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Department of Consumer Affairs

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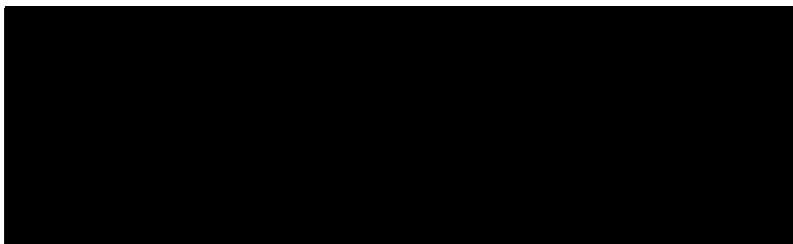
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Administrative Interpretation 11.490-1002

May 6, 2010

Via Electronic and US Mail



RE: Informal Interpretation Request

Dear [Redacted]

You have requested an informal interpretation regarding the Financial Identity Fraud and Identity Theft Protection Act ("the Act"), Act No. 190, 2008 S.C. Acts, specifically S.C. Code Ann. § 1-11-490¹. From the information you have provided, the following questions have been posed and will be addressed herein:

1. Does section 1-11-490 apply to the unauthorized access to and acquisition of paper records, consisting mainly of facsimiled documents, containing unredacted personal identifying information?
2. What steps must be taken to comply with the notification provision contained in section 1-11-490(I)?

Section 1-11-490 requires state agencies to notify affected consumers, and in certain circumstances the South Carolina Department of Consumer Affairs and national credit reporting agencies, upon the discovery of a breach of security of state agency data. The focus of your first question is whether the unauthorized access to and acquisition of paper records containing unredacted personal identifying information constitutes triggers the Act's requirements. To make such a determination, the Department looks to the language of the section as a whole. *See Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 368, 20 S.E.2d 813,815-816 (1942) (The

¹ Further reference to the South Carolina Code of Laws will be by Code section only.

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statute must be read as a whole and given a “practical, reasonable and fair interpretation consonant with the purpose, design and policy of lawmakers.”)

Section 1-11-490(A), in part, states:

An agency of this State owning or licensing *computerized data* or *other data* that includes personal identifying information shall disclose a *breach of the security of the system* following discovery or notification of the *breach in the security of the data* to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident.
(Emphasis added).

Section 1-11-490(D)(2) defines “Breach of the security of the system” as:

[U]nauthorized access to and acquisition of *computerized data* that was not rendered unusable through encryption, redaction, or other methods that compromises the security, confidentiality, or integrity of personal identifying information maintained by the agency, when illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the consumer. (Emphasis added).

“Computerized data” is not defined within the section, however, when seeking to ascertain the meaning of an undefined statutory term, dictionaries may be utilized. Georgia Carolina Bail Bonds, Inc. v. City of Aiken and Goddard, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct.App. 2003). When combining the dictionary definitions provided for ‘computerized’ and ‘data’, the phrase means “facts, information, statistics, figures, details, observations, material(s), evidence; text” stored, performed or produced by computer. *The Oxford Dictionary: American Edition*, 288 and 355 (1996).

Looking to the phrase alone, the very broad definition encompasses items processed or stored with or in a computer, as well as paper documents originating therefrom, which would include facsimiles whereby the fax machine stores data received and/or distributed. A particular clause in a statute, however, should not be construed in isolation, but “in conjunction with the purpose of the whole statute and policy of the law.” Univ. of S. Cal. v. Moran, 365 S.C. 270, 278, 617 S.E.2d 135, 139 (Ct. App. 2005). While the definition of “breach of the security of the system” solely makes reference to “computerized data,” other portions of the statute additionally make reference to “other data” or “data.” As shown above, section 1-11-490(A) utilizes such phrasing in delineating who this section applies to – a state agency “owning or licensing computerized data or *other data*.” Subitem (B) also requires agencies maintaining “computerized data or *other data*” on behalf of other persons to notify the owner of the information of “a breach in the security of the data.” If the Legislature solely intended



“computerized data” to be the subject of the notification requirements, it would not have included “other data” in items (A) and (B). A statutory provision shall not be ignored and shall be interpreted to give effect to each provision while avoiding an absurd result as “the Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something.” TNS Mills, Inc. v S.C. Dep’t of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

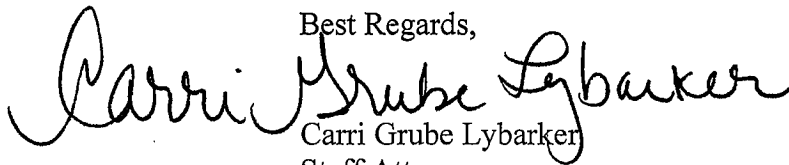
If the Department ignored statutory language and determined that the Legislature only wanted South Carolina consumers to be notified of a breach of their personal identifying information if such information constituted “computerized data,” an absurd result would occur. As an example, consumers who submitted information on paper to an agency would not be notified of a breach of their personal identifying information until and unless the information provided became “computerized.” So, if a paper document containing data that has not been stored, performed or produced by a computer is stolen- no notification is required. However, if a jump drive or computer printout containing the identical information is stolen, notification is required. This reasoning ignores the apparent purpose of the statute, the Financial Identity Fraud and Identity Theft Protection Act, to provide notice to consumers so that they may take the appropriate steps in an effort to prevent or mitigate an identity theft that has or may occur as a result of a breach of data containing their personal identifying information.

Applying the above interpretation to the information you provided, the breach in the security of paper documents faxed to [REDACTED] which contained personal identifying information of South Carolina residents triggered the notification requirements of the Act.

Your second question regarding section 1-11-490(I) concerns the requirement that an agency must notify the South Carolina Department of Consumer Affairs (“the Department”) and national credit reporting agencies (“CRAs”) when more than 1,000 persons are affected by the breach at one time. Notification must include “the timing, distribution and content of the notice.” *See* section 1-11-490(I). The Department interprets this language as requiring that the notice to the Department and CRAs contain the date of the breach, date the agency became aware of the breach, date the notice was/will be sent to affected consumers, method of consumer notification (ie: mail, telephone, electronic), number of consumers affected, and the content of the consumer notice (ie: copy of the letter sent to consumers).

I hope this informal interpretation fully answers the questions you posed. Please do not hesitate to contact me directly should you need any further information.

Best Regards,


Carri Grube Lybarker
Staff Attorney