

In the Beginning . . . An Early History of the Privacy Profession

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I. INTRODUCTION

Privacy is a concept that has existed in various forms and degrees, for much of human history. However, the origin of information privacy as a compliance, risk management, and operational concern has been much more recent. This new field, and the professionals who work within it—the privacy profession—did not exist broadly until the past decade. From essentially no active professionals in the 1970s and 1980s, the privacy profession has grown to at least 13,000 people working on managing information privacy within their

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organizations.¹ As the information economy continues to grow—pushed by the breath-taking speed of technological development, cloud computing, big data, and emerging uses for exponentially increasing stores of data—it is reasonable to expect that the privacy profession will grow. The exact trajectory of the privacy profession is difficult to predict. Management of privacy is, today, a well-established and important function, and it is obvious that the professionals who work in this field will grow in number and prominence in the coming years.

Without knowing where we've come from, we can't know where we are going and so it is appropriate for us to document the nascent years of the privacy profession. We expect that, at some point in the future, scholars will seek to understand *how* the field of privacy management emerged, *who* served as a catalyst for the growth of the field, and *what* the important milestones for the privacy profession were as the turbulence of the early days of the information economy played out. While this history is most certainly global—the privacy profession has its earliest roots in Germany in the 1970s—we have chosen to investigate this change where we understand it best and where the profession has appeared to grow the most, the United States. We have also limited our focus to the role of the privacy professional and privacy lawyer. There are certainly public policy leaders and advocates in the privacy field who deserve well-documented histories. Through these lenses, we offer a history of privacy becoming a profession.

II. 1970S: CREATING THE GROUNDWORK

A. A Book

The publication of *Privacy and Freedom* by Alan Westin in 1967 was a great milestone that helped to define the field of privacy globally.² As Westin noted in the opening, “[f]ew values so fundamental to society as privacy have

¹ *About the IAPP*, INT’L ASS’N PRIVACY PROFS., https://www.privacyassociation.org/about_japp (last visited Oct. 21, 2013).

² ALAN WESTIN, *PRIVACY AND FREEDOM* (1967). Alan Westin died in February of this year at the age of 83. Jedidiah Bracy, *Westin’s Privacy Scholarship, Research Influenced a Generation*, IAPP, (Mar. 1, 2013), https://www.privacyassociation.org/publications/2013_02_19_westins_privacy_scholarship_research_influenced_a_generation. He was a foundational thinker in the privacy field, authoring *Privacy and Freedom*, which many believe is the first work to identify the major coming issues involved with consumer data privacy and data protection, along with *Databanks in a Free Society*, *Information Technology in a Democracy*, and other works. *Id.* He served as Professor of Public Law & Government Emeritus at Columbia University, was publisher with Robert Belair of *Privacy & American Business*, was editor of the ACLU’s *Civil Liberties Review*, and served as President of the Center for Social & Legal Research. *Id.* In 2005, he was awarded the IAPP’s Privacy Leadership Award, and in 2012 he received an inaugural Louis D. Brandeis Privacy Award from Patient Privacy Rights. *Id.*; see also *Alan Westin*, WIKIPEDIA, http://en.wikipedia.org/wiki/Alan_Westin (last visited Oct. 21, 2013).

been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists.”³ The text sought to put an end to that vague and confused writing and defined privacy as a person’s control over their personal information.⁴ In many ways, *Privacy and Freedom* became the framework for the future field of informational privacy. It was the conceptual background upon which many of the U.S. privacy laws of the seventies were built.⁵ In fact, according to his *New York Times* obituary, “Westin was considered to have created, almost single-handedly, the modern field of privacy law.”⁶

B. A Scandal

On June 17, 1972, five men broke into the Democratic National Committee headquarters at the Watergate office complex in Washington, D.C.⁷ This scandal led to the creation of the Domestic Council Committee on the Right of Privacy in the White House (often called the White House Privacy Committee).⁸ Around the same time period, at the behest of Secretary of Health, Education, and Welfare Elliot L. Richardson, the Secretary’s Advisory Committee on Automated Personal Data Systems set to work researching historic developments in record-keeping, implicitly focusing on governmental record-keeping. Based on this research, on July 25, 1973, the Department of Health, Education, and Welfare issued a report entitled *Records, Computers and*

³ WESTIN, *supra* note 2, at 7.

⁴ *Id.* (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”).

⁵ *E.g.*, The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2012) (Passed in 1971 providing for accuracy, fairness and privacy of information in consumer reporting agency files, FCRA became a template for future privacy laws and it created a bar of folks representing companies that were the subject of investigations.).

⁶ Margalit Fox, *Alan F. Westin, Who Transformed Privacy Debate Before the Web Era, Dies at 83*, N.Y. TIMES, Feb. 23, 2013, at D7, available at http://www.nytimes.com/2013/02/23/us/alan-f-westin-scholar-who-defined-right-to-privacy-dies-at-83.html?pagewanted=all&_r=0.

⁷ U.S. SENATE HISTORICAL OFFICE, SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES (THE WATERGATE COMMITTEE) 1 (1974), available at http://www.senate.gov/artandhistory/history/common/investigations/pdf/Watergate_Investigation_Citations.pdf.

⁸ Richard Nixon, Radio Address About the American Right of Privacy (Feb. 23, 1974) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=4364>) (“To meet a challenge of these dimensions, we need more than just another investigation and just another series of reports. We need action. That is why I am today establishing in the White House a top priority Domestic Council Committee on the Right of Privacy. This will not just be another research group. It will be a panel of some of the most able men and women in the Government, and it will be primed for high-level action.”). See generally Bartosz M. Marcinkowski, *Privacy Paradox(es): In Search of a Transatlantic Data Protection Standard*, 74 OHIO ST. L.J. 1167 (2013).

the Rights of Citizens (the “HEW Report”).⁹ The lasting and enormously valuable contribution of this report was the introduction of a federal code of fair information practices for all automated personal data systems.¹⁰ The HEW Report, in many ways, served as the genesis for many future iterations of the *fair information practices*, a framework that describes the primary mechanisms through which informational privacy is protected by law and practice.

On August 9, 1974, Nixon resigned under the threat of impeachment.¹¹ Not long after, on December 31, 1974, The Privacy Act of 1974 was enacted, which established a code of fair information practices governing collection, maintenance, use, and dissemination of information about an individual that is maintained in systems of records by federal agencies.¹² It also established the “U.S. Privacy Protection Study Commission” to evaluate the statute and to issue a report containing recommendations for improvement.¹³ In 1977 the Privacy Protection Study Commission (PPSC) issued its report: *Personal Privacy in an Information Society*.¹⁴ This report, though dated around the edges, is still very relevant. It called for privacy legislation in about a dozen areas and endorsed the sectoral approach to respond to privacy harms.¹⁵ President Ronald Reagan’s approach to privacy was less accommodating, and certainly not enthusiastic, and the proposals in the report were not carried out. However, the study remained an intellectual roadmap for future developments in the field.

⁹ U.S. DEP’T. OF HEALTH, EDUC. & WELFARE, SEC’Y’S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYS., RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS (1973) [hereinafter HEW Report], available at <http://www.aspe.hhs.gov/datacncl/1973/privacy/tocprefacemembers.htm>.

¹⁰ *Id.* at 50 (calling for Code of Fair Information Practices that includes civil and criminal penalties, the availability of injunctive relief, and individual rights of action for actual, liquidated, and punitive damages).

¹¹ Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A01, available at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm>; see H.R. REP. No. 93-1416, at 8, 9 (Congressman William Moorhead (D-Pa.), Committee on Government Operations: “Additional impetus in Congress to enact privacy safeguards into law has resulted from recent revelations connected with Watergate-related investigations, indictments, trials, and convictions. They included such activities as the break-in at the Democratic National Committee’s headquarters in June 1972, the slowly emerging series of revelations of ‘White House enemies’ lists, the break-in of the office of Daniel Ellsberg’s psychiatrist, the misuse of CIA-produced ‘personality profiles’ on Ellsberg, the wiretapping of the phones of government employees and news reporters, and surreptitious taping of [9] personal conversations within the Oval Office of the White House as well as political surveillance, spying, and ‘mail covers.’”).

¹² Privacy Act of 1974, 5 U.S.C. § 552a (2012).

¹³ *Id.*

¹⁴ See generally U.S. PRIVACY PROT. STUDY COMM’N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977), available at <http://epic.org/privacy/ppsc1977report>.

¹⁵ Telephone Interview with Bob Belair, Partner, Arnall Golden Gregory LLP (May 16, 2013).

C. A Supreme Court Case

One of the turning points for privacy in the United States came in the Supreme Court case of *United States v. Miller*.¹⁶ The United States Supreme Court reviewed whether there was a constitutionally protected privacy interest in bank records and held that once information was put into the sea of commerce any right to privacy in that data was lost.¹⁷ This holding set changes immediately into motion.¹⁸ Rick Fischer, who represented the California Bankers Association (CBA), was helping banks with their privacy concerns at the time.¹⁹ Within California he pushed for legislation requiring notification before financial institutions were required to provide records. After this succeeded, he received a call from John Joseph Cavanaugh III, a Congressman from Nebraska, who sought a federal solution to the financial privacy concerns. John asked, “Can you be here tomorrow to testify?” Rick responded, “Yes,” and immediately took the red-eye to Washington, wrote his testimony on the plane, and testified before the committee after only a few hours of sleep.²⁰ Work on the Right to Financial Privacy Act of 1978 began right away and the experience triggered an interest in Rick Fischer.²¹ He had never focused on financial privacy before his experience with the CBA, but he started his treatise, *The Law of Financial Privacy*, and sought to develop an expertise in the developing area of privacy law.²² Rick Fischer became one of the early practitioners to treat privacy as a discrete practice area, and for years he would remain a rare specialist.

¹⁶ *United States v. Miller*, 425 U.S. 435 (1976).

¹⁷ *Id.* at 443 (“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”).

¹⁸ See *The Right to Financial Privacy Act*, EPIC, <http://epic.org/privacy/rfpa/> (last visited Oct. 21, 2013).

¹⁹ Telephone Interview with Rick Fischer, Senior Partner, Morrison & Foerster LLP (May 2, 2013). Rick Fischer is currently a partner with Morrison & Foerster, based in the Washington, D.C. office, where he serves as Washington counsel for Visa. *Id.* While attending the University of California, Hastings College of Law, Fischer served on the editorial board of the *Hastings Law Journal* and was elected to the Order of the Coif. *Id.* For nearly forty years, he has advised a variety of companies including banks, retailers, insurers, and technology companies throughout the United States on the full range of financial services and payment system issues. *Id.* His practice was one of the first to have a special emphasis on privacy, and continues to focus on data security, e-commerce, technology, and financial services joint ventures. *Id.*

²⁰ *Id.*

²¹ Right to Financial Privacy Act, 12 U.S.C. §§ 3401–22 (1978).

²² See generally RICHARD L. FISCHER, *THE LAW OF FINANCIAL PRIVACY* (1998).

Two other privacy lawyers active in the 1970s were Ron Plesser²³ and Robert (Bob) Belair.²⁴ In the late 1970s, Ron Plesser left the Privacy Protection and Study Commission, where he oversaw government-wide compliance with federal privacy law, to establish a practice focused on informational privacy. In the same era, Bob Belair left the National Commission on the Confidentiality of Health Records, where he served as General Counsel, to pursue a similar career. For much of the late 1970s and 1980s, Plesser and Belair were among the few attorneys in the privacy field in the United States.

III. 1980S: PRESSURE FROM THE INTERNATIONAL COMMUNITY

Work on privacy and trans-border data flows at the Organization for Economic Co-operation and Development (OECD) began in the early 1970s. The original motivation for this effort was to work towards the creation of guidelines that would allow free flow of data across borders.²⁵ This initial focus morphed into a collection of data protection standards with the purpose of protecting privacy.²⁶ The recommendation of the OECD Council, *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (“Privacy Guidelines”), was adopted by the OECD Council in

²³ Patricia Sullivan, *Privacy Law Expert Ronald L. Plesser Dies*, WASH. POST, Nov. 21, 2004, at C11. Ron Plesser died in 2004, at age 59. *Id.* At the time, he was a partner in the Washington office at Piper Rudnick, and was considered a “leading authority on federal privacy law and information policy.” *Id.* He got his law degree from the National Law Center at George Washington University, where he was adjunct professor of law from 1982 to 1986, and he served as chairman of the Individual Rights and Responsibilities section of the American Bar Association. *Id.* He became general counsel of the Privacy Protection and Study Commission in 1975 and his win of an appellate decision in *Vaughn v. Rosen* established procedures for lower courts to follow in Freedom of Information Act cases. *Id.*

²⁴ Robert R. Belair, ARNALL GOLDEN GREGORY, <http://www.agg.com/robert-belair/> (last visited Oct. 21, 2013). Robert Belair is currently a partner and practice leader of the Privacy Practice, and co-chair of the Government Relations Practice, at Arnall Golden Gregory law firm. *Id.* His long history in privacy includes service as Deputy Counsel to the White House Privacy Committee in the Ford Administration and as a lawyer in the Federal Trade Commission’s Bureau of Consumer Protection doing Fair Credit Reporting Act and other privacy-related work. *Id.* He was also General Counsel of the National Commission on the Confidentiality of Health Records and served on the Judiciary Committee Advisory Committee for Chairman Joe Biden (D-Del.) and as an advisor to Senator Bob Bennett’s (R-Utah) Health Privacy Task Force. *Id.* Together with Alan Westin, he was also the editor of *Privacy & American Business*. *Id.* He received his J.D. from Columbia Law School, where he was Editor-in-Chief of *Columbia Human Rights Law Review*. *Id.*

²⁵ MICHAEL KIRBY ET AL., THE HISTORY, ACHIEVEMENT AND FUTURE OF THE 1980 OECD GUIDELINES ON PRIVACY 1, 3 (2010), available at www.oecd.org/sti/ieconomy/44945835.doc (presented at the Round Table on the 30th Anniversary of the OECD Guidelines on Privacy).

²⁶ See *id.* at 12, 13; Omer Tene, *Privacy Law’s Midlife Crisis: A Critical Assessment of the Second Wave of Global Privacy Laws*, 74 OHIO ST. L.J. 1217, 1220–22 (2013).

1980.²⁷ The Privacy Guidelines contain a revised version of the Fair Information Practices with changes to the fair information practices described in the HEW Report of 1973.²⁸

One major milestone that caused privacy to become dormant in the United States for years occurred when the United States attempted to adopt the OECD Privacy Guidelines.²⁹ The United States, under President Jimmy Carter, was going to adopt the OECD Privacy Guidelines passed in 1980 and Carter intended to create a department to oversee OECD Privacy Guidelines. However, when President Reagan came into office he dismantled the unit.³⁰ It is quite possible that had the United States pushed for voluntary compliance with the OECD Privacy Guidelines the privacy profession would have been very different and may have developed sooner than it did.

²⁷ OECD GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA: BACKGROUND, <http://www.oecd.org/internet/ieconomy/oecdguidelinesonthe protectionofprivacyandtransborderflowsofpersonaldata.htm> (last visited Oct. 26, 2013) (“The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, adopted on 23 September 1980, continue to represent international consensus on general guidance concerning the collection and management of personal information.”).

²⁸ See Robert Gellman, *Fair Information Practices: A Basic History*, BOB GELLMAN 1, 4 (June 24, 2013), <http://bobgellman.com/rg-docs/rg-FIPShistory.pdf>.

²⁹ Telephone Interview with Martin E. Abrams, President, Ctr. for Info. Pol’y Leadership at Hunton & Williams LLP (Apr. 26, 2013). Marty Abrams recently announced his impending retirement this fall as President of the Centre for Information Policy Leadership, a privacy-focused think tank based in Washington, D.C., as part of the Hunton & Williams law firm. *Id.* He also leads the Accountability Project, which includes participating governments, regulators, business and consumer organizations from Europe, North America, and Asia. *Id.* Its work has been reported at the International Conference of Data Protection and Privacy Commissioners, OECD, and APEC. *Id.* Previously, he led the project group that developed multi-layered notices and gained its acceptance from Working Party 29 of the European Commission, OECD, and APEC, and was the 2008 winner of the International Association of Privacy Professionals’ Vanguard Award. *Id.* He received his M.A. from the University of Illinois and did his undergraduate work at State University of New York. *Id.*

³⁰ WORLD PRIVACY FORUM, THE US DEPARTMENT OF COMMERCE AND INTERNATIONAL PRIVACY ACTIVITIES: INDIFFERENCE AND NEGLECT 7 (Nov. 22, 2010), available at www.worldprivacyforum.org/pdf/USDepartmentofCommerceReportfs.pdf (“At a hearing in 1984, a former NTIA privacy staffer confirmed the agency’s loss of interest in privacy. The Director of the OECD Privacy Guidelines Project testified that the NTIA privacy initiative ended when the Reagan Administration began: ‘Shortly after Mr. Reagan took office, the privacy staff at NTIA was dismantled. No one associated with that effort is currently working on privacy-related issues, and most of the staff has left the Government.’” (quoting *Privacy and 1984: Public Opinions on Privacy Issues: Hearing Before a Subcomm. of the Comm. on Gov’t Operations H. Reps.*, 98th Cong. 114 (1984) (statement of Jane H. Yurow, President, Jane Yurow & Assocs.))).

IV. 1990S: AND SO IT BEGINS

A. *The First CPOs and Privacy Professionals*

At the dawn of the 1990s there were a series of industries starting to experience greater risks associated with data collection and processing. As a result, these industries began to develop greater expertise in privacy management and risk mitigation. Most notably, telecom, health, information technology, consumer reporting, and data brokerages were beginning to assign employees to the task of managing privacy. As the role of privacy grew within these organizations the need for a leader—a professional within the organization who could oversee privacy as a compliance, government affairs, and operational concern—became more apparent.

In 1991, Acxiom named Jennifer Glasgow as the leader of their privacy efforts.³¹ While Glasgow did not immediately hold the title of *chief privacy officer*, it is clear that she had the title by the mid-1990s. Based on our understanding, this would make Jennifer Glasgow the first chief privacy officer in the United States. This role was a hybrid position between setting policy within the company and promoting good practices in the industry. The path to the creation of this role took over a decade. Glasgow joined Acxiom in 1974,³² when the company worked with marketing files (databases), which were lists for prospecting purposes. Acxiom realized they were buying the same lists over and over and they had to clean them up each time to create a usable file. The solution was to own the data, with the permission to resell it. This led Glasgow to consider what it meant for Acxiom to “own data.” According to Glasgow, the early years of the Acxiom privacy office were part-time—most issues could be addressed in two to three hours.³³ It didn’t take long, however, for that time spent on privacy to become more than a full-time job and a central role within the company.

This sort of beginning was shared by Agnes Scanlan, who began at Fleet Bank in 1999 when the bank was going through a merger with another

³¹ Telephone Interview with Jennifer Glasgow, Chief Privacy Officer, Acxiom (May 7, 2013). Jennifer Barrett Glasgow continues to serve as Chief Privacy Officer at Acxiom, which she first joined in 1974. *Id.* She has led Acxiom’s initiatives relating to internal compliance with applicable privacy guidelines, consumer affairs and government affairs since 1991. *Id.* Before that, she worked in systems development, operations, marketing and business development. *Id.* She has a bachelor’s degree in mathematics and computer science from the University of Texas at Austin. *Id.*; see Press Release, Acxiom, Acxiom’s Jennifer Barrett Glasgow Honored with the 2011 Privacy Vanguard Award (Sept. 16, 2011), available at <http://www.acxiom.com/press-releases/2011/acxiom%E2%80%99s-jennifer-barrett-glasgow-honored-with-2011-privacy-vanguard-award/>.

³² *Jennifer Barrett Glasgow*, ACXIOM, <http://www.acxiom.com/jennifer-glasgow/> (last visited Oct. 21, 2013).

³³ Telephone Interview with Jennifer Glasgow, *supra* note 31.

institution.³⁴ Scanlan was handling community reinvestment, which involved making sure banks put money back into their communities. Someone brought her an article in *American Banker* about how former Community Reinvestment Act officers were being designated chief privacy officers at banks.³⁵ Not long after this introduction to the role of CPO, Scanlan became Fleet's first CPO. According to Scanlan, colleagues hearing of this new role thought she had been demoted. She went from having over a hundred people supporting her work to three people.³⁶ It soon became clear that the move was far from a demotion, but the early days of the profession didn't come with automatic prestige.

Another early privacy professional, Jules Polonetsky, was working as the NYC Consumer Affairs Commissioner for Mayor Rudolph Giuliani in 2000.³⁷ He picked up the paper one day and saw that a company called DoubleClick was in trouble and they were going to create a chief privacy officer role.³⁸ He didn't know DoubleClick but he remembered a sign downtown: "DoubleClick welcomes you to Silicon Alley." It sounded interesting so he inquired and got the position in March 2000.³⁹ Crain's New York Business covered the story and made fun of the CPO title and predicted that the use of the title would soon

³⁴Telephone Interview with Agnes Scanlan, Senior Advisor, Treliant Risk Advisors (May 2, 2013). Agnes Bundy Scanlan is currently a Senior Advisor of Treliant Risk Advisors. *Id.* As global chief privacy officer at TD Bank Group, Scanlan was founding president of the International Association of Privacy Professionals' Board of Directors. *Id.* She has also served as counsel in Goodwin Procter's Business Law Department; as chief compliance/privacy officer for Bank of America/FleetBoston Financial; as counsel to the U.S. Senate Budget Committee; and as co-chair of the Corporate Compliance Subcommittee of the Business Law Section of the American Bar Association. *Id.* With a J.D. from Georgetown University Law Center and a BA from Smith College, she is a member of the United States Supreme Court Bar, the Bars of the Commonwealths of Massachusetts and Pennsylvania, and the Bar of the Superior Court of the District of Columbia. *Id.*; *see also FleetBoston Financial*, WIKIPEDIA, http://en.wikipedia.org/wiki/FleetBoston_Financial (last visited Oct. 21, 2013).

³⁵Telephone Interview with Agnes Scanlan, *supra* note 34.

³⁶*Id.*

³⁷Jules Polonetsky: *Co-chair and Director of the Future of Privacy Forum*, WASH. POST, May 31, 2013, http://articles.washingtonpost.com/2013-05-31/news/39649098_1_consumer-protection-chief-privacy-officer-network-advertising-initiative.

³⁸Telephone Interview with Jules Polonetsky, Dir. & Co-chair, Future of Privacy Forum (May 3, 2013). Jules Polonetsky is currently Director and Co-Chair of the Future of Privacy Forum, a Washington-based think tank that seeks to advance responsible data practices, as well as a member of the Department of Homeland Security Data Privacy and Integrity Advisory Committee. *Id.* He has previously served on the International Association of Privacy Professionals' board of directors, as chair of the CPO Council of the Internet Advertising Bureau and as Chief Privacy Officer at AOL and DoubleClick. *Id.* Polonetsky was also NYC Consumer Affairs Commissioner for Mayor Rudolph Giuliani, an elected member of the New York State Assembly from 1994 to 1997, and a legislative aide to Congressman Charles Schumer. *Id.* He is a graduate of New York University School of Law and Yeshiva University, and is admitted to the Bars of New York, New Jersey, and Washington, D.C. *Id.*

³⁹*Id.*

end.⁴⁰ One publication compared the title of “chief privacy officer” to “chief ninja.”⁴¹ DoubleClick was dealing with crisis at the time—a common trigger for the hiring of early privacy professionals—and, according to Polonetsky, he had a chance to “get things done and hire some great people.”⁴² The DoubleClick privacy team became an early career incubator for many privacy professionals around the United States and abroad.

A turning point for the role of the chief privacy officer came when Harriet Pearson became the first CPO of a Fortune 100 Company in November 2000.⁴³ Pearson was first approached about privacy in 1996 by Louis Gerstner, chairman of the board and chief executive officer of IBM, who looked at the strategy of the company and where the customers were going and saw that privacy would be one of the issues of the era.⁴⁴ Pearson immediately got to

⁴⁰ *Id.* But see John Schwartz, *First Line of Defense; Chief Privacy Officers Forge Evolving Corporate Roles*, N.Y. TIMES, Feb. 12, 2001, <http://www.nytimes.com/2001/02/12/business/first-line-of-defense-chief-privacy-officers-forge-evolving-corporate-roles.html?pagewanted=all&src=pm> (“Chief privacy officers like Mr. Polonetsky are increasingly common in the executive suite—and not just at dot-coms. In recent months, C.P.O.’s, as they are called, have been appointed at companies like I.B.M., AT&T and Eastman Kodak. There are now at least 100 privacy chiefs in the United States, making \$125,000 to \$175,000 a year, according to Alan F. Westin, who runs a training program for chief privacy officers associated with his organization, Privacy and American Business.”).

⁴¹ Angelique Carson, *DoubleClick: The Privacy Profession’s Incubator*, INT’L ASS’N PRIVACY PROFS. (Mar. 8, 2012), https://www.privacyassociation.org/publications/2012_03_08_doubleclick_the_privacy_professions_incubator.

⁴² Telephone Interview with Jules Polonetsky, *supra* note 38. For example, Nuala O’Connor Kelly had been DoubleClick’s first privacy counsel and joined his team, then went on to a great career as a privacy leader at GE. *Id.* Elise Berkower came from the NYC Department of Consumer Affairs to join the team where she worked as director of adjudication. *Id.* Brooks Dobbs joined as the company’s technologist. *Id.*

⁴³ *Harriet Pearson*, HOGAN LOVELLS, <http://www.hoganlovells.com/harriet-pearson/> (last visited Oct. 21, 2013). Harriet Pearson is currently a partner in the Washington office of Hogan Lovells law firm, which she joined after serving as the first Chief Privacy Officer at IBM. *Id.* She also now serves on the American Bar Association President’s Cybersecurity Legal Task Force; co-chairs the inaugural Georgetown University Cybersecurity Law Institute; serves on the advisory boards of the Electronic Privacy Information Center and the Future of Privacy Forum; and was a founding and long-serving board member of the International Association of Privacy Professionals, from which she received its highest honor, the Vanguard Award, in 2007. *Id.* Prior to studying law, she worked for Shell Oil as an engineer on offshore production platforms in the Gulf of Mexico. *Id.* Pearson did her undergraduate work at Princeton and studied law at UCLA. *Id.*; see also *IBM Names Harriet P. Pearson as Chief Privacy Officer*, IBM (Nov. 29, 2000), <http://www-03.ibm.com/press/us/en/pressrelease/1464.wss> (“We know that one of the great conundrums of e-business is that it gives enterprises a powerful new capability to capture and analyze massive amounts of customer information so they can serve individual customers more effectively,” said IBM Chairman and CEO Louis V. Gerstner, Jr. “Yet this very capability troubles some people, who see it as a means to disclose or exploit their personal information. These are legitimate and very real concerns, and they must be addressed if the world of e-business is to reach its full potential.”).

⁴⁴ Telephone Interview with Harriet Pearson, Partner, Hogan Lovells (May 9, 2013).

work addressing privacy by undertaking internal policy development, gathering internal task forces, creating one of the first ever web site privacy policies, and conditioning IBM advertising (IBM was the second largest online advertiser at the time) to require privacy policies on the sites they advertised on which drove adoption of policies across the web.⁴⁵ In 2000, Pearson proposed that the company formalize the program that she developed and she was placed into a senior CPO role—making her a top-300 executive within IBM. IBM's promotion of Pearson, in many ways, solidified the start of the privacy profession. It was a very visible change in the privacy landscape, and led many other companies to develop the role.

B. *Communities Congregating—The Launch of Privacy and American Business*

A community was beginning to form around the topic of privacy. As an example, the first Computers, Freedom, and Privacy (CFP) conference was held in Burlingame, California on March 26–28, 1991.⁴⁶ A few corporate professionals (not yet identifying themselves as privacy professionals, but perhaps professionally interested in the topic) were present, but the majority of the discussion was about the law enforcement and advocate communities.⁴⁷ The CFP conference has been running roughly annually since that time, and now draws a vibrant mix of advocates, industry professionals, and IT experts.

Starting in the early 1970s, several noteworthy publications targeted those interested in the field of privacy. Among the early publications was *Privacy Journal*, a consumer-focused newsletter first published in 1974 by Bob Smith.⁴⁸ In 1981, *Privacy Times*, published by Evan Hendricks, offered a more political

⁴⁵ *Id.*

⁴⁶ The First Conference on Computers, Freedom, and Privacy, Burlingame, Cal.—Index of Papers and Transcripts (March 26–28, 1991), <http://cpsr.org/prevsite/conferences/cfp91/home.html/>.

⁴⁷ Lorrie Faith Cranor, *Ten Years of Computers, Freedom and Privacy: A Personal Retrospective*, AT&T Labs-Research 11, 11, available at www.cfp2000.org/papers/2cranor.pdf.

⁴⁸ PRIVACY ISSUES IN THE AGE OF SOCIAL NETWORKING: BIOGRAPHICAL SUMMARY, http://www.fawco.org/index.php?option=com_content&view=article&id=1307:ellis-smith-rober-bio&catid=269&Itemid=200395 (last visited Aug. 15, 2013). Robert Ellis Smith, graduate of Harvard College and Georgetown University Law Center, was a daily news reporter, weekly newspaper editor, and then assistant director of civil rights in the U.S. Department of Health and Human Services, before starting *Privacy Journal* in 1974. *Id.* Since then, he has twice been asked to write the definition of privacy for the *World Book Encyclopedia* and has authored several books, including *Ben Franklin's Web Site: Privacy and Curiosity from Plymouth Rock to the Internet*, an account of privacy throughout American history, and *Privacy: How To Protect What's Left of It*, which was nominated for the National Book Award in 1980. *Robert Ellis Smith*, WIKIPEDIA, http://en.wikipedia.org/wiki/Robert_Ellis_Smith (last visited Aug. 15, 2013). See also PRIVACY JOURNAL, <http://www.privacyjournal.net/> (last visited Aug. 15, 2013).

angle.⁴⁹ As the professional audience for privacy publications grew, so too did the need for content squarely focused on business issues related to the field. To respond to this emerging need, Robert Belair and Alan Westin launched *Privacy & American Business* in 1993.⁵⁰ The goal of this publication was to catalyze the privacy sector and, according to Belair, to encourage industry to understand and focus on the privacy issue.⁵¹ In the spring of 1994, *Privacy & American Business* launched its first conference with just over 100 people in attendance.⁵² *Privacy & American Business* published all through the 1990s and held about three conferences per year.⁵³ By 2003 the concept had run its course, but not before establishing that there was a sophisticated and growing audience of privacy professionals seeking to develop expertise in the new privacy field.⁵⁴

C. EU Privacy Directive

During the mid-1990s in the United States there was a regulatory shift away from addressing privacy only in specifically regulated industries. This broadening of scope is exemplified in part with the Department of Commerce “Privacy and Self-regulation in the Information Age” conference held in June 1997 and hosted by Secretary Daley.⁵⁵ The conference explored “the extent to which industry self-regulation can be effective in reducing the risks information technologies pose for individual privacy.”⁵⁶ In August 1994, Congress amended Section 5 of the Federal Trade Commission Act (F.T.C.A.) to “provide that an act or practice is *unfair* if the injury it causes or is likely to cause to consumers is: (1) substantial; (2) not outweighed by countervailing benefits to consumers or to competition; and (3) not reasonably avoidable by consumers themselves.”⁵⁷ In October of 1994 Christine Varney became the Commissioner

⁴⁹ *Evan Hendricks Bio*, PRIVACY TIMES, <http://www.privacytimes.com/about-bio.html> (last visited Aug. 15, 2013). Evan Hendricks has been Editor and Publisher of *Privacy Times* since 1981, based in Washington, D.C. *Id.* He has testified on privacy issues before Congress on a number of occasions, has often presented at FTC workshops on privacy-related matters and can regularly be seen and heard in national news stories. *Id.* See PRIVACY TIMES, <http://www.privacytimes.com/about.html> (last visited Aug. 15, 2013).

⁵⁰ Telephone Interview with Bob Belair, *supra* note 15. See also Fox, *supra* note 6 (“Mr. Westin, who in the 1970s was editor in chief of The Civil Liberties Review, a publication of the American Civil Liberties Foundation, published and edited the newsletter *Privacy & American Business* from 1993 to 2006.”).

⁵¹ Telephone Interview with Bob Belair, *supra* note 15.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Privacy and Self-Regulation in the Information Age*, NAT’L TELECOMMS. & INFO. ADMIN., U.S. DEP’T COM. (June 12, 1997), <http://www.ntia.doc.gov/report/1997/privacy-and-self-regulation-information-age>.

⁵⁶ *Id.*

⁵⁷ See Appendix 1—Laws Enforced by the FTC, FTC, http://www.ftc.gov/opp/gpra/append1.shtm#N_8_ (last visited Oct. 21, 2013) (citing Section 5(n) of the FTC Act,

of the Federal Trade Commission (FTC) and, after some careful thought with some of her closest advisors, she began to champion the idea that the agency should focus on consumer privacy in the digital age; FTC Chairman Robert Pitofsky supported this approach, and, assisted by senior staff including Becky Burr and David Medine, the FTC pushed for greater disclosure of data practices and for enforcement against companies that misrepresented their practices.⁵⁸

In the same era, U.S. companies began to address the passage of the European Union Data Protection Directive (Directive 95/46).⁵⁹ This comprehensive data protection legislation had the effect of limiting data from leaving Europe without recognition of the receiving country being “adequate” under EU data protection law.⁶⁰ Notably, the United States was deemed to not be adequate under this directive, and American companies struggled to understand the mechanisms through which increasingly robust data flows from Europe to the United States could be enabled.⁶¹ This left the European Union and the United States with a distinct conflict that had to be sorted out.⁶² The Department of Commerce sought to organize a “safe harbor” privacy

15 U.S.C. § 45(n) (2012), added by the Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691). The Commission previously relied on similar criteria to define the scope of its authority to prohibit unfair acts or practices pursuant to Section 5(a) of the FTC Act. *See, e.g., In re Orkin Exterminating Co.*, 108 F.T.C. 263, 362 (1986); *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1061 (1984). *See generally* Federal Trade Commission Policy Statement on Unfairness, *reprinted in Int’l Harvester Co.*, 104 F.T.C. at 1070–76.

⁵⁸ Telephone Interview with Peter Swire, Professor at the Scheller College of Business at Georgia Tech (Apr. 19, 2013); Telephone Interview with Christine Varney, Partner in Cravath, Swaine & Moore LLP’s Litigation Department and Chair of the Firm’s Antitrust practice (Oct. 7, 2013); *see also* Christine A. Varney, Comm’r, FTC, Prepared Remarks Before the Privacy & American Business National Conference: Consumer Privacy in the Information Age: A View from the United States (Oct. 9, 1996), *available at* <http://www.ftc.gov/speeches/varney/priv&ame.shtm>; Glenn R. Simpson, *FTC Emerges as Chief Enforcer of the Web; Firms Are Worried*, WALL ST. J., Feb. 29, 2000, <http://online.wsj.com/article/SB951775698401816263.html>.

⁵⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

⁶⁰ Telephone Interview with James Koenig, Director and Leader of PricewaterhouseCoopers’ Privacy and Identity Theft practice (May 1, 2013). James Koenig is currently Director and Leader of PricewaterhouseCoopers’ Privacy and Identity Theft practice. *Id.* He serves on the Educational Advisory Board for the International Association of Privacy Professionals, is a member of the Privacy Council for the Direct Marketing Association and serves on the Technical Management Board’s Task Force on Privacy. *Id.* Previously, he was Executive Vice President at privacy consulting firm ePrivacy Group and was Director of Business Development at QVC. *Id.* He received his J.D. from University of Miami School of Law, where he was Editor of the *University of Miami Law Review*, and did his undergraduate work at MIT. *Id.*

⁶¹ *Id.*; *see* Dennis D. Hirsch, *In Search of the Holy Grail: Achieving Global Privacy Rules Through Sector-Based Codes of Conduct*, 74 OHIO ST. L.J. 1029 (2013).

⁶² Telephone Interview with Rick Fischer, *supra* note 19.

arrangement with the European Commission and Barbara Wellbery⁶³ sent out an e-mail to the group addressing “industry representatives.”⁶⁴ Privacy advocates responded with outrage for being lumped into that category, and this is perhaps a crystallizing moment where it became clear that the boundaries of the industry privacy professional and the privacy advocate had been drawn, and privacy advocates demanded acknowledgement of this distinction.⁶⁵ The European Union Data Protection Directive forced companies into engaging with global privacy frameworks, and the ensuing complexity drove adoption of privacy officers and privacy programs.⁶⁶

D. *The Rise of the Internet*

In the early days of the Internet there was a belief that it could not and should not be regulated. Companies were able to go to Washington, D.C., and say that regulation would hurt innovation and it worked.⁶⁷ Several self-regulatory efforts were formed composed of Internet companies. The Online Privacy Alliance was formed in 1998 and was credited with turning the debate in favor of industry.⁶⁸ By October of 1999, the Online Privacy Alliance included nearly 100 global internet companies and associations.⁶⁹ The Privacy Leadership Initiative (PLI) formed in September 2000 as a partnership of fifteen corporations and nine business associations that came together to focus on the need for control of data by individuals.⁷⁰ Former PLI chairman Zeke Swift⁷¹

⁶³ *Speaker Biographies: Barbara S. Wellbery*, INTERNET L. & POL’Y F., http://www.ilpf.org/events/jurisdiction2/biographies/wellbery_bio.htm (last visited Sept. 14, 2013). Barbara Wellbery died in 2003 at the age of fifty-four. At the time, she was a partner with Morrison & Foerster law firm, which established the Barbara Wellbery Memorial Award for international privacy writing after her death. See *2005 Barbara Wellbery Memorial Award*, MORRISON FOERSTER, <http://www.mofo.com/news/xpqNewsDetail.aspx?xpST=NewsDetail&news=1785> (last visited Sept. 14, 2013). Most notably in the privacy field, Wellbery served at the Department of Commerce as the chief architect and principal negotiator of the Safe Harbor privacy accord with the European Commission and was lead U.S. government negotiator on electronic commerce issues in international and regional multilateral organizations, such as the Organization for Economic Cooperation and Development. Before that, she was Chief Counsel to the National Telecommunications and Information Administration at Commerce. *Speaker Biographies: Barbara S. Wellbery*, *supra*. She received her J.D. from Stanford Law School and did her undergraduate work at S.U.N.Y. Binghamton. *Id.*

⁶⁴ Telephone Interview with Peter Swire, *supra* note 58.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Telephone Interview with Jules Polonetsky, *supra* note 38.

⁶⁸ Steve Lohr, *Seizing the Initiative on Privacy: On-Line Industry Presses Its Case for Self-regulation*, N.Y. TIMES, Oct. 11, 1999, at C1.

⁶⁹ *Id.*

⁷⁰ *Others To Carry on Mission of Privacy Leadership Initiative*, CHIEF MARKETER (July 1, 2002), <http://www.chiefmarketer.com/special-reports-chief-marketer/others-to-carry-on-mission-of-privacy-leadership-initiative-01072002>.

described the group's goal as understanding "the privacy expectations of consumers and . . . address[ing] many of their concerns with tangible action."⁷² These organizations soon faced events with media backlash and more legislative awareness became necessary.

A seminal moment in the early days of the Internet was "Cookiegate." The White House incorporated the use of a common Internet technology called "cookies" into its anti-drug campaign.⁷³ Because cookies can track and record users' movements across websites, the government was violating its own privacy policies.⁷⁴ Privacy groups surged into action. Marc Rotenberg,⁷⁵ Director of the Electronic Privacy Information Center (EPIC), sent a letter to congressional leaders claiming that the activity violated the White House privacy policy and may have been illegal under the Privacy Act of 1974.⁷⁶ Events like this made the Internet seem less untouchable and a generation of staffers started their careers thinking that regulation of the Internet was possible.

⁷¹ Zeke Swift retired from Procter & Gamble in 2002, where he served as Privacy Director and as Marketing Director for Global iVentures, which oversaw the company's roughly 100 web sites. *Privacy Gamble*, CHIEF MARKETER (Nov. 1, 2000), <http://www.chiefmarketer.com/special-reports-chief-marketer/privacy-gamble-01112000>. From 2000–2002, Swift was Chairman of the Privacy Leadership Institute, a group created by a number of large corporations and business associations, which ended up turning operations over to the Better Business Bureau. See *Others To Carry on Mission of Privacy Leadership Initiative*, *supra* note 70. Swift now works with SAGE Partnership and the Mariemont Church in Cincinnati, Ohio. See *Global Ministries*, MARIEMONT CHURCH, <http://mariemontchurch.org/global/> (last visited Sept. 9, 2013).

⁷² *Others To Carry on Mission of Privacy Leadership Initiative*, *supra* note 70.

⁷³ "Cookiegate" Alarms Watchdogs, WIRED (June 22, 2000), <http://www.wired.com/politics/law/news/2000/06/37173> ("[T]he White House admitted it may have violated federal privacy guidelines by tracking users who searched for drug-related information online.").

⁷⁴ *White House on Cookies: Doh!*, WIRED (June 26, 2000), <http://www.wired.com/politics/law/news/2000/06/37233> ("Because of the unique laws and traditions about government access to citizen's [sic] personal information, the presumption should be that 'cookies' will not be used at Federal websites," wrote Jacob Lew, director of the Office of Management and Budget in a memorandum sent . . . to the heads of all federal departments and agencies.").

⁷⁵ *Marc Rotenberg*, EPIC, <http://epic.org/epic/staff/rotenberg/> (last visited Aug. 13, 2013). Marc Rotenberg is currently Executive Director of EPIC, based in Washington, D.C. *Id.* He also teaches information privacy law at Georgetown University Law Center, chairs the ABA Committee on Privacy and Information Protection, and is a Fellow of the American Bar Foundation. *Id.* Previously, he served as Chair of the Public Interest Registry, manager of the .ORG domain, has testified a number of times before Congress, and has edited *Privacy and Human Rights* and *The Privacy Law Sourcebook*, along with co-editing *Information Privacy Law*. *Id.* He received his J.D. from Stanford Law School and did his undergraduate work at Harvard. *Id.*

⁷⁶ Press Release, EPIC, Privacy Advocates Call on Congress To Investigate "Cookiegate": Letter to Congressional Leaders Outlines Risks of Web Tracking Technologies (June 22, 2000), available at http://epic.org/privacy/internet/cookiegate_pr.html.

As privacy issues became more complicated and regulated, the growth of privacy professionals accelerated.

A separate but related issue at the time was the Y2K problem that was sometimes known as the millennium bug. Programs that represented years by using two digits were at risk of operating incorrectly for dates and times on and after January 1, 2000.⁷⁷ A lot of programmers were hired to fix systems and in many ways this was merely a diversion.⁷⁸ While this was a non-event, it did have an effect on the privacy profession. For one, the security controls that were implemented during this time as related upgrades later helped with internal privacy efforts.⁷⁹ Rick Fischer observed that when financial institutions were forced to look at their systems and to invest a lot in technology, they justified that by asking themselves what they could get out of all of that effort.⁸⁰ What financial institutions started to do was to look at their records (branch banks, credit cards, etc.), and they sought to interconnect the information they had with respect to their customer, which led to the development of integrated customer management and response systems. Of course the more you know about a customer, the more issues you have in terms of privacy, which led to a combined privacy impact.⁸¹ There were several parallel technology changes, such as cheaper storage and better remote processing capabilities, which also influenced this privacy growth.⁸² Finally, the trend towards outsourcing of processes common from company to company led to new markets for the flow of data.⁸³

E. *New Sector-Specific Laws*

The 1990s were a time of new sector-specific regulations. The health care industry was forced into action by the Health Insurance Portability and Accountability Act (HIPAA), enacted August 21, 1996.⁸⁴ HIPAA regulates the use and disclosure of protected health information by covered entities.⁸⁵ The goal of the legislation was to make transactions more efficient and to do so it

⁷⁷ See Tony Long, *Dec. 31, 1999: Horror or Hype? Y2K Arrives and World Trembles*, WIRED (Dec. 30, 2009, 8:00 PM), <http://www.wired.com/thisdayintech/2009/12/1231-y2k> (“The problem, as some saw it, was that older computers still being used for critical functions might break down when the date switched from 99 to 00, since the numeric progression convention, programmed to store data using only the last two digits of any given year, wouldn’t recognize the logic of a century change.”).

⁷⁸ Telephone Interview with Jennifer Glasgow, *supra* note 31.

⁷⁹ Telephone Interview with Agnes Scanlan, *supra* note 34.

⁸⁰ Telephone Interview with Rick Fischer, *supra* note 19.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Telephone Interview with Martin E. Abrams, *supra* note 29.

⁸⁴ See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d to -9 (2012).

⁸⁵ See *Keshecki v. Saint Vincent’s Med. Ctr.*, 785 N.Y.S.2d 300, 303 (N.Y. Sup. Ct. 2004).

made transactions occur electronically.⁸⁶ As leading health law attorney Peter Grant notes, it was only an afterthought that privacy be added.⁸⁷ A less discussed aspect of HIPAA is the level of surprise within the industry that it was implemented at all.⁸⁸ The HIPAA rules were drafted on the political fault line of changing presidential administrations. Peter Swire, who held the position of Chief Counselor for Privacy in the Office of Management and Budget, was brought in by the Clinton Administration to coordinate the creation of the HIPAA Privacy Rule by aiding the Department of Health and Human Services (HHS).⁸⁹ The rules were drawn up in the final days of the Clinton Administration, but implementation was scheduled after the Bush Administration took office.⁹⁰ Perhaps the surprise felt by the health industry is

⁸⁶ *HIPAA Administrative Simplification Statute and Rules*, HHS, <http://www.hhs.gov/ocr/privacy/hipaa/administrative/index.html> (last visited Sept. 14, 2013).

⁸⁷ Telephone Interview with Peter N. Grant, Partner at Davis Wright Tremaine LLP (May 9, 2013); see also *Peter N. Grant*, DAVIS WRIGHT TREMAINE LLP, <http://www.dwt.com/people/petergrant/> (last visited Aug. 17, 2013). Peter N. Grant is currently a partner at Davis Wright Tremaine law firm, based in San Francisco. *Id.* Grant previously served as legal counsel to the American Medical Group Association, the Hospital Council of Northern and Central California, the IPA Association of America, and the Integrated Healthcare Association. *Id.* He serves on the editorial board of *Health Affairs* and on the advisory board for *Harvard Health Policy Review*. *Id.* He has a Ph.D. and M.A. from Harvard University, and a J.D. from University of Texas School of Law, having done his undergraduate work at University of Texas at Austin. *Id.*

⁸⁸ Telephone Interview with Peter N. Grant, *supra* note 87.

⁸⁹ *Peter Swire Resume/Bio*, PETERSWIRE.NET, <http://www.peterswire.net/psresumebio.htm> (follow “long version” hyperlink) (last visited Aug. 17, 2013); see also *Peter Swire*, CENTER FOR AM. PROGRESS [hereinafter *Peter Swire*, PROGRESS], <http://www.americanprogress.org/about/staff/swire-peter/bio> (last visited Aug. 17, 2013). Peter Swire recently moved to the Scheller College of Business at Georgia Tech from his position as the C. William O’Neill Professor of Law at The Ohio State University Moritz College of Law. *Id.* He is also a Senior Fellow with the Center for American Progress and Future of Privacy Forum, *id.*, and a policy fellow with the Center for Democracy and Technology. *Peter Swire Resume/Bio*, *supra*. From 1999 to 2001, Swire served as the Clinton Administration’s Chief Counselor for Privacy, in the U.S. Office of Management and Budget, as the only person to date to have U.S. government-wide responsibility for privacy issues. *Peter Swire*, PROGRESS, *supra*. Swire worked on technology issues for the Obama–Biden Transition, and worked on technology and other issues as Special Assistant to President Obama in 2009 to 2010, serving in the National Economic Council under Lawrence Summers. *Id.*; see also *Peter Swire Resume/Bio*, *supra*. He is the lead author of *None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive* with Robert E. Litan. *Id.* He received his J.D. from Yale Law School, was a student at Université Libre de Bruxelles, and did his undergraduate work at Princeton University. *Peter Swire*, PROGRESS, *supra*; see also *Peter Swire, Medical Privacy*, PETERSWIRE.NET, <http://www.peterswire.net/psmedicalpage.htm> (last updated 2002).

⁹⁰ See Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician–Patient Privilege*, 77 TEMP. L. REV. 505, 567–68 (2004).

best captured by Robert Gellman,⁹¹ a leading health privacy expert and consultant in Washington who reacted to the news saying: “Curiouser and curiouser . . . I don’t know anybody who expected the rule to be adopted. Every single person I talked to expected the rule to be pulled back. So I am surprised at this.”⁹² Surprise quickly gave way to a need to act. HIPAA had many new privacy requirements, including workforce training requirements, which caused explosive growth in health care privacy professionals.⁹³

The other landmark statute affecting privacy in the 1990s was the Gramm–Leach–Bliley Act (GLB), enacted November 12, 1999, which sought to modernize financial services.⁹⁴ GLB addressed privacy by limiting disclosure of “nonpublic personal information” and prohibiting fraudulent access to financial information (aka pretexting).⁹⁵ These privacy provisions were the subject of great dispute in the legislature with Rep. John Dingell (MI) declaring that a loophole in the privacy protections made them “about as effective as a lace doily would be in holding back a flood,”⁹⁶ while others, such as Sen. William Gramm, praised the provisions against pretexters, saying: “We come down on them like a ton of bricks, as we should.”⁹⁷ GLB was not the only legislative activity seeking to protect financial privacy at this time; in fact, Bliley himself proclaimed that “[t]he ink hadn’t even dried on Gramm–Leach–Bliley privacy provisions when the privacy jihad was renewed” and noted that the Californian legislature twice “came with[in] a hair’s breadth” of new legislation that would

⁹¹ Robert Gellman, *Biography of Robert Gellman*, BOBGELLMAN.COM, <http://www.bobgellman.com/rg-files/rg-bio.html> (last visited Aug. 18, 2013). Robert Gellman currently works as an independent privacy and information policy consultant, based in Washington, D.C. *Id.* He also is a member of the editorial board of *Government Information Quarterly* and serves on the advisory board of the Privacy Rights Clearinghouse. *Id.* In 2012, he was Senior Fellow at Fordham University School of Law’s Center on Law and Information Policy. *Id.* Previously, he was a member of the National Committee on Vital and Health Statistics at the Health and Human Services Department and Chair of the Subcommittee on Privacy and Confidentiality. *Id.* As a Staff Member of the Subcommittee on Information, Justice, Transportation, and Agriculture of the House Committee on Government Operations, he worked closely with the Freedom of Information Act and Privacy Act of 1974. *Id.* He received his J.D. from Yale Law School and did his undergraduate work at University of Pennsylvania. *Id.*

⁹² Frank James, *Health Privacy Rules To Proceed: White House OK of Clinton-Era Plan Surprises Experts*, CHI. TRIB., Apr. 13, 2001, at N10 (internal quotations omitted).

⁹³ Heather Fesko, *Privacy and Security Compliance for Health Care Providers and Other Covered Entities*, in *COMPLYING WITH HEALTH CARE PRIVACY LAWS: LEADING LAWYERS ON MAINTAINING PRIVACY AND SECURITY COMPLIANCE, MANAGING LIABILITY, AND UNDERSTANDING RECENT DEVELOPMENTS* (2008).

⁹⁴ Gramm–Leach–Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended at 15 U.S.C. §§ 6801–6809 (2012)).

⁹⁵ 15 U.S.C. § 6801(a); *see also* Fesko, *supra* note 93.

⁹⁶ 145 CONG. REC. 29,064 (1999) (statement of Rep. Dingell).

⁹⁷ *Id.* at 28,904 (Nov. 3, 1999) (statement of Sen. Gramm).

have been more restrictive.”⁹⁸ The result of all this activity was the mailing of millions of privacy notices and the hiring of new privacy professionals to adapt to the evolving corporate landscape.⁹⁹ As noted privacy scholar Alan Westin reflected on the totality of these statutory changes in 2004, “[m]ost companies have shifted from a privacy approach that would be based on proactive steps, competitive-edge orientation and customer trust building to a narrow legal-compliance priority.”¹⁰⁰ The privacy profession grew and the scope of the work narrowed.

V. 2000s: EXPLOSIVE GROWTH

A. *The FTC, the Internet, and Privacy Notices*

On May 10, 2002, the FTC publically filed a complaint against Eli Lilly and Company for events relating to its Prozac.com website.¹⁰¹ Between March 15, 2000 and June 22, 2001, Eli Lilly provided an e-mail reminder service known as “Medi-messenger” that provided personal e-mail reminder messages on a schedule established by the subscriber.¹⁰² On June 27, 2001, an Eli Lilly employee sent an e-mail message to Medi-messenger subscribers announcing the termination of the service and mistakenly disclosed the email addresses of all 669 Medi-messenger subscribers.¹⁰³ James Koenig was hired as a privacy consultant on this case and he sees this as the first case that made privacy mandatory for Internet companies.¹⁰⁴ This was the first time the FTC enforced a violation of online privacy policies. It set in motion the rise of privacy policies as binding statements about how companies will handle personal information, and it brought the FTC to the forefront as an actor in privacy.¹⁰⁵ As a result, many corporations woke up to the broad applicability of privacy and the resulting regulatory risks to their organizations.

⁹⁸ Ron Panko, *Legislative Landscape Seen More Fluid Since Sept. 11*, BESTWIRE (Nov. 12, 2001).

⁹⁹ Meg Green, *As Privacy Demands Grow, Insurers Hire Chief Privacy Officers*, BESTWIRE (July 14, 2000); see also Dawn Kopecki, *Banks, Retailers Spend Millions To Send Privacy Policies*, DOW JONES NEWS SERVS., Feb. 26, 2001; Schwartz, *supra* note 40, at C1.

¹⁰⁰ Steve Ulfelder, *Chief Privacy Officers: Hot or Not?*, COMPUTERWORLD (Mar. 15, 2004, 12:00 PM), http://www.computerworld.com/s/article/91168/CPOs_Hot_or_Not_.

¹⁰¹ *In re Eli Lilly & Co.*, 133 F.T.C. 763, 763–64 (2002).

¹⁰² *Id.* at 764.

¹⁰³ *Id.* at 766–67.

¹⁰⁴ Telephone Interview with James Koenig, *supra* note 60; see also *Eli Lilly Settles Charges with the FTC that It Violated Its Own Privacy Policies*, WALL ST. J., Jan. 18, 2002, <http://online.wsj.com/article/SB1011376238448093160.html>.

¹⁰⁵ Telephone Interview with James Koenig, *supra* note 60.

B. *The Professional Associations*

As the privacy profession grew, more formal communities began to develop. Initially, two groups were created to meet this need, the Privacy Officers Association (POA) and the Association of Corporate Privacy Officers (ACPO). ACPO was a very small group created in 2000 with a few handfuls of members led by Alan Westin.¹⁰⁶ Membership was so minimal in those early years that, when Agnes Bundy Scanlan spoke at one of their first conferences, “there was a pillar in the middle of the room and it didn’t matter because the room wasn’t full enough for there to be people behind it—there was no back of the room.”¹⁰⁷ The other organization created in 2000 was the Privacy Officers Association (POA)—a group focused on conferences and providing relevant privacy news and updates.¹⁰⁸ The POA had been formed by Peter Grant, a lawyer with Davis Wright Tremaine, and Brent Saunders, a consultant working on privacy issues for PricewaterhouseCoopers.¹⁰⁹ Grant and Saunders recognized that this emerging field needed mechanisms to connect, share information, and educate newcomers to the field.¹¹⁰

With many overlapping members and board leaders, a union of the POA and the ACPO soon made sense. In 2001, the groups combined under a new name, the International Association of Privacy Officers (IAPO).¹¹¹ The first Privacy and Data Protection Summit was held in Arlington, Virginia in May of 2001.¹¹² Many of the early leaders in the field of privacy—including Peter Swire, Bob Belair, Alan Westin, Jim Koenig, Trevor Hughes, and Barbara Wellbery—spoke at this event.¹¹³ By 2003, the newly combined group held two conferences a year: one global conference in D.C. (the Global Privacy Summit) and another outside D.C., designed to be more operational and less policy focused.¹¹⁴

Membership in the IAPO swelled to 150–200 members by the summer of 2002, and the volunteer board recognized the need for an executive director.¹¹⁵ A small search committee, which included Agnes Bundy Scanlan (at that time, the president of the IAPO board), interviewed and hired Trevor Hughes.¹¹⁶ Hughes initially worked part-time for the IAPO and also served as the executive director for two privacy-related trade groups, the Network Advertising Initiative

¹⁰⁶ Telephone Interview with Agnes Scanlan, *supra* note 34.

¹⁰⁷ *Id.*

¹⁰⁸ Telephone Interview with James Koenig, *supra* note 60.

¹⁰⁹ Telephone Interview with Peter N. Grant, *supra* note 87.

¹¹⁰ *Id.*

¹¹¹ Telephone Interview with Agnes Scanlan, *supra* note 34.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

and the E-mail Sender and Provider Coalition.¹¹⁷ Hughes lived with his family in York, Maine, and worked virtually for these organizations. As the IAPO grew, the offices and employees stayed based in this area.

The IAPO board decided in early 2003 to recognize the broadening of the profession of privacy by changing the name to the International Association of Privacy Professionals (IAPP).¹¹⁸ IAPP President Agnes Bundy Scanlan commented that “[a]s privacy professionals, we have many roles and responsibilities,” and “[s]afeguarding privacy is a team effort.”¹¹⁹ This was perhaps the first announcement of a large and broad association that people working on issues of privacy could join.¹²⁰ Although still small, the groundwork had been laid for a broad and deep professional field.

Another milestone in the development of the field of privacy was the introduction of certification programs designed to demonstrate competence and knowledge of data protection standards. The IAPP, with very limited funds, sought and received seed grants from Peter Cullen,¹²¹ then the Chief Privacy Officer of Microsoft, and Dan Swartwood,¹²² a privacy leader at Hewlett-Packard, to build such a program. Larry Ponemon¹²³ helped to design and create

¹¹⁷ J. Trevor Hughes, LINKEDIN, <http://www.linkedin.com/in/jtrevorhughes> (last visited Sept. 22, 2013).

¹¹⁸ *History of the IAPP*, IAPP, https://www.privacyassociation.org/about_iapp/history_of_the_iapp (last updated 2013).

¹¹⁹ *Milestones 2003*, IAPP, https://www.privacyassociation.org/about_iapp/timelines_2003/ (last updated 2013).

¹²⁰ Telephone Interview with James Koenig, *supra* note 60.

¹²¹ *A Passion for Privacy: Three Chief Privacy Officers Reflect on a Decade of Work Creating a More Trustworthy Computing Ecosystem*, MICROSOFT (Mar. 7, 2012), <http://www.microsoft.com/en-us/news/features/2012/mar12/03-083cpos.aspx>. Peter Cullen is the GM of Trustworthy Computing at Microsoft Corporation. *Id.* He previously served as corporate privacy officer for the Royal Bank of Canada. *See Peter Cullen*, MICROSOFT (May 1, 2007), <http://www.microsoft.com/en-us/news/presskits/security/docs/CullenPBio.doc>. Cullen is recognized as a pioneer in privacy and is known for his development of financial industry best practices around the collection and use of information. *Id.* In 2003, Cullen received the IAPP Vanguard Award for Privacy Innovation for his contributions to the privacy profession. *Id.* Cullen received an M.B.A. from the Richard Ivey School of Business at the University of Western Ontario. *Id.*

¹²² *Ponemon Institute Fellows*, PONEMON INST., <http://www.ponemon.org/ponemon-institute-fellows#swartwood> (last visited Oct. 21, 2013). Dan Swartwood is currently the Information Security Governance Leader for Mars, Inc., and formerly the Director, Information Safeguarding, for The Walt Disney Company; the Corporate Privacy Manager at Compaq; the Data Privacy Officer at HP; and the Data Protection Officer at Motorola. *Id.* In addition to his privacy leadership at four Fortune 100 companies, he was granted membership in the FBI sponsored National Counterintelligence Working Group in 2012 and was named Senior Fellow of the Ponemon Institute, a leading research group for data protection and privacy, in 2011. *Id.*

¹²³ *Our Team*, PONEMON INST., <http://www.ponemon.org/management> (last visited Oct. 21, 2013). Dr. Larry Ponemon is the Chairman and Founder of the Ponemon Institute, a think tank focused on advancing privacy and data protection practices. *Id.* Dr. Ponemon is also an adjunct professor for ethics and privacy at Carnegie Mellon University's CIO

the body of knowledge and test questions for the Certified Information Privacy Professional (CIPP) credential, and on October 26, 2004, the IAPP held its first-ever CIPP exam at the IAPP Privacy and Data Security Academy and Expo in New Orleans with 150 total students participating.¹²⁴ Ponemon served as a proctor for the exam, accompanied by Richard Purcell¹²⁵ (who had previously served as a CPO at Microsoft). Purcell surprised the room by arriving to proctor the exam in a nun's habit.

Early growth for the CIPP credential was slow, and it took three years for the IAPP to recognize 1,000 certified professionals.¹²⁶ Growth accelerated in the program as more and more organizations sought mechanisms to understand and mitigate privacy risks.¹²⁷ As of the writing of this article, there are over 6000 CIPP credentials issued in the global marketplace.¹²⁸

Institute. *Id.* Dr. Ponemon previously was a senior partner of PricewaterhouseCoopers, where he founded the firm's global compliance risk management group. *Id.* He was also a founding member of the Certified Information Privacy Professional (CIPP) Advisory Board. *Id.* Dr. Ponemon earned his PhD at Union College, his Master's degree from Harvard University, and his Bachelor's from the University of Arizona. *Id.*

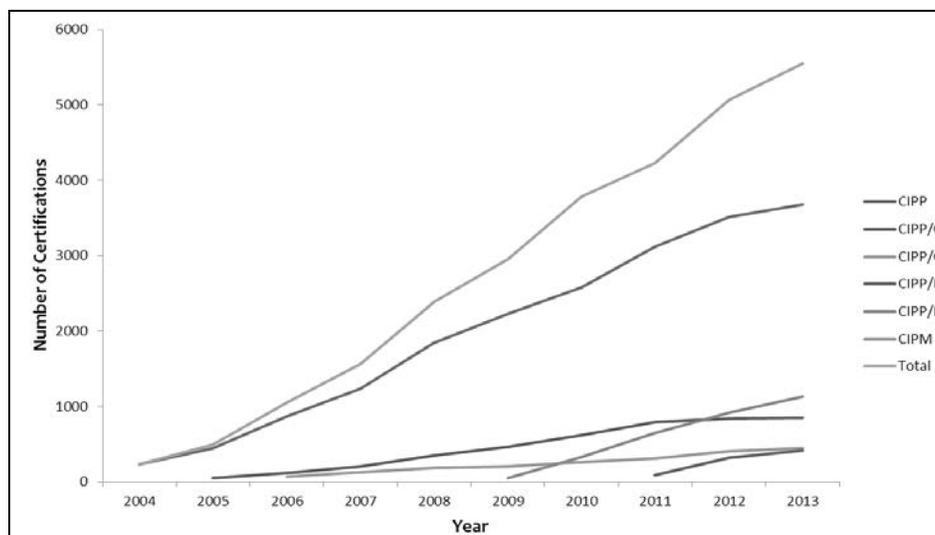
¹²⁴ *Milestones in Privacy 2004*, IAPP, https://www.privacyassociation.org/about_iapp/timelines_2004/ (last visited Oct. 21, 2013).

¹²⁵ *Who*, CORP. PRIVACY GROUP, <http://corporateprivacygroup.com/who> (last visited Aug. 17, 2013); see also *Understanding the Power of Data Led Richard Purcell to a Career in Privacy*, MICROSOFT TRUSTWORTHY COMPUTING, <http://download.microsoft.com/download/0/E/6/0E614D14-E517-4E06-A9CC-76A710E29AA2/Richard%20Purcell%20Profile%202-29-12%20final.pdf>. Purcell is the CEO at Corporate Privacy Group (CPG). *Who, supra*. CPG is a consulting firm dedicated to helping companies build privacy programs. *Id.* Purcell was one of the earliest Chief Privacy Officers for a multi-national company based in the United States. *Id.* From 2000–2003, Purcell was Microsoft's Senior Director of Privacy. *Understanding the Power of Data Led Richard Purcell to a Career in Privacy, supra*. Purcell got his start at Early Winters, a Seattle-based catalogue company that sold outdoor recreational equipment, where he developed computer models to analyze customer orders. *Id.* That expertise in analyzing information databases led to a position at Microsoft. *Id.*

¹²⁶ *Milestones in Privacy 2004, supra* note 124.

¹²⁷ Press Release, Int'l Ass'n of Privacy Profs., IAPP Membership Climbs to 6,000 (July 14, 2009), available at https://www.privacyassociation.org/about_iapp/media/2009_07_14_iapp_membership_climbs_to_6000.

¹²⁸ Sam Pfeifle, *IAPP Launches New Certification: CIPM*, IAPP (Mar. 8, 2013) https://www.privacyassociation.org/publications/2013_03_08_iapp_launches_new_certification_cipm.

Figure 1: *IAPP Certifications by Year*

The last decade has been a story of growth for the IAPP and, more broadly, the privacy profession. In March of 2012, the IAPP reached 10,000 members.¹²⁹ In March of 2013, the IAPP reached 13,000 members in seventy-eight countries around the world.¹³⁰ Throughout the first decade of the millennium, there were many catalysts for the explosive growth of the profession. Certainly, the continued march of technological innovation has challenged traditional notions of informational privacy and demanded better risk management and privacy controls (frequently developed and managed by privacy professionals). Cloud computing, big data, the “Internet of things,” sensors, location-based services, wearable computing, and biometrics—all have demanded deeper understanding and management of privacy concerns. The introduction of new types of data protection laws—notably, the entire class of notice of security breach laws—also required organizations to invest in staff with abilities to understand and prepare for the possibility—or, perhaps, the inevitability—of data breaches. And new risk vectors continue to emerge for organizations. At the time of writing, there is a significant increase in FTC enforcement of privacy cases, class action lawsuits, and even competitive differentiation on the basis of privacy in the marketplace.

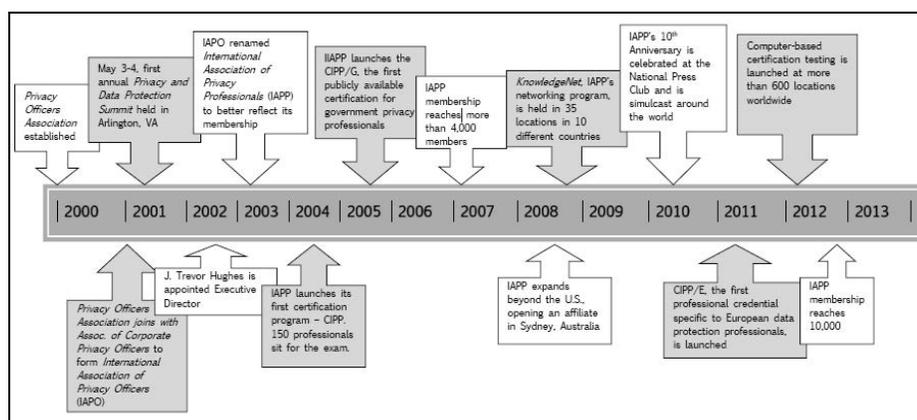
It is thus impossible to identify a single source for the growth of the profession. Rather, the steady growth of the information economy, coupled with the emergence of new risks for organizations trying to exploit data, has resulted

¹²⁹ Press Release, Int’l Ass’n of Privacy Profs., International Association of Privacy Professionals Reaches 10,000 Member Mark (Mar. 7, 2012), *available at* https://www.privacyassociation.org/about_iapp/media/international_association_of_privacy_professionals_reaches_10000_member_mar.

¹³⁰ *About the IAPP*, *supra* note 1.

in extensive investments across the private and public sectors in privacy management. As these professionals have entered the field, the IAPP has grown commensurately, with sixty-five employees now providing a diverse array of services, including conferences, local chapters, newsletters, blogs, research, and certifications.

Figure 2: IAPP Timeline



VI. CONCLUSION: LOOKING FORWARD

Where is the privacy profession going from here? To begin, it's important to remember that the advent of the role of CPO is still a relatively recent phenomenon in the United States. The role has, however, gained significant traction in major organizations, governmental agencies (where it is now mandatory), and data-intensive businesses. We expect that trend to continue as the information economy creates greater complexity and, as a result, risk associated with privacy. Indeed, we expect that senior CPO roles will become coveted positions, and the sophistication demanded by these roles will be very high.¹³¹ Jennifer Glasgow, Chief Privacy Officer at Acxiom, predicts that evolution of skills will come full circle.¹³² In the 1980s and 1990s, privacy professionals were pioneers.¹³³ They were people who liked to figure things out from scratch and make things happen in the absence of precedent. During the 2000s there has been more focus on implementing guidelines, stabilizing

¹³¹ See Press Release, Neustar, Inc., Neustar Names Becky Burr as Its Chief Privacy Officer (May 22, 2012), available at <http://www.neustar.biz/about-us/news-room/press-releases/2012/neustar-names-becky-burr-as-its-chief-privacy-officer>; see also Cecilia Kang, *Facebook Continues D.C. Hiring Spree with White House, Privacy Expert Hires*, WASH. POST BLOG (Sept. 13, 2011, 8:45 AM), http://www.washingtonpost.com/blogs/post-tech/post/facebook-continues-dc-hiring-spree-with-white-house-privacy-expert-hires/2011/09/13/gIQANX4MPK_blog.html.

¹³² Telephone Interview with Jennifer Glasgow, *supra* note 31.

¹³³ *Id.*

operations, and assessing risk—all of which made the practice of privacy more reliant on following in the footsteps of others.¹³⁴ But with new privacy issues like anonymity, big data, location privacy, and the “Internet of things,” professionals are being challenged in ways that cannot be solved by the current methods of protecting privacy. We are back to needing innovators and pioneers.¹³⁵ Privacy professionals today will need to figure out the guidelines for the next thirty years.

These new pioneers will need new skills but a best model has yet to emerge. Marty Abrams, President of the Centre for Information Policy Leadership at Hunton & Williams LLP, predicts that the two primary skill models that will emerge will be an information technology skill set and an information policy and strategy skill set, and both models will be tested against the new privacy challenges with no predictable winner.¹³⁶ Harriet Pearson, a partner at Hogan Lovells, goes further saying that there is no guarantee that there will be a privacy profession in the next decade, at least not one as we recognize it today.¹³⁷ Privacy roles may grow beyond privacy in a way that strategists will need to incorporate more cyber security and aspects of information governance into their roles.¹³⁸

What may be certain is that as more complicated privacy rules, laws, and regimes develop, it becomes less possible for one person to do it all. No one person will be able to be up to speed on domestic and international issues, the latest in data security, and everything else that is necessary to protect privacy as we look ahead. Further, the growth of privacy concerns will continue to extend the need for privacy expertise across the enterprise. We are already seeing a stratification of roles emerge below the CPO. In the future, we expect that any role involving data in a significant way will require an understanding of core privacy issues. And in a global information economy—where data will be associated with an ever-increasing number of jobs—we may all become privacy professionals.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Telephone Interview with Martin E. Abrams, *supra* note 29.

¹³⁷ Telephone Interview with Harriet Pearson, *supra* note 44.

¹³⁸ *Id.*