



1000 University Ave., W. Suite 222
Saint Paul, MN 55104
651-330-8062 (Main)
www.mendozalawoffice.com

Anthony S. Mendoza, Esq.
Direct Dial: 651-340-8884
Cell: 651-247-1012
tony@mendozalawoffice.com

September 21, 2017

Author's Note: This is the first of a series of articles on Internet privacy laws with a special focus on Minnesota. Any views expressed herein are the author's own and should not be attributed to any client.

DID YOU KNOW MINNESOTA ALREADY HAS AN INTERNET PRIVACY STATUTE?

The last Minnesota legislative session saw a flurry of bills introduced pertaining to internet privacy. The activity was a reaction to the repeal of FCC broadband privacy rules by Congress in January. Some Minnesota lawmakers responded by hastily introducing a slew of state internet privacy bills, assuming that without federal broadband privacy rules, Minnesotans were unprotected.

But in addition to numerous existing federal privacy protections unaffected by the repeal of the FCC rules, the Minnesota Legislature had long ago already moved to protect the internet privacy of Minnesotans. In 2002, the Legislature enacted an Internet privacy statute (Minn. Stat. Chapter 325M) prohibiting internet service providers (ISPs) from knowingly disclosing “personally identifiable information” (PII) concerning a consumer. PII is defined under the statute as information that identifies: (i) a consumer by physical or electronic address or telephone number; (ii) a consumer as having requested or obtained specific materials or services from an ISP; (iii) Internet or on-line sites visited by a consumer; or (iv) any of the contents of a consumer’s data-storage devices.

PII may be only disclosed by an ISP: (i) if the disclosure is incident to the “ordinary course of business” of the ISP; (ii) to another ISP for the purpose of reporting or preventing violations of the published acceptable use policy or customer service agreement of the ISP; (iii) with the authorization of the consumer; or (iv) as provided under Minnesota’s state analog to the federal Electronic Communications Privacy Act, which governs law enforcement wire taps.

The term “ordinary course of business” is defined under the statute as debt-collection activities, order fulfillment, request processing, or the transfer of ownership. “Authorization” may be obtained in writing or by electronic means. And a request for authorization must reasonably describe the types of persons to whom PII may be disclosed and the anticipated uses of the information. In order for an authorization to be effective, a contract between an ISP and the consumer must state either (i) that the authorization will be obtained by an affirmative act of the consumer, or (ii) that failure of the consumer to object after a request has been made constitutes authorization. The provision in the contract must be conspicuous. Authorization may be obtained in a manner consistent with self-regulating guidelines issued by the ISP or online industries, or in any

other manner reasonably designed to comply with the authorization requirements.

The law requires an ISP to take “reasonable steps to maintain the security and privacy” of PII. While the law prohibits class action suits, it provides a private cause of action to a consumer who prevails or substantially prevails in any action brought under Chapter 325M. A prevailing party under a private cause of action is also entitled to costs and attorney fees. Chapter 325M further provides that the establishment and implementation of reasonable practices and procedures to prevent violations of any provision of Chapter 325M is a defense to a private cause of action.

Because Chapter 325M prohibits ISPs from knowingly disclosing PII, it is difficult to comprehend how an ISP could sell PII without that sale constituting a knowing disclosure of PII. Knowingly divulging means to take an action with the conscious objective of achieving a result. The act of selling PII, and transferring right and title to use the PII to a buyer, would necessarily involve the seller’s knowledge and objective to disclose that PII to the buyer. Thus, it is clear that Minnesota’s existing Chapter 325M already protects Minnesota consumers by prohibiting ISPs from selling PII without the authorization of the customer. Chapter 325M appears to have provided a strong deterrent to violations of internet privacy by ISPs. Since the law was adopted in 2002, not a single cause of action, either by a consumer or the Minnesota Attorney General has been filed. Minnesota lawmakers were clearly ahead of their time!

~~~~~