

UNIVERSITY OF CALIFORNIA
LOS ANGELES
SCHOOL OF LAW

Prof. Selbst

Law 484 § 1 Information Privacy and Data Protection

May 10 – May 11

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.
2. You may prepare your answers in any word processing program, but you will need to upload your answers in a single PDF document. Please make sure that the document includes a header that contains your exam number and total word count, and numbers the pages in a format that includes the total number of pages (page 1 of X, 2 of X, etc.). Write your answers in 12-point font, with lines double-spaced. **Start your response to each question on a new page.**
3. There is no page limit, but the word limit for the entire exam is **4500** words. I will not read past that number of words. Do not waste words restating the facts! **If you do not put your final word count on your exam, it will not be accepted.** If the final word count is misrepresented, will be considered a violation of the UCLA Student Conduct Code.
4. You may not discuss the exam with any other person once you have downloaded it, nor may you receive aid from any other person in completing the exam. To be clear—because this exam is being given as a take-home exam, once you have downloaded the exam, you may not discuss the exam, or any issues raised by the exam, with any other student **until the entire exam period is over.** Some students may have to take it late due to extenuating circumstances. Discussion of the exam during the exam period, even with other students you believe have already taken the exam, will be considered a violation of the UCLA Student Conduct Code.
5. The exam has a fact pattern and three questions, two of them with subparts. The approximate percentage value of each question is marked. Though final point values may differ slightly, those are my recommended time allocations.
6. Your answers will be evaluated according to responsiveness to the question, familiarity with doctrine, clear expression of your analysis, reliance on appropriate authority, discussion of policy considerations (where appropriate), and grasp of the relative importance of issues and strength of arguments.
7. 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.

Question 1. (50 percent)**Part A (20 percent):**

Alex Alvarez is a police officer in Wilshire City, in the state of Hilgard. (The state of Hilgard is a new state in the United States, to which federal law applies normally. Assume it does not have a specific common law, so the laws of all states are persuasive authority.) In the last ten months, there have been a series of bank robberies in Wilshire City about every two months. Alvarez has investigated and determined that they are connected, but he has had no useful leads as to the perpetrators. Two days ago, Alvarez received an anonymous tip that Blair Bennington may be one of a group working together on these robberies. Alvarez has spent the few days trying to find information on Bennington, and discovered that they work in a local office of Eagle Eye Bank. Alvarez also found their home address, a cell phone number registered with Horizon Wireless, and a Zoogole account with email address.

Frustrated after months without a lead, Alvarez wants to jump right on Bennington's communications to assemble a list of Bennington's known associates and to scan Bennington's communications for any evidence of planning. He plans to contact Horizon and Zoogole to obtain Bennington's text messages and emails over the past year, including header information and content. Alvarez also seeks Bennington's cell site location information for the individual days on which each of the stores were robbed, as his complete Zoogole location data for any of the days he was logged into Zoogole services over the last year. Finally, seeking to prevent the next robbery, Alvarez wants to ask Zoogole to log and forward all of Bennington's emails for the next two months and get Horizon to intercept and record Bennington's phone calls for the next two months.

You are counsel at the Wilshire City Police Department. Please write a memo explaining whether Alvarez can conduct the investigation in this manner. For each kind of information sought, please explain what he must do to obtain it legally, or why he may not do so. Please be sure to explain each step in your analysis, with citations to appropriate case law or statutory authority in your analysis.

Part B (30 percent):

Soon after you write your memo, Alvarez obtains Bennington's text messages (legally or not). Upon reading them, Alvarez discovers nothing related to a bank robbery, but instead gets some disturbing news on a personal level. Over the course of the last three months, Bennington had been having an affair with Alvarez's wife, Chloe Campbell. Alvarez does not take this well and decides to exact revenge on Bennington. But he wants to be strategic about it.

The day after the discovery, Alvarez called up Donny Darden, a friend and retired colleague who had since become a private investigator. Darden mostly works for individual clients, but about 30% of his cases come from a life insurance company based in Wilshire City. Alvarez told Darden that he needs to get whatever information is necessary to ruin Bennington's life, but not to invade private spaces. Alvarez told Darden to follow Bennington around, to stick to them like glue while they are in public, and to use whatever microphones or long-range camera lens Darden has to record anything that Alvarez might find useful to use against him.

Over the next week, Darden followed Bennington every time they left the house, and took more than a thousand of pictures. For the first three days, Bennington went to a nearby casino after work, and then drove home after, late at night, at least one time likely drunk. The fourth night, Bennington came home after work. The weather was pleasant, so Bennington spent the night with their windows open. Darden took that opportunity to sneak up to a window and listen in. Darden recorded several phone conversations, including one with a financial planner. Bennington discussed their plans to quit their job and open a restaurant soon, recounting their preliminary conversations with a loan officer at Fifth First Bank, a competing bank across town. Darden also recorded a second phone conversation that included some sexual overtones with a caller he suspected was Campbell, in which Bennington and the caller made a plan to meet up at “next time” at caller’s house.

On the sixth night, Alvarez and Darden set up a sting. Alvarez had told Campbell that he was going out late to a bar, expecting Bennington to join Campbell that night. Alvarez gave Darden a key and showed him where he could stand to capture video and audio in their bedroom from the garden outside, but also told Darden to go inside if necessary. As expected, Bennington came over to the house that night. At some point, Bennington and Campbell proceeded into the bedroom. Before engaging in a night of passion, Campbell locked the door, shut the windows, and drew the blinds. She turned to Bennington: “Can’t be too careful.” Darden, original plans frustrated, let himself into the house and made an audio recording outside the bedroom door. He was also able to crack the door slightly, and snapped a few quick photos before leaving.

At the end of the week, Darden gave Alvarez a full report of what he found as well as the recordings. Alvarez thanked him and paid him. Now it was time to exact his revenge. Alvarez first went to Fifth First Bank to talk to Bennington’s loan officer. He showed the loan officer Darden’s report, explaining that this was not a trustworthy person, and that they should not give him a loan. Next, Alvarez called Eagle Eye Bank (where Bennington worked), explaining that he had been investigating Bennington for a little while as a suspect in a string of bank robberies, and while the investigation is ongoing, they probably don’t want to employ someone that might be planning to rob them. Finally, he types out a note in large typeface, drives it over to Bennington’s home, and tapes it to the door for any passerby to see. It reads “Screw my wife? I screw your life. Watch your back.”

Later that night, Alvarez confronted Campbell. Campbell’s sister was visiting and the two were in conversation when Alvarez barged in. He immediately started playing the recording of Campbell and Bennington’s night together before demanding an explanation. Campbell’s sister excused herself after hearing the recording to leave them to their argument.

Now you are an attorney with a plaintiffs’ firm in Wilshire City. Bennington has lost their job and their loan prospects, and discovered what Alvarez and Darden did to them. Bennington comes to you to file a lawsuit. Please write a memo examining all the claims that Bennington can bring against Alvarez and Darden, and how likely each is to succeed. As it was clear that Alvarez was acting in his personal capacity, ignore any immunities related to his role as a police officer or state employee.

Question 2. (20 percent)

Subscription Supermarket is a US-based grocery delivery service. Users pay a yearly subscription fee and can have groceries delivered from several different local grocery stores. But not all of its revenue comes from subscriptions. Scientific studies show that nutrient diversity and amount of calories consumed are the two strongest predictors of the hypertension, high cholesterol, and

diabetes. Thus, many US supermarkets have discovered that by analyzing their customers' food choices, they can infer their customers' health needs, and make more money by marketing health products to them. Subscription Supermarket's market research shows that its users shop through the service almost exclusively, which has allowed Subscription Supermarket to develop a program of analyzing health data that outperforms other US supermarket chains. They are rapidly growing from a small startup into a larger company.

As part of its expansion plans, Subscription Supermarket plans to begin offering its services in France. In addition to its subscription fees, it hopes to achieve two different outcomes from such an expansion. First, it hopes to combine the French supermarket data with its US data to improve its health analysis tools. Comparing the different cultures and food habits can make the analysis more robust and help Subscription Supermarket to determine what may be cultural effects and what effects are directly attributable to nutritional value of food. Second, it aims to apply its existing algorithms to deduce nutrient diversity and calorie consumption by its French customers, then sell the data and analytic methods to French health insurance firms. Although France has universal healthcare, for most people under 65, government coverage only applies to 70% of the cost of covered services. Many of them therefore purchase private insurance to cover additional services like long-term care at private hospitals, or to cover the remaining 30% of basic care costs. Subscription Supermarket believes it can make a lot of money by assisting French insurance firms in setting premiums for supplemental insurance products based on its understanding of who is likely to develop the three major diseases mentioned above. If successful in rolling out its service in France, Subscription Supermarket hopes to expand to several other countries inside the EU.

You are in-house counsel for Subscription Supermarket. Describe the steps the company needs to take to carry out these plans in France and potentially beyond while ensuring lawful processing of their European customers' grocery data and guaranteeing the rights of their customers as data subjects under the General Data Protection Regulation (GDPR). If there are multiple approaches to ensuring lawful processing, please describe the benefits and challenges of each before making a recommendation for how to proceed.

Question 3. (30 percent)

Toy company Matt. L. Toys is the maker of the "Margie" line of fashion dolls. Since 1959, Margie and her boyfriend Ben have been at the center of a doll empire that includes frequent new editions with new clothes, houses, cars, and other accessories. Over the last few decades, after criticism that the Margie doll was not representative and reinforced harmful stereotypes about women, different Margie dolls have begun to appear with different apparent racial qualities like skin tone, and representing many possible career choices, such as Astronaut Margie, Paramedic Margie, Photojournalist Margie, and ... Cat Burglar Margie? (How inspiring!) As a company with such a long history, Matt. L. Toys understands that it must constantly adapt to keep up with the times.

In 2015, Matt. L. Toys introduced a line of "Howdy Margie" dolls. Howdy Margie is an interactive, internet-enabled Margie doll. Children can speak to the doll, and it will respond with a number of phrases, depending on what was said to it. Some sample phrases include "I love hanging out with you! (SIGH)", "Ooh, why don't we talk about friends!," and "You know what I want to talk about? SCHOOL!". The bank of phrases and its responsive algorithms are updated periodically, requiring that the doll be connected to the internet via Wi-Fi signal. The doll proved to be a hit, selling about 250,000 units across the United States in each of the first five years.

When operated, the Howdy Margie doll is continuously connected to a cloud server owned by Matt. L. Toys. The doll collects data, uploads it all to the cloud, and stores some of it locally as well. In order to set up the doll, a parent must grant permission for the recording of their child by making an account on the Howdy Margie website and securing permission with a credit card. On the website, the parent is presented with the following disclosure:

Howdy Margie is an interactive doll that will record your child's voice. This recording will be uploaded to servers at Matt. L. Toys and analyzed for content. These recordings are what allows the magic of Howdy Margie, ensuring that she can appropriately respond to your child's speech, and best simulate conversation. It is also necessary for identity verification.

We will never sell your data. Information about our customers is an important part of our business, and we are not in the business of selling our customers' personal information to others. We may, from time to time provide advertising companies with market analyses informed by data we collect, that will allow advertisers to serve you with more useful and relevant content.

We work to protect the security of your and your child's personal information during transmission by using encryption protocols and software. We maintain physical, electronic, and procedural safeguards in connection with the collection, storage, and disclosure of customer personal information. Your personal information data will be stored for no more five years.

Below this disclosure is a form where the parent can enter a credit card information and their contact information. After collection, the account information, credit card number, and contact information are then stored on Matt. L. Toys's encrypted servers, while the user ID and a variable indicating continued parental permission is stored locally within the doll.

Howdy Margie also makes voice recordings. These are uploaded to the servers and analyzed for voice recognition and speech patterns. Those analyses are stored remotely and transmitted back to the doll, for the purpose of improved interaction with the child and for verification purposes to ensure the doll is interacting with the expected child. The voice analyses are then used internally to improve Matt. L. Toys's algorithms and learn what they can about consumer preferences.

Six months ago, in October 2021, the Howdy Margie backup servers were breached. The servers contained data from over 1 million active Howdy Margie customers, dating back to 2015. Containment and analysis procedures identified a remote access from somewhere in Eastern Europe, but it is not known what data was accessed or copied. The vulnerability was patched within 24 hours of the discovery of the breach and notifications of the breach were sent by email to everyone that could be reached within 48 hours. While the main servers were encrypted, the backup servers are not. They contain firewalls, but they have not been updated since 2018. Cybersecurity training at Matt. L. Toys is only required for people who develop the Howdy Margie software directly. This is also the second time that the Howdy Margie servers were breached. The first breach was contained and not disclosed widely. An analysis showed that it was likely that the data of only 1000 customers in Nebraska, Kansas, and Colorado were breached, and they were notified. The cause of the first breach was believed to be a customer service representative who gave out a password on the phone. The representative was fired, but no other updates were made to the system after that.

- EXAM CONTINUES ON NEXT PAGE -

Part A (20 percent):

You are an attorney for a consumer privacy advocacy organization in Chicago. The legal director asks you to write a memo identifying and evaluating:

1. Claims that the organization could potentially include in a class action complaint. Be sure to consider whether you would have difficulty finding representative plaintiffs with standing to bring those claims in federal court.
2. Arguments that you would advise the organization to include in a “mock” complaint designed to encourage the FTC to investigate Matt. L. Toys under any of its existing authorities. Be sure to discuss any remedies that the FTC may seek.

Part B (10 percent):

It turns out that there have been an unusually high number of breaches in internet-enabled toys. After the latest incident with Matt. L. Toys, regulators started making a point of mentioning the lax security in the toy industry in speeches and public writing. Fearing future regulation, the biggest toy companies have made clear that they want to come together to collaboratively agree to an internet-enabled toy data security standard, modeled on the payment card industry’s PCI-DSS.

Your legal director comes back to you, asking for your thoughts on whether this is likely to work. Please write a memo explaining the benefits and drawbacks of such an approach to security in the toy industry. Discuss any factors that you think could make such an approach more or less likely to be successful.

* * * *

END

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

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SCRATCHPAPER