

DEALING WITH BIOMETRIC INFORMATION

CLE FOR IN-HOUSE COUNSEL
2020 WEBINAR SERIES
JULY 8, 2020
Noon – 12:50 CT

RONALD J. HEDGES

- Senior Counsel, Dentons US LLP
- United States Magistrate Judge, District of New Jersey, 1986-2007
- Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Chair of Court Technology Committee of the ABA of the ABA Judicial Division
- Co-Chair of Pretrial Practice & Discovery Committee of the ABA Section of Litigation
- Co-Chair of New York State Bar Association's Technology and the Legal Profession Committee
- Full biography available at <https://www.dentons.com/en/ronald-hedges>

DISCLAIMER

- The information in these slides and in this presentation is not legal advice and should not be considered legal advice.
- This presentation represents the personal views of the presenters and does not reflect the views of his firm.
- This presentation is offered for informational and educational uses only.

3

大成 DENTONS

INTRODUCTION TO BIOMETRIC INFORMATION

- What is Biometric Information?
- How Biometric Information is Used

4

大成 DENTONS

WHAT IS BIOMETRIC INFORMATION?

CCPA (Cal. Civ. Code § 1798.140):

“Biometric information’ means an individual’s physiological, biological, or behavioral characteristics, including an individual’s deoxyribonucleic acid (DNA), that can be used, singly or in combination with each other or with other identifying data, to establish individual identity. Biometric information includes, but is not limited to, imagery of the iris, retina, fingerprint, face, hand, palm, vein patterns, and voice recordings, from which an identifier template, such as a faceprint, a minutiae template, or a voiceprint, can be extracted, and keystroke patterns or rhythms, gait patterns or rhythms, and sleep, health, or exercise data that contain identifying information.”

WHAT IS BIOMETRIC INFORMATION?

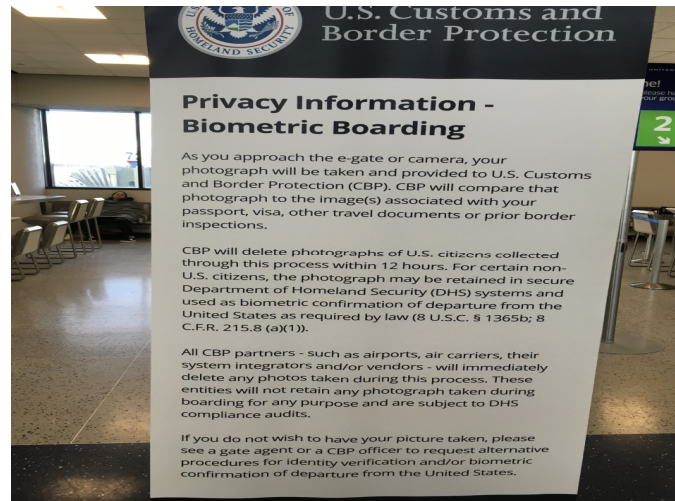
Illinois BIPA:

Biometric information “means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. ***”

New York SHIELD Act (S.5575B/A.5635):

“Biometric information, meaning data generated by electronic measurements of an individual’s unique physical characteristics, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of biometric data which are used to authenticate or ascertain the individual’s identity ***.”

HOW BIOMETRIC INFORMATION IS USED



WHAT ARE THE USES OF BIOMETRIC INFORMATION

Some examples:

- Scan of fingerprint to gain access to amusement park through season pass.
- Law enforcement surveillance
 - Clearview
- Current "backlash"
 - Amazon
 - IBM

RISKS RELATED TO BIOMETRIC INFORMATION

- Bias Related to Biometric Information
- Statutes Governing Biometric Information
 - Applicability
 - Disclosure
 - Consent
 - Notice
 - Disposition

9

大成 DENTONS

REMEDIES THAT MIGHT BE AVAILABLE FOR “MISUSE” OF BIOMETRIC INFORMATION

- Discovery
 - Duty to preserve
 - Scope of discovery: *Fed. R. Civ. P.* 26(b)(1)
 - Requests for production and responses: *Fed. R. Civ. P.* 34(a)(1)
- Liability
 - Attorney General and/or FTC
 - *State v. Clearview AI, Inc.* (Vt. Super. Ct. Mar. 10, 2020)
 - Private cause of action
 - *Rosenbach v. Six Flags Entm’t Corp.*, 2019 IL 123186 (2019)
 - *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019), *cert. denied*, 140 S.Ct. (2020)
 - *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617 (7th Cir. 2020)

10

大成 DENTONS

SUGGESTED STRATEGIES

- What is the existing technology framework of the business entity?
- Who decides what new technology is needed?
- Who evaluates the new technology?
- Who incorporates the new technology?
 - Internal?
 - Vendor?
- Who has access to the new technology?
- Who monitors the new technology?
- What is the audit trail for the new technology?

SUGGESTED STRATEGIES

- Which law(s) will a business entity be subject to?
- What type of biometric information does the entity collect and why does it collect that information?
- What written policies guide collection, use, storage, and disposition of the information?
- Which mechanism will the entity have to secure consent for collection, etc.?
- Which mechanism will the entity have to respond to “consumer” requests for information, rectification, and disposition of the information?

RESOURCES

- C. Garvie, “Garbage In, Garbage Out: Face Recognition on Flawed Data” (May 16, 2020), <https://www.flawedfacedata.com/>
- J. Bracy, “Will NYT’s Facial-Recognition Story Sway Privacy Debate?” *IAPP Privacy Perspectives* (Jan. 21, 2020), <https://iapp.org/news/a/concerns-around-regulation-of-facial-recognition-technology-on-the-rise/>
- “NIST Releases Data to Help Measure Accuracy of Biometric Information” *NIST* (Dec. 12, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-releases-data-help-measure-accuracy-biometric-identification>

Q&A

Closing