



**PAI**

**PRIVACY ASSOCIATES INTERNATIONAL LLC**

---

# **Conducting a Privacy Analysis of New Products and Services**

*Privacy Law Committee of IT Law Section, State Bar of Michigan*

*March 23, 2017*

# Purpose of Session

- Discuss how each of us approaches the privacy analysis of a new product or service
- Utilize a simple, high level, outline of 7 steps as an example of one approach
  - Discussion of details and issues
  - No right answer for every situation
- Utilize Smart Condom/We-Vibe examples

# Facts

- The Smart Condom

<https://www.cnet.com/news/icon-smart-condom-ring/>

- We-Vibe

<https://www.cnet.com/news/app-enabled-sex-toy-users-get-10000-each-after-privacy-breach/>

# Process



# Step 1

Understand what information is being collected by or in connection with the new product or service, and why

- How is the information being transmitted and stored and what risks are involved?
- Is the information being associated with other information?
- How is the information to be used?
- Who has access to the information or with whom is it shared?

# Step 2

Determine whether the information being collected, before or after association with other information, falls under any definition of personal information or similar term

# Step 3

With respect to information that may be personal information, and considering the proposed use of that information:

- Which jurisdictions may be involved?
- Are there cross-border transfers of the information involved? Which countries?
- Which statutory privacy and security laws are applicable?
- What non-statutory privacy and security risks (e.g. tort liability) are potentially applicable?
- Have promises been made in the past with respect to this category of information (e.g. privacy statements, ISO or similar certifications) What are they?

# Step 3 (continued)

What best practices are applicable? Representative areas to consider:

- Management
- Notice/privacy policy
- Choice and consent
- Collection
- Use, retention and disposal
- Access
- Disclosure to third parties
- Security
- Quality
- Monitoring and enforcement



# Step 4

Considering the actual proposed information uses

- Identify the statutory and non-statutory (e.g. tort) legal rules with which the product or service must comply
- Identify the applicable privacy policies or other promises with which the product or service must comply
- Identify the best practices with which the company wishes to comply

# Step 5

Conduct a gap analysis of the proposal to the standards identified in Step 4

# Step 6

Create and implement a plan to mitigate risk associated with any gaps identified between the proposal and the standards

# Step 7

Ongoing monitoring and adjustments due to changes in program, law or best practices/competitive situations

# Backup



# Restatement (Second) of Torts

## Section 652B **Intrusion Upon Seclusion**

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

# Restatement (Second) of Torts

## Section 652D **Publicity Given to Private Life**

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public