

The Politics of Privacy and Technology: Fighting an Uphill Battle

Eric Fulton, CEO SubSector Solutions
Daniel Zolnikov, MT House Representative

Note, a prettier and updated version of this presentation can be obtained by emailing:

daniel.zolnikov@gmail.com

or

eric@subsectorcorp.com

Daniel Zolnikov

MT State House
Representative

Still has a
Blackberry..

@DanielZolnikov





Eric Fulton

Runs an information security consulting firm

Adventures a lot

@SubsectorCorp

Preface

Entire story takes place January - April 2013,
before PRISM/NSA spying fiasco

Daniel was serving his first term as a freshman legislator, focusing on privacy legislation. Eric worked behind the scenes formulating the legislation.

Daniel will be running for the 2015 Montana legislature.

Need For Privacy Laws

Create legislation to enforce Montana's constitutional right to privacy

“RIGHT OF PRIVACY. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”

Sadly, rights and liberties have no meaning without laws clearly protecting them.

Policy Frameworks

Base proposed Montana law on existing frameworks

- California's Civil Code 1798.14-1798.23
- Massachusetts' 201 CMR 17.00
- EU's Privacy Directive
- Germany's Data Privacy Laws
(Bundesdatenschutzgesetz or BDSG)

California's Civil Code 1798.14- 1798.23

“Each agency shall maintain in its records only personal information which is relevant and necessary to accomplish a purpose of the agency...”

Massachusetts' 201 CMR 17.00

Section 2 - Regulations to **safeguard personal information** of commonwealth residents

Section 3 - Duty to **report known security breach or unauthorized use** of personal information

Germany's Data Privacy Laws

- Prevents organizations from collecting any personally identifiable information without obtaining permission from an individual
- Permission for the collection of data must be specific including how, where, how long and for what purposes the data will be used.
- Individuals may revoke permissions at any time.
- Policies, procedures, controls must be put in place by the organization to protect all data.

Creation Process

- Our Bill was originally put together from outside sources and tried the previous session.
- Polished the previous bill, added additional explanations, definitions, and clarifications.
- Handed updated bill to legislative services
- Proposed bill to House

HB400 in Depth

Main Points of HB 400

(1) data subjects must be given notice when their personal information is being collected;

(2) personal information may be used only for the purpose stated and not for any other purposes;

(3) personal information may not be collected or disclosed without the data subject's consent;

Main Points of HB 400 (continued)

(4) personal information that is collected must be kept secure from any potential abuses;

(5) data subjects must be informed as to who is collecting personal information;

(6) data subjects must be allowed to access their personal information and make corrections to any inaccurate data; and

(7) data subjects must have a method available to them to hold data collectors accountable for following the principles contained in this section.

First Bill Draft - Document Issues

Definitions

Opt Outs and Extenuating Circumstances

Created paperwork issues for small businesses

Definition Issues

Almost 30 definitions

"Agency", "Blocking", "Business", "Collection", "Communication", "Consent", "Controller", "Customer", "Data subject", "Disclose", "Entity", "Erasure", "Governmental entity", "Individual", "Maintain", "Mobile telecommunications services", "Modification", "Person", "Personal information", "Processing", "Processor", "Record", "Storage", "System of records", "Third party", "Use"

Phrases like "Data Subject" are hard to differentiate from "Customer" and "Individual"

How to define "Personal Data"

Overreaching Clauses

"A business may not refrain from conducting commerce with an individual solely because the individual refuses to consent to the business's collection, processing, or use of the individual's personal information except when the personal information is genuinely needed for the business to provide the service or product requested, to complete a financial transaction, or to comply with the law".

Small Business Burden

Can small businesses comply?

Could this create another burdensome regulation on small businesses that make it harder to compete?

Should mom and pop shops be collecting information if they can't safely store it?

First Bill Draft - People Issues

- Leadership issues
- Extensive push back from lobbyists
- “Too Long” (at 26 pages)
- People didn't understand it / read it

Leadership Issues

- Conservative leadership promised the bill would end up in the Judiciary committee.
- Judiciary committee focuses on rights and liberties. For example, gun bills, gay rights and abortion bills.
- Leadership was not concerned about privacy legislation and didn't fully understand it.
- The bill ended up in Business and Labor to be killed.

HB 400

37 Signatures,
mostly from
members of the
House and Senate
appropriations
committee.

Aloud...
David...
Al...
D...
D...

1 *Frank M...* HB BILL NO. 400
 2 INTRODUCED BY *Daniel Zuker*
 (Primary Sponsor)
 3
 4 A BILL FOR AN ACT ENTITLED: "AN ACT CREATING THE MONTANA PERSONAL DATA PROTECTION ACT;
 5 PROVIDING DEFINITIONS; REQUIRING CONSENT IN ORDER FOR PERSONAL INFORMATION TO BE
 6 COLLECTED; PROVIDING FOR STORAGE, MODIFICATION, AND USE OF PERSONAL INFORMATION;
 7 REQUIRING NOTIFICATION OF THE COLLECTION OF PERSONAL INFORMATION; PROVIDING FOR
 8 DISCLOSURE OF INFORMATION; PROVIDING FOR SECURITY, ACCIDENTAL DISCLOSURE, AND ACCESS
 9 TO PERSONAL INFORMATION; PROVIDING FOR ACCOUNTABILITY AND MAINTENANCE OF SOURCES;
 10 PROVIDING FOR REMOVAL AND ERASURE OF INFORMATION; PROVIDING RULEMAKING AUTHORITY;
 11 AND ESTABLISHING PENALTIES FOR VIOLATIONS." *Raymond Dristol*
 12
 13 WHEREAS, all individuals have a right of privacy in information pertaining to them and the right to privacy
 14 is a personal and fundamental right protected by Article II, section 10, of the Montana Constitution, which states
 15 that the right of individual privacy "is essential to the well-being of a free society and shall not be infringed without
 16 the showing of a compelling state interest"; and *Thomas...*
 17 WHEREAS, the right to privacy is being threatened by the indiscriminate collection, maintenance,
 18 aggregation, and dissemination of personal information and the lack of effective laws and legal remedies, and
 19 WHEREAS, the increasing use of computers and other sophisticated information technology has greatly
 20 magnified the potential risk to individual privacy that can occur from the maintenance of personal information; and
 21 WHEREAS, in order to protect the privacy of individuals, it is necessary that the maintenance and
 22 dissemination of personal information be subject to strict limitations. *Bruce...*
 23
 24 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 25
 26 NEW SECTION. Section 1. Short title. [Sections 1 through 15] may be cited as the "Montana Personal
 27 Data Protection Act". *Kevin...*
 28
 29 NEW SECTION. Section 2. Legislative purpose. (1) The purpose of [sections 1 through 15] is to
 30 protect the privacy of Montanan citizens. The principles of [sections 1 through 15] include the following:

Legislative Services Division

Kevin McCarthy

Steve...

Push Back From Lobbyists

- Some Representatives serve as easy votes to their sponsors, the lobbyists and took their side without ever questioning intentions.
- Lobbyists said they were concerned about more regulation. In truth, they were concerned about possibly losing the ability to profit from consumer information.
- I obtained a reputation rather quick with my low tolerance for lobbyists.. Was referred to as the "Mad Russian".

Understandability Problems

- Partially a generational problem.
- Young Democrats and Republicans worked together. Older Representatives barely knew what facebook was.
- Lack of awareness (not any more)

Bill Sizing Issues

The bill:

- Was 26 pages long. This is big by MT Standards
- Complex. It interacted with a number of other state laws increasing reading complexity.
- Proposed a lot of new ideas and paradigms in one document.

The Committee Meeting

- Two Proponent Testimonies, ACLU and Eric
- A line of Opponents: MT Retail Association, MT Telecommunications Association, Multiple Insurance companies, MT Auto Dealers Association, MT Bankers Association, Multiple Hospitals, Chamber of Commerce, MT Collectors Association, MT Data Association
- Unengaged Committee Members

Tabled in Committee

- Wrong committee in the first place
- Nearly all of the lobbyists were not supportive of any type of privacy legislation. Special interests profit from this data
- The bill was large.
- Most legislators didn't understand the premise on why we needed this legislation.
- Many legislators saw HB400 as growing government and creating unnecessary laws.

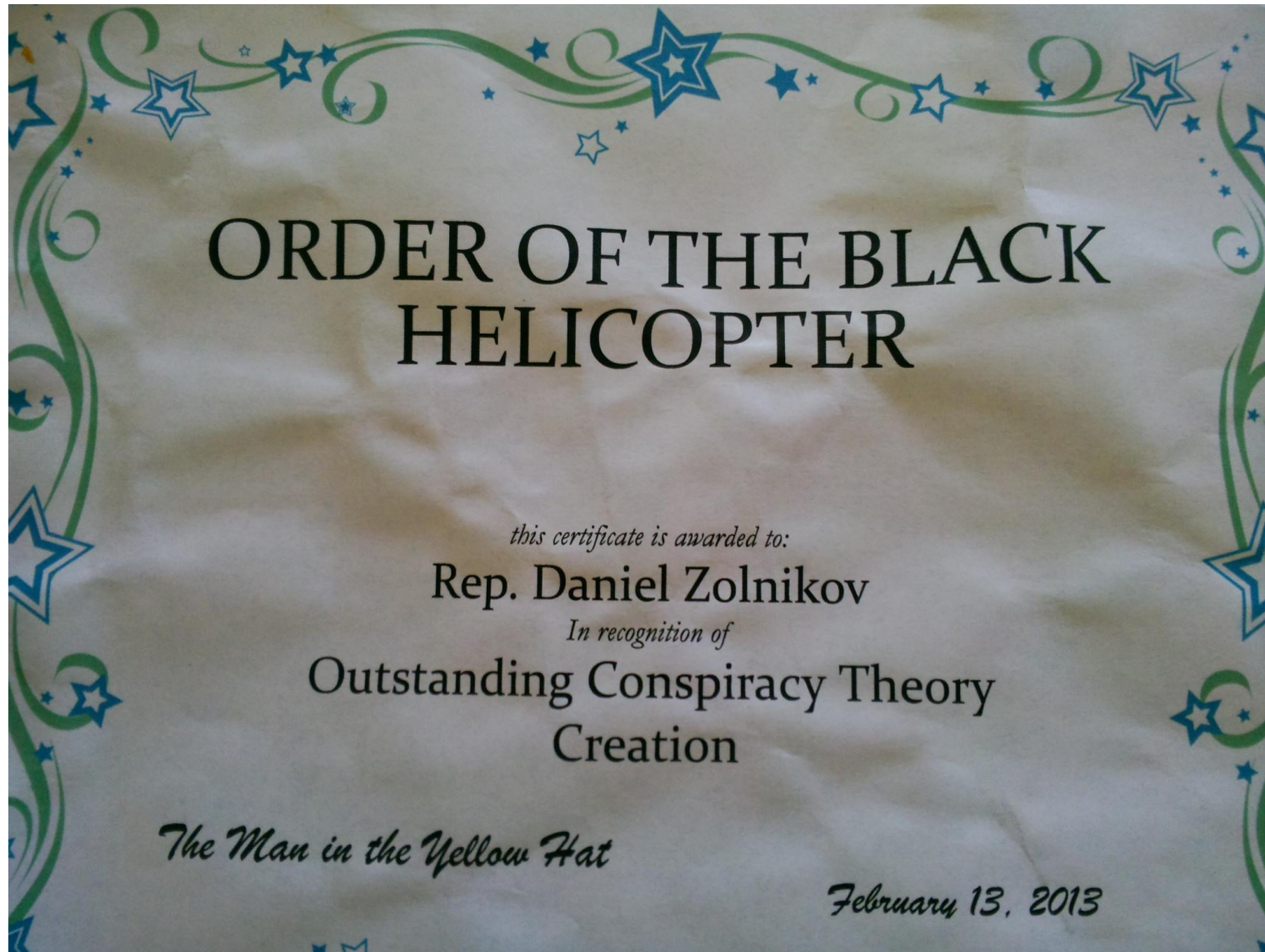
The Demise of HB400 - Death By Committee

- HB400 tried too much
- Privacy (currently) didn't affect people DIRECTLY. We were two or three months ahead of our time.
- We didn't compromise with opposing interests.

The Demise of HB400 - Additional Thoughts

- We are new to the process. There were a lot of informal formalities we didn't realize had to be done
- Lack of \$\$\$ for awareness
- No motivating story

Unexpected Consequences/Results



A Privacy Bill Was Passed Through...

Cell Phone privacy

- Required law enforcement to obtain a search warrant before being able to collect location information from electronic devices.
- It was short and simple. Only 1 page.
- It had emergency opt-outs
- It was a “common sense” bill

Revising Our Legislative Strategy

- Break HB400 into smaller, more digestible pieces
- Create clear cases for each new bill
- Work with businesses to ensure they understand our goals, and we understand their hardships

Privacy Legislation Goals

Implement the 7 core points of HB400:

- (1) data subjects must be given notice when their personal information is being collected;
- (2) personal information may be used only for the purpose stated and not for any other purposes;
- (3) personal information may not be collected or disclosed without the data subject's consent;
- (4) personal information that is collected must be kept secure from any potential abuses;
- (5) data subjects must be informed as to who is collecting personal information;
- (6) data subjects must be allowed to access their personal information and make corrections to any inaccurate data; and
- (7) data subjects must have a method available to them to hold data collectors accountable for following the principles contained in this section.

Privacy Legislation Goals - 2015

We need to have the consent section passed:

Consent. (1) Personal information may be collected, processed, or used by an entity only if the data subject has consented or any other legal provision explicitly permits or allows an activity without the need for consent.

Consent implies ownership of private information. This section is also relatively simple and the most important step that can be taken.

It all leads to...

Model privacy legislation

States rights

Setting a legal precedent for privacy

Ensuring Orwell was a dreamer and not a predictor

Conclusion

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Daniel Zolnikov

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Bryce Bennett

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