

# The U.S. Privacy Acts and GDPR

**World Association of Detectives**

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<https://beardeninvestigations.com/cle-presentations/>



# GDPR Quick Brief

- General Data Protection Regulation (GDPR)
  - Broad scope and extraterritorial reach-applies to
    - Organizations **established** in the EU
    - Also if **goods or services offered** in the EU
    - Also if behavior of individuals in the EU is being **monitored** (profiling)
  - Replaces EU Data Protection Directive 95/46/EC
  - Went into force May 25, 2018
- EU approach to privacy and data protection
  - Privacy is a fundamental human right which is enshrined in human rights and privacy law
  - Harmonize EU member state privacy laws and allow free flow of information
  - Binds all 27 EU member states



# What Information? Personally Identifiable Information.

- PII – Almost any information relating to an identified or identifiable individual name, address, email address, phone number, financial information, images and video, unique identifiers, IP addresses and geolocation, health data, genetic information or biometric information, race/ethnicity, sex life or sexual orientation, religious or political beliefs, trade union membership, criminal convictions and offenses.

# Data Controller? Data Processor? Who Cares?

- **Data Controller** - Determines the purposes and means of processing personal data.  
Ex. include employee data, customer (consumer) data, business contacts. Joint controllers must determine their respective responsibilities. A Data Controller must be able to demonstrate compliance with its obligations through records of processing and other documentation.
- **Data Processor** - Processes personal data on behalf of and at the instruction of Data Controller - Service providers and vendors - Data Processors now have direct obligations under the GDPR for processing of personal data.

# How do you do an investigation under GDPR?

- Exemptions (“Derogations”) for specific situations (e.g., explicit consent, and a lot of others):
  - See Recital 45 – Legal Obligations – You can rely on this lawful basis if you need to process the personal data to comply with a common law or statutory obligation.
  - See Recital 52 - A derogation should also allow the processing of such personal data where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure.
- Compelling legitimate interests of controller (i.e., limited number; not override data subjects interests/rights). Probably OK, if current litigation, or suspected litigation, or suspected fraud, etc.
- See Recital 47. Legitimate Interest - “The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned.”

EU has done this for law enforcement and intelligence agencies. But little for private investigators.

<https://gdpr.eu/>

# Data Leaving the EU

- GDPR creates a “wall” around the perimeter of Europe for EU citizen data to stay in EU. Generally, what happens in Europe, stays in Europe.
- When data leaves the EU, it has to do so by a limited door. Such as US Privacy Shield.
- In essence the Privacy Shield was a way for transfer of data that allegedly had the same protections as GDPR for EU citizens.
- US Privacy Shield was the method for transatlantic movement of data.



# Schrems II Case

- Basically, found 2 things:

1. That US law enforcement can gain access to personal data that is transferred under Privacy Shield. Says that US policies prioritize national security over the rights and freedoms of EU data subjects.

2. Is that Privacy Shield requires the appointment of an ombudsperson. The position exists, but the appointee lacks the authority to make binding decisions on US government and intelligence agencies, which means EU data subjects lack actionable rights in the US court system against government violations. This conflicts with EU law that requires EU data subjects to have a redress mechanism for privacy violations.

# SCCs are the Solution. For now!

Solutions? GDPR Standard Contractual Clauses. Dependent on relationships: <https://eur-lex.europa.eu/>

## SET II

Standard contractual clauses for the transfer of personal data from the Community to third countries (controller to controller transfers)

### Data transfer agreement

between

– (name)

– (address and country of establishment)

hereinafter “data exporter”)

and

– (name)

– (address and country of establishment)

hereinafter “data importer”

each a “party”; together “the parties”.

### Definitions

For the purposes of the clauses:

- (a) “personal data”, “special categories of data/sensitive data”, “process/processing”, “controller”, “processor”, “data subject” and “supervisory authority/authority” shall have the same meaning as in Directive 95/46/EC of 24 October 1995 (whereby “the authority” shall mean the competent data protection authority in the territory in which the data exporter is established);
- (b) “the data exporter” shall mean the controller who transfers the personal data;
- (c) “the data importer” shall mean the controller who agrees to receive from the data exporter personal data for further processing

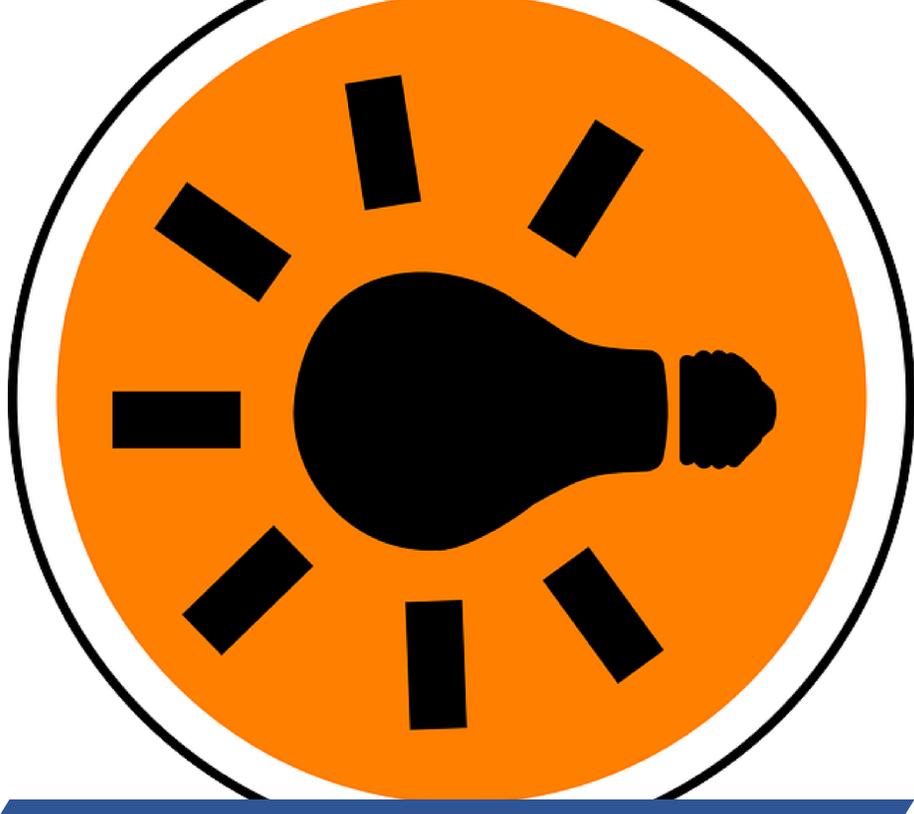
# U.S. Federal Privacy Bill

- GDPR – Europe’s framework regarding Data Privacy.
- CCPA – Mimics GDPR but, on a limited scale.
- NY, TX, FL, Etc. – Currently state proposals on state, CCPA like, privacy bills.



## Privacy Bill Concerns

- Does the bill limit exposure to small business?
- Even if so, what if your client is a large affected business?
- Private right of action by the consumer?



# Federal Privacy Act Components

Social Media – Use,  
Access, Policing

Privacy – Individual  
Rights

Specific Add On – Think  
DPPA, Think GPS  
Tracking, Think DNA,  
Think Genetic Material  
Regulations, etc.

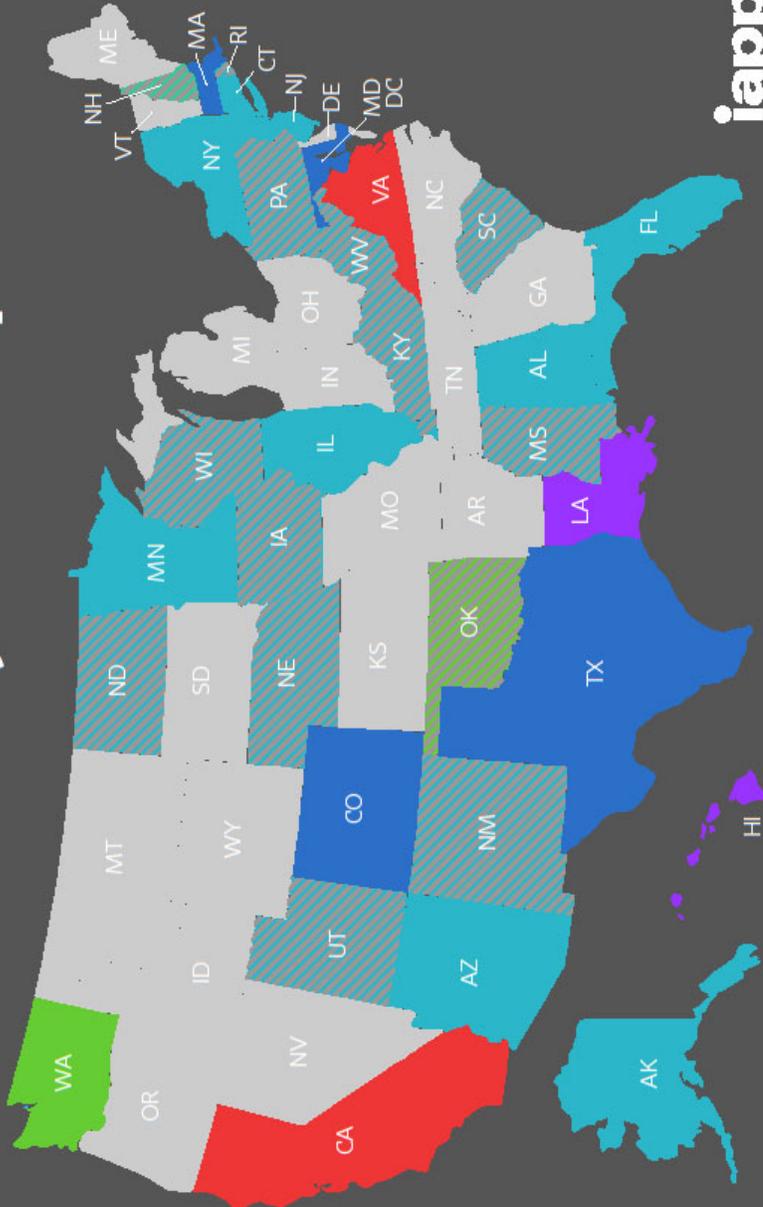
# State Comprehensive-Privacy Law Comparison



- Task Force Substituted for Comprehensive Bill
- Bill Died in Committee or Postponed
- None

## Statute/Bill in Legislative Process:

- Introduced
- In Committee
- Cross Chamber
- Cross Committee
- Passed
- Signed



Last updated: 4/12/2021



c/o International Association of Privacy Professionals

# California Bill

- **California Consumer Privacy Act**
- **Who ?**
- **Gross Revenue = \$25 Million**
- **Buys, receives 50,000 or more consumers, households, or devices. OR,**
- **Derives 50 percent or more of its annual revenues from selling consumers' personal information.**



**CALIFORNIA REPUBLIC**



# What is Personal Information?

“Personal information” means information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly,

(A) Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier, Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers.

(D) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.

(E) Biometric information.

(F) Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer’s interaction with an internet website application, or advertisement.

(G) Geolocation data.

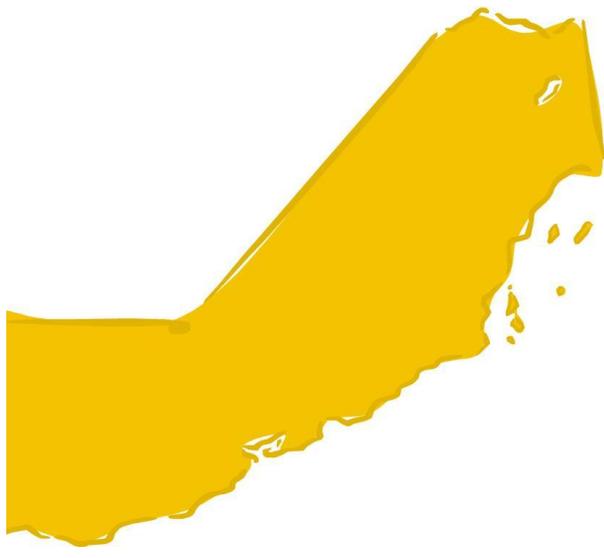
(H) Audio, electronic, visual, thermal, olfactory, or similar information.

(I) Professional or employment-related information.

(J) Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232g; 34 C.F.R. Part 99).

(K) Inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

(L) Sensitive personal information.



# CCPA Exemptions?

Exercise or defend legal claims.

No Application to FCRA data AND it is used in that way. Same for GLB data.

Personal information collected, processed, sold, or disclosed pursuant to the Driver's Privacy Protection Act of 1994

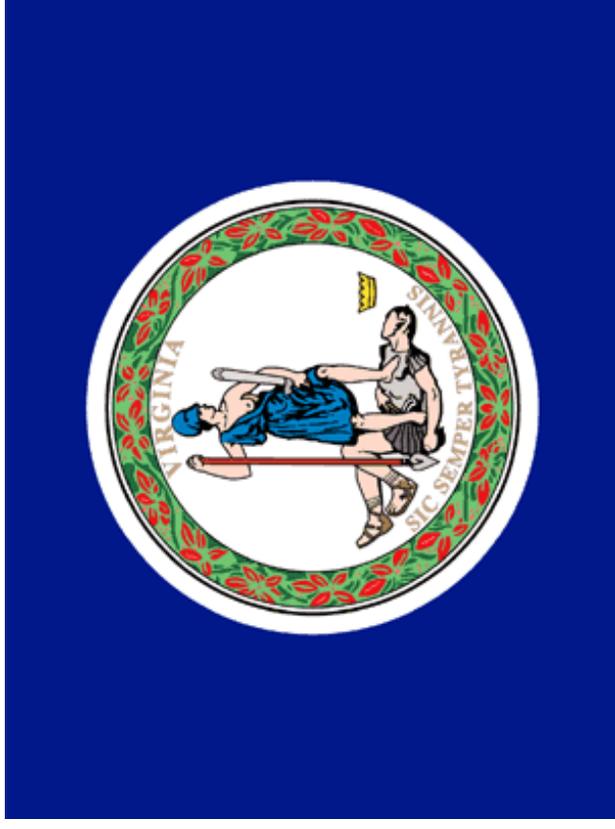
Protection by evidentiary privilege.

HIPPA and Medical Act.

Comply or in response to Law Enforcement.

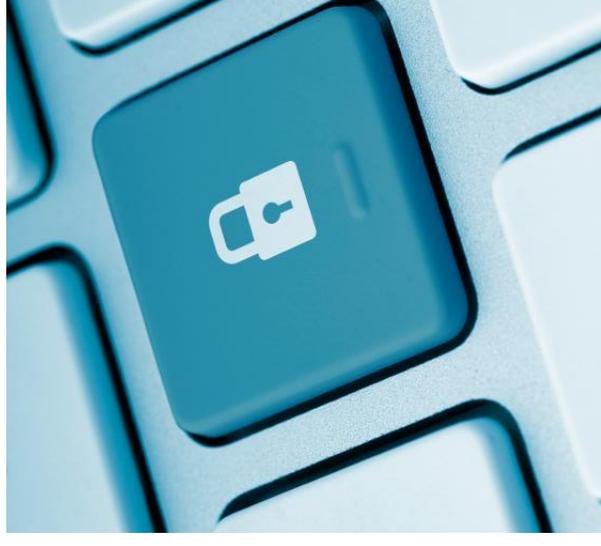
# Virginia Consumer Data Protection Act Senate Bill 1392

- Passed with favorable positions:
- Only applies if processing 100k “consumers” or 20k consumer with 50% income from that processing.
- FCRA and HIPPA regulations OK.
- No private cause of action.
- Chapter allows a processor or controller ability to “investigate, establish, exercise, prepare for or defend legal claims.”



# FLORIDA - HB 969

- Buy 50,000 \$25 Million **OR** “Derives 50 percent or more of its global annual revenues from selling or sharing personal information about consumers.”
- Long Bill 39 Page Bill
- Exceptions: 3. Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons **by federal, state, or local authorities.**





# TX and FL Bills

- FL – H.B. 969 – Omnibus Bill.
- TX – Multiple Bills
  - HB 3741 – 5,000? 3<sup>rd</sup> Party Hangout
  - HB 3742 – DNA
  - HB 3743 – Distance Learning Data
  - HB 3744 – Mug Shot Issues
  - HB 3745 – Resale of Tickets
  - HB 3746 – Data Breach

NCISS  
Legislative  
Representation

[NCISS.org](http://NCISS.org)

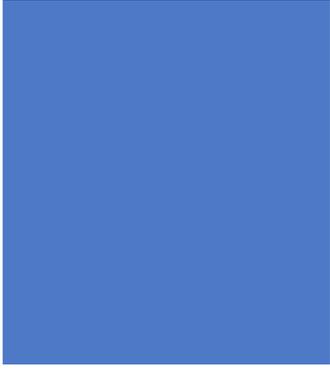


# Courts? How are they dealing with GDPR?



- *In re Mercedes-Benz Emissions Litig.*, No. 16-CV-881 (KM)(ESK), 2020 WL 487288, at \*2 (D.N.J. Jan. 30, 2020). What happens when party needs discovery but EU party says can't because of GDPR?  
5 factor test in *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist., 482 U.S. 522 (1987)*.

See also *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 484 F. Supp. 3d 249 (USDC E.D. Pa. 2020).



THANK YOU!!!

See you in????????????