the internet for answers (but you may access internet materials assigned in the syllabus).

2. This exam has four questions. Each question is accompanied by a percentage that reflects my estimate of the relative difficulty and time demands of the question. I intend for them to be close to the final relative point totals, but those are subject to adjustments as necessary.

3. Type your exam answers onto a separate Word processing document, clearly labeling each response with the corresponding question number. Double space your answer document and format with 1-inch margins.

4. I have tried to include all necessary facts in the questions. If, however, you discover that a material fact is omitted or ambiguous, state how the omission or ambiguity affects your argument. Similarly, if you feel that there has been a typographical error or other mistake on the exam, identify the error and answer the question as you think it should be corrected to read.

5. Please do not discuss the exam with any other students until after the conclusion of the exam period.

* * *

Question 1. (30 percent)

John Blodgett, COO of Widgets, Inc., has decided to do some renovations in the U.S. corporate headquarters, located in Chicago, IL. While the management of Widgets Inc. is relatively traditional, they have heard for years from shareholders that they needed to get with the times and use technology to the fullest. Blodgett sees opportunities to cut costs while improving the overall health of its employees. Thus, wanting to promote a healthy workforce, Blodgett discovered a startup based in Austin, TX, called HealthiOffice, which promises to use the magic of "synergistic technological advancement to holistically promote health and wellness in the office."

Blodgett was particularly impressed by HealthiChair, an ergonomically designed smart chair and part of the new line of internet-enabled office furniture. The HealthiChair is lined with sensors that allow HealthiOffice to provide various services to companies. The sensors include a weight sensor, a heartrate monitor, an air quality sensor. Blodgett loves how his Apple Watch tells him to stand up every so often, and was particularly excited at the HealthiChair demo showing that the weight sensors could determine how long a person has been sitting without standing up, so it could accomplish the same thing. The chair's data also allows HealthiOffice's software to directly contact emergency services in case of a heart attack or fire. In order for the HealthiChair to operate, it must be connected to the internet, and HealthiOffice's software requires a user to log in to their HealthiOffice account and specific HealthiChair whenever they log in to the office network.

HealthiOffice also offers management services for employee wellness programs. Widget Inc.'s employee wellness program is voluntary and includes programming to promote regular health screenings, weight loss, smoking cessation, and stress reduction. As with all voluntary wellness programs, increasing participation is important to its success. As program manager, HealthiOffice offers several strategies to increase participation. Their primary innovation is to use the data they collect from their smart office furniture to predict who most needs health interventions. HealthiOffice then engages in a persuasion campaign to get targeted employees to sign up and regularly participate. Every month, HealthiOffice sends an email to all employees of its customers with the subject line "Healthy Office Insights." These emails are personalized in such a way as to direct attention to the most needed programs for that person, according to HealthiOffice's data. If HealthiOffice identifies someone with a particularly necessary health intervention, they first increase the frequency and personalization of the emails, and eventually offer increasingly lucrative discounts and gift cards from corporate partners in order to get them to sign up. Due to the need to identify employees in need of health interventions, logging into the HealthiChair is mandatory independent of participation in the wellness program, and an employer using their services must give HealthiOffice access to personnel information.

Part A

Blodgett decides that he wants to buy HealthiChairs for the entire office, and to hire HealthiOffice to manage the employee wellness program. In initial discussions, Blodgett learns that part of HealthiOffice's business includes aggregating data from its customers' employees to sell insights to health insurance companies.

You are an attorney who specializes in data privacy and data security compliance. Blodgett hires you advise him both in the contract negotiations between Widget Inc. and HealthiOffice and with respect to internal company policy changes to accommodate the use of HealthiOffice software. What advice do you offer Blodgett? Be informative but also realistic, with the understanding that Blodgett wants to get a deal done and HealthiOffice will have its own interests to protect.

Part B

Anita Adams is a 45-year-old employee in Widgets Inc.'s corporate office., where she has worked for ten years. She has smoked cigarettes since her teens. She tried to quit three years ago, for the fifth time, and was again unsuccessful. Embarrassed by her continued addiction, she told everybody that she quit and actively hides her smoking. She vapes during the workday in private, in order to avoid the smell, and only ever smokes cigarettes outside of work. She has friends at work, but over the last three years has started to keep her distance to protect her secret. For example, she no longer invites the coworkers she is friends with to her home.

When Widgets Inc. started using HealthiOffice's software, Adams joined the wellness program. She was conscious of her weight and blood pressure and liked occasional gift certificates, so figured she might as well do so. Adams noticed the smoking cessation programs, but did not sign up for fear of outing herself to her coworkers. Three months after she began using the wellness program, she began receiving emails from HealthiOffice that included prominent advertisement of the smoking cessation program. She ignored them, and for the next month, she received another email each week highlighting the program specifically. Eventually, two months later, she received an offer of a $100 Amazon gift card if she signed up. So she signed up for the program.

Just under a year after Widgets Inc. began using HealthiOffice, the HealthiOffice marketing team sent an email to Blodgett, as part of a renewal pitch. The email included a list of accomplishments over the year. One page in the renewal pitch included employee ID photos paired with a short description of how the HealthiChair data helped their health outcomes. Next to Adams's photo was a description of how HealthiOffice determined that she was a smoker based on hear heartbeat patterns and ambient odor, and was able to successfully enroll her in the smoking cessation program. Blodgett was quite impressed! He was so excited that he forwarded the marketing email to all the employees in the building to brag about how great HealthiOffice is.

When Adams received Blodgett's forwarded email, she was mortified. In the next couple days, several colleagues came to her and said variants of "Oh, I thought you quit smoking earlier. Good for you for trying again!" She felt like all her coworkers were staring at her, and that nobody trusted her anymore. Adams was also outraged, not just that Blodgett shared her secret, but that HealthiOffice knew it in the first place! She worked so hard to hide it! Adams ended up quitting her job about a month later.

You are an attorney at a plaintiffs' firm specializing in privacy issues. Adams comes to you with her story and asks for help. She wants to sue both Widgets, Inc., and HealthiOffice. The partner you're working with asks for a memo detailing all plausible causes of action Adams has against both parties, how likely they are to succeed, and why they will or will not.

Write the memo.

Question 2. (30 percent)

FBI agent Bernard Koenig is investigating a shooting that occurred on the National Mall in Washington, DC. The attack occurred in the middle of the day and the victim was a Saudi national who worked in the Embassy of Saudi Arabia. Witnesses identified the shooter as a masked man of average build, but could not provide more information. After subpoenaing telephone companies for all phone numbers in the range of the nearest cell towers at the time of the shooting, the FBI has identified a possible suspect: Abdul Saleh, a 23 year old engineer who lives in the District. Saleh is a Yemeni national who emigrated to the U.S. with his parents when he was six years old and has lived in the United States since. He is a permanent resident of the United States.

Officer Koenig has added him as a friend on Facebook under a false identity, and Saleh accepted his friend request. Examining Saleh's profile, Koenig observed that he frequently posts on political topics, though his posts do not follow any one obvious political alignment. He has posted a screenshot from an unidentified website on February 12, 2020, that purports to explain how President Trump's secret plan to oust the #FakePresident will all be revealed in two weeks. On January 7, he posted a meme that says "I Am Antifa" over an image of Sparticus, with the caption, "It was all Antifa. We are all Antifa", a reference to the claim that Antifa caused January 6 violence at the Capitol. He posted three photos of June 2020 protests with the caption "DEFUND THE POLICE #BLM", and another post from June 2020 that says "Unbelievable that the US still sells more and more bombs to Saudi Arabia! I guess my people's lives are worthless since we don't sit on oil money? The US government are murderers!", an apparent reference to the ongoing Saudi bombing of Yemen.

Agent Koenig also discovered two older posts he deemed relevant. In November 2018, after the CIA concluded that Saudi Crown Prince Mohammed bin Salman ordered the assassination of Washington Post journalist Jamal Khashoggi, Saleh posted "How can Trump let them get away with this??!! Isn't this America? They kill one of us, we kill ten of you!!" In addition, five years ago, when Saleh was 18, he posted the following message:

> Just got home from Intro to Politics. Class is blowing my mind! The so-called terrorists making some sense. They'd just stop if Obama would stop bombing. Someone just needs to do something!
>
> Of course whoever's listening, I'm not saying I'm gonna do anything haha ;)

No other references to terrorism are apparent in Saleh's Facebook history.

Agent Koenig wants to continue investigating Saleh. He wants 1) all of the contents and header information of Saleh's Google email from the last year; 2) Saleh's Google search history over the last three months; 3) to intercept all his phone calls over the next 30 days to find accomplices; 4) to search his apartment for evidence. He has turned to the lawyers at the Department of Justice to ask for how he can legally do so.

You are a summer intern at the Department of Justice with a top-secret security clearance. Your supervisor asks you to prepare a memo outlining whether and how Agent Koenig can lawfully accomplish the surveillance he seeks. Be sure to pay attention to the relevant standards and cite specific provisions of any statutes you rely on. If Agent Koenig must satisfy any preconditions or limitations on the surveillance in order to legally proceed, please explain what they are, and if there is any ambiguity about whether a given standard applies, explain the ambiguity, and propose alternative paths where applicable.

Write the memo.

Question 3. (25 percent)

Let's Eat! is a new restaurant review and recommendations app. Users sign up, leave reviews of the restaurants on the platform, and can read each others' reviews before deciding where to eat. The app also allows diners to make reservations at partner restaurants. The business model works as follows: First, restaurants sign to be on the platform up, paying the app a fee for the exposure to their customer. Second, the app offers contextual advertising. Restaurants can advertise or offer sponsored recommendations, which are directed to users depending on their food preferences. The developers also discovered through market research that people's food preferences revealed a good amount about their shopping habits, so they sell targeted advertising to companies on the premise that it will be delivered to users depending on what their food tastes say they will more likely purchase.

Upon sign-up, Let's Eat! users are asked for their name, birth date, email address, phone number, and social security number. A new user is also asked to fill out a 50-question survey about how often they eat out at restaurants, on what occasions, and what types of food or ambience they tend to look for in restaurants. Finally, to use the reservation service, a user must have a credit card number on file.

Let's Eat!'s website includes a privacy policy, reproduced in part here:

> We obtain certain personal information in connection with the products and services we provide…

> We may use the personal information we obtain about you to: Provide our products and services to you; establish and manage your Let's Eat! account and profile; personalize your experience with our products and services; identify and authenticate you; increase and maintain the safety and security of our products and services and prevent misuse; communicate with you (including providing you with offers about our products and services) and provide customer support; perform analytics (including market and consumer research, trend analysis, and financial analysis).

> We do not sell or otherwise share personal information about you except as described in this Privacy Policy. We may share your personal information with (1) our affiliates and subsidiaries and (2) our service providers who perform services on our behalf, such as marketing, customer service, order fulfillment and data analytics and storage.

> We also may disclose personal information about you (1) if we are required to do so by law or legal process (such as a court order or subpoena); (2) in response to requests by government agencies, such as law enforcement authorities; (3) to establish, exercise or defend our legal rights; (4) when we believe disclosure is necessary or appropriate to prevent physical or other harm or financial loss; (5) in connection with an investigation of suspected or actual illegal activity; or (6) otherwise with your consent.

> The personal information we collect is securely stored within our databases, and we use standard, industry-wide, commercially reasonable security practices such as encryption, for protecting your information.

About a year after launch, Let's Eat has acquired 20,000 users, but its investors decided that its business model does not permit a large enough profit with such a small user base. Thus, the founders decided to pivot. Along with the market research mentioned above regarding purchasing habits, the company discovered that food preferences also reveal information about credit risk. The developers were therefore able to create something they called a "dough score"—a credit score based on food. Let's Eat!'s developers then created a platform that allows banks and other lenders to request a user's dough score for a fee. When the bank requests a user's dough score, the app checks the user's social security number

to ensure it is the same person, and then sends the bank the dough score and an explanation of the dough score method, but no other personal information beyond what was in the request already (contact information and SSN).

Part A:

You are an attorney in the FTC's enforcement division, and this matter has been brought to your attention. Your supervisor wants you to explore whether enforcement is appropriate. She asks you to draft a memo explaining what claims you would bring in an enforcement action, and if a settlement is expected, what Let's Eat! will be required to do to meet the terms of the settlement.

Write the memo.

Part B:

One year later, Let's Eat has managed to stay out of legal trouble, and at the same time, grow enough with its new business model that the company can afford a lawyer. They have hired you as in-house counsel. As it turns out, one of the most active investors is from Germany and would really like to see a version of the app rolled out in his home country. He thinks there is a whole lot of money to be made from banks that are hungry for whatever new information they can get. The founders are somewhat skeptical, but really are not comfortable telling this investor no without good reason.

As your first assignment, they ask you to provide them a plausible shield. The want you to point to all the provisions in the GDPR that would prevent them from simply operating as they do in the U.S. and explain why those provisions prevent it. But because they do like money, after all, they would also like to know if it is possible to change their operations to comply with the GDPR without fundamentally changing their business model, and if so how they might do so.

Write the memo.

Question 4. (15 percent)

We have read and discussed the ways in which a thin notion of notice and consent fails to adequately regulate the collection and use of data. A thin notion of consent presumes as a formal matter that a person giving consent to the collection and use of their personal information is informed about and appreciates the type and extent of the data being collected and the uses to which it is put, but requires no extra assurance that a person actually does know and appreciate these things. Consent need not be so formalistic, however. Some data protection regimes, most notably the GDPR, rely in part on more meaningful version of consent, requiring that it be freely given, specific, informed, and unambiguous, and where consent being freely given takes power relationships into account.

Using the various theoretical, critical, and policy concepts we have discussed this semester, explain the strengths and weaknesses of an approach to privacy regulation centered on meaningful consent. Please be specific about the relative merits of meaningful consent in comparison to other possible approaches to privacy regulation that we have studied, and how the different approaches you discuss relate to the different goals of privacy and data protection law we discussed. To illustrate your argument, please make reference to specific legal contexts and privacy laws that we have studied as appropriate.

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Good luck with the rest of your exams, and have a great summer!

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