

STATE OF NEW YORK

8884--B

IN ASSEMBLY

January 4, 2018

Introduced by M. of A. TITONE -- (at request of the Department of Law)
-- read once and referred to the Committee on Consumer Affairs and
Protection -- committee discharged, bill amended, ordered reprinted as
amended and recommitted to said committee -- again reported from said
committee with amendments, ordered reprinted as amended and recommit-
ted to said committee

AN ACT to amend the general business law and the state technology law,
in relation to notification of a security breach

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. This act shall be known and may be cited as the "Stop Hacks
2 and Improve Electronic Data Security Act (SHIELD Act)".

3 § 2. The article heading of article 39-F of the general business law,
4 as added by chapter 442 of the laws of 2005, is amended to read as
5 follows:

6 NOTIFICATION OF UNAUTHORIZED ACQUISITION OF PRIVATE
7 INFORMATION; DATA SECURITY PROTECTIONS

8 § 3. Subdivisions 1, 2, 3, 5, 6, 7 and 8 of section 899-aa of the
9 general business law, as added by chapter 442 of the laws of 2005, para-
10 graph (c) of subdivision 1, paragraph (a) of subdivision 6 and subdivi-
11 sion 8 as amended by chapter 491 of the laws of 2005 and paragraph (a)
12 of subdivision 8 as amended by section 6 of part N of chapter 55 of the
13 laws of 2013, are amended to read as follows:

14 1. As used in this section, the following terms shall have the follow-
15 ing meanings:

16 (a) "Personal information" shall mean any information concerning a
17 natural person which, because of name, number, personal mark, or other
18 identifier, can be used to identify such natural person;

19 (b) "Private information" shall mean either: (i) personal information
20 consisting of any information in combination with any one or more of the
21 following data elements, when either the data element or the combination
22 of personal information ~~[or]~~ plus the data element is not encrypted, or
23 is encrypted with an encryption key that has also been accessed or
24 acquired:

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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(1) social security number;
(2) driver's license number or non-driver identification card number;
[~~ex~~]

(3) account number, credit or debit card number, in combination with any required security code, access code, [~~ex~~] password or other information that would permit access to an individual's financial account;

(4) account number, credit or debit card number, if circumstances exist wherein such number could be used to access an individual's financial account without additional identifying information, security code, access code, or password; or

(5) biometric information, meaning data generated by electronic measurements of an individual's unique physical characteristics, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of biometric data which are used to authenticate or ascertain the individual's identity;

(ii) a user name or e-mail address in combination with a password or security question and answer that would permit access to an online account; or

(iii) any unsecured protected health information held by a "covered entity" as defined in the health insurance portability and accountability act of 1996 (45 C.F.R. pts. 160, 162, 164), as amended from time to time.

"Private information" does not include publicly available information which is lawfully made available to the general public from federal, state, or local government records.

(c) "Breach of the security of the system" shall mean unauthorized access to or acquisition of, or access to or acquisition without valid authorization, of computerized data that compromises the security, confidentiality, or integrity of [~~personal~~] private information maintained by a business. Good faith access to, or acquisition of [~~personal~~], private information by an employee or agent of the business for the purposes of the business is not a breach of the security of the system, provided that the private information is not used or subject to unauthorized disclosure.

In determining whether information has been accessed, or is reasonably believed to have been accessed, by an unauthorized person or a person without valid authorization, such business may consider, among other factors, indications that the information was viewed, communicated with, used, or altered by a person without valid authorization or by an unauthorized person.

In determining whether information has been acquired, or is reasonably believed to have been acquired, by an unauthorized person or a person without valid authorization, such business may consider the following factors, among others:

(1) indications that the information is in the physical possession and control of an unauthorized person, such as a lost or stolen computer or other device containing information; or

(2) indications that the information has been downloaded or copied; or

(3) indications that the information was used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft reported.

(d) "Consumer reporting agency" shall mean any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means

1 or facility of interstate commerce for the purpose of preparing or
2 furnishing consumer reports. A list of consumer reporting agencies shall
3 be compiled by the state attorney general and furnished upon request to
4 any person or business required to make a notification under subdivision
5 two of this section.

6 2. Any person or business which [~~conducts business in New York state,~~
7 ~~and which~~] owns or licenses computerized data which includes private
8 information shall disclose any breach of the security of the system
9 following discovery or notification of the breach in the security of the
10 system to any resident of New York state whose private information was,
11 or is reasonably believed to have been, accessed or acquired by a person
12 without valid authorization. The disclosure shall be made in the most
13 expedient time possible and without unreasonable delay, consistent with
14 the legitimate needs of law enforcement, as provided in subdivision four
15 of this section, or any measures necessary to determine the scope of the
16 breach and restore the [~~reasonable~~] integrity of the system.

17 (a) Notice to affected persons under this section is not required if
18 the exposure of private information was an inadvertent disclosure by
19 persons authorized to access private information, and the person or
20 business reasonably determines such exposure will not likely result in
21 misuse of such information, or financial or emotional harm to the
22 affected persons. Such a determination must be documented in writing and
23 maintained for at least five years. The person or business shall provide
24 the written determination to the state attorney general within ten days
25 after the determination.

26 (b) If notice of the breach of the security of the system is made to
27 affected persons pursuant to the breach notification requirements under
28 any of the following laws, nothing in this section shall require any
29 additional notice to those affected persons, but notice still shall be
30 provided to the state attorney general, the department of state and the
31 office of information technology services pursuant to paragraph (a) of
32 subdivision eight of this section and to consumer reporting agencies
33 pursuant to paragraph (b) of subdivision eight of this section:

34 (i) regulations promulgated pursuant to Title V of the federal Gramm-
35 Leach-Bliley Act (15 U.S.C. 6801 to 6809), as amended from time to time;

36 (ii) regulations implementing the Health Insurance Portability and
37 Accountability Act of 1996 (45 C.F.R. parts 160 and 164), as amended
38 from time to time, and the Health Information Technology for Economic
39 and Clinical Health Act, as amended from time to time;

40 (iii) part five hundred of title twenty-three of the official compila-
41 tion of codes, rules and regulations of the state of New York, as
42 amended from time to time; or

43 (iv) any other data security rules and regulations of, and the stat-
44 utes administered by, any official department, division, commission or
45 agency of the federal or New York state government as such rules, regu-
46 lations or statutes are interpreted by such department, division,
47 commission or agency or by the federal or New York state courts.

48 3. Any person or business which maintains computerized data which
49 includes private information which such person or business does not own
50 shall notify the owner or licensee of the information of any breach of
51 the security of the system immediately following discovery, if the
52 private information was, or is reasonably believed to have been,
53 acquired by a person without valid authorization.

54 5. The notice required by this section shall be directly provided to
55 the affected persons by one of the following methods:

56 (a) written notice;

(b) electronic notice, provided that the person to whom notice is required has expressly consented to receiving said notice in electronic form and a log of each such notification is kept by the person or business who notifies affected persons in such form; provided further, however, that in no case shall any person or business require a person to consent to accepting said notice in said form as a condition of establishing any business relationship or engaging in any transaction.

(c) telephone notification provided that a log of each such notification is kept by the person or business who notifies affected persons; or

(d) substitute notice, if a business demonstrates to the state attorney general that the cost of providing notice would exceed two hundred fifty thousand dollars, or that the affected class of subject persons to be notified exceeds five hundred thousand, or such business does not have sufficient contact information. Substitute notice shall consist of all of the following:

(1) e-mail notice when such business has an e-mail address for the subject persons, except if the breached information includes an e-mail address in combination with a password or security question and answer that would permit access to the online account, in which case the person or business shall instead provide clear and conspicuous notice delivered to the consumer online when the consumer is connected to the online account from an internet protocol address or from an online location which the person or business knows the consumer customarily uses to access the online account;

(2) conspicuous posting of the notice on such business's web site page, if such business maintains one; and

(3) notification to major statewide media.

6. (a) whenever the attorney general shall believe from evidence satisfactory to him or her that there is a violation of this article he or she may bring an action in the name and on behalf of the people of the state of New York, in a court of justice having jurisdiction to issue an injunction, to enjoin and restrain the continuation of such violation. In such action, preliminary relief may be granted under article sixty-three of the civil practice law and rules. In such action the court may award damages for actual costs or losses incurred by a person entitled to notice pursuant to this article, if notification was not provided to such person pursuant to this article, including consequential financial losses. Whenever the court shall determine in such action that a person or business violated this article knowingly or recklessly, the court may impose a civil penalty of the greater of five thousand dollars or up to ~~[ten]~~ twenty dollars per instance of failed notification, provided that the latter amount shall not exceed ~~[one]~~ two hundred fifty thousand dollars.

(b) the remedies provided by this section shall be in addition to any other lawful remedy available.

(c) no action may be brought under the provisions of this section unless such action is commenced within ~~[two]~~ three years ~~[immediately]~~ after either the date ~~[of the act complained of or the date of discovery of such act]~~ on which the attorney general became aware of the violation, or the date of notice sent pursuant to paragraph (a) of subdivision eight of this section, whichever occurs first.

7. Regardless of the method by which notice is provided, such notice shall include contact information for the person or business making the notification, the telephone numbers and websites of the relevant state and federal agencies that provide information regarding security breach response and identity theft prevention and protection information, and a

1 description of the categories of information that were, or are reason-
2 ably believed to have been, accessed or acquired by a person without
3 valid authorization, including specification of which of the elements of
4 personal information and private information were, or are reasonably
5 believed to have been, so accessed or acquired.

6 8. (a) In the event that any New York residents are to be notified,
7 the person or business shall notify the state attorney general, the
8 department of state and the [~~division of state police~~] office of infor-
9 mation technology services as to the timing, content and distribution of
10 the notices and approximate number of affected persons and shall provide
11 a copy of the template of the notice sent to affected persons. Such
12 notice shall be made without delaying notice to affected New York resi-
13 dents.

14 (b) In the event that more than five thousand New York residents are
15 to be notified at one time, the person or business shall also notify
16 consumer reporting agencies as to the timing, content and distribution
17 of the notices and approximate number of affected persons. Such notice
18 shall be made without delaying notice to affected New York residents.

19 § 4. The general business law is amended by adding a new section 899-
20 bb to read as follows:

21 § 899-bb. Data security protections. 1. Definitions. (a) "Compliant
22 regulated entity" shall mean any person or business that is subject to,
23 and in compliance with, any of the following data security requirements:

24 (i) regulations promulgated pursuant to Title V of the federal Gramm-
25 Leach-Bliley Act (15 U.S.C. 6801 to 6809), as amended from time to time;

26 (ii) regulations implementing the Health Insurance Portability and
27 Accountability Act of 1996 (45 C.F.R. parts 160 and 164), as amended
28 from time to time, and the Health Information Technology for Economic
29 and Clinical Health Act, as amended from time to time;

30 (iii) part five hundred of title twenty-three of the official compila-
31 tion of codes, rules and regulations of the state of New York, as
32 amended from time to time; or

33 (iv) any other data security rules and regulations of, and the stat-
34 utes administered by, any official department, division, commission or
35 agency of the federal or New York state government as such rules, regu-
36 lations or statutes are interpreted by such department, division,
37 commission or agency or by the federal or New York state courts.

38 (b) "Private information" shall have the same meaning as defined in
39 section eight hundred ninety-nine-aa of this article.

40 (c) "Small business" shall mean any person or business with (i) fewer
41 than fifty employees; (ii) less than three million dollars in gross
42 annual revenue in each of the last three fiscal years; or (iii) less
43 than five million dollars in year-end total assets, calculated in
44 accordance with generally accepted accounting principles.

45 2. Reasonable security requirement. (a) Any person or business that
46 owns or licenses computerized data which includes private information of
47 a resident of New York shall develop, implement and maintain reasonable
48 safeguards to protect the security, confidentiality and integrity of the
49 private information including, but not limited to, disposal of data.

50 (b) A person or business shall be deemed to be in compliance with
51 paragraph (a) of this subdivision if it either:

52 (i) is a compliant regulated entity as defined in subdivision one of
53 this section; or

54 (ii) implements a data security program that includes the following:

55 (A) reasonable administrative safeguards such as the following, in
56 which the person or business:

1 (1) designates one or more employees to coordinate the security
2 program;

3 (2) identifies reasonably foreseeable internal and external risks;

4 (3) assesses the sufficiency of safeguards in place to control the
5 identified risks;

6 (4) trains and manages employees in the security program practices and
7 procedures;

8 (5) selects service providers capable of maintaining appropriate safe-
9 guards, and requires those safeguards by contract; and

10 (6) adjusts the security program in light of business changes or new
11 circumstances; and

12 (B) reasonable technical safeguards such as the following, in which
13 the person or business:

14 (1) assesses risks in network and software design;

15 (2) assesses risks in information processing, transmission and stor-
16 age;

17 (3) detects, prevents and responds to attacks or system failures; and

18 (4) regularly tests and monitors the effectiveness of key controls,
19 systems and procedures; and

20 (C) reasonable physical safeguards such as the following, in which the
21 person or business:

22 (1) assesses risks of information storage and disposal;

23 (2) detects, prevents and responds to intrusions;

24 (3) protects against unauthorized access to or use of private informa-
25 tion during or after the collection, transportation and destruction or
26 disposal of the information; and

27 (4) disposes of private information within a reasonable amount of time
28 after it is no longer needed for business purposes by erasing electronic
29 media so that the information cannot be read or reconstructed.

30 (c) A small business as defined in paragraph (c) of subdivision one of
31 this section complies with subparagraph (ii) of paragraph (b) of subdivi-
32 sion two of this section if the small business's security program
33 contains reasonable administrative, technical and physical safeguards
34 that are appropriate for the size and complexity of the small business,
35 the nature and scope of the small business's activities, and the sensi-
36 tivity of the personal information the small business collects from or
37 about consumers.

38 (d) Any person or business that fails to comply with this subdivision
39 shall be deemed to have violated section three hundred forty-nine of
40 this chapter, and the attorney general may bring an action in the name
41 and on behalf of the people of the state of New York to enjoin such
42 violations and to obtain civil penalties under section three hundred
43 fifty-d of this chapter.

44 (e) Nothing in this section shall create a private right of action.

45 § 5. Paragraph (a) of subdivision 1 and subdivisions 2, 3, 6, 7 and 8
46 of section 208 of the state technology law, paragraph (a) of subdivision
47 1 and subdivisions 3 and 8 as added by chapter 442 of the laws of 2005,
48 subdivision 2 and paragraph (a) of subdivision 7 as amended by section 5
49 of part N of chapter 55 of the laws of 2013 and subdivisions 6 and 7 as
50 amended by chapter 491 of the laws of 2005, are amended to read as
51 follows:

52 (a) "Private information" shall mean either: (i) personal information
53 consisting of any information in combination with any one or more of the
54 following data elements, when either the data element or the combination
55 of personal information ~~[ex]~~ plus the data element is not encrypted or

1 encrypted with an encryption key that has also been accessed or
2 acquired:

3 (1) social security number;

4 (2) driver's license number or non-driver identification card number;
5 ~~[or]~~

6 (3) account number, or credit or debit card number, in combination
7 with any required identifying information, security code, access code,
8 or password which would permit access to an individual's financial
9 account;

10 (4) account number, or credit or debit card number, if circumstances
11 exist wherein such number could be used to access to an individual's
12 financial account without additional identifying information, security
13 code, access code, or password; or

14 (5) biometric information, meaning data generated by electronic meas-
15 urements of an individual's unique physical characteristics, such as
16 fingerprint, voice print, or retina or iris image, or other unique phys-
17 ical representation or digital representation which are used to authen-
18 ticate or ascertain the individual's identity;

19 (ii) a user name or e-mail address in combination with a password or
20 security question and answer that would permit access to an online
21 account; or

22 (iii) any unsecured protected health information held by a "covered
23 entity" as defined in the health insurance portability and accountabil-
24 ity act of 1996 (45 C.F.R. pts. 160, 162, 164), as amended from time to
25 time.

26 "Private information" does not include publicly available information
27 that is lawfully made available to the general public from federal,
28 state, or local government records.

29 2. Any state entity that owns or licenses computerized data that
30 includes private information shall disclose any breach of the security
31 of the system following discovery or notification of the breach in the
32 security of the system to any resident of New York state whose private
33 information was, or is reasonably believed to have been, accessed or
34 acquired by a person without valid authorization. The disclosure shall
35 be made in the most expedient time possible and without unreasonable
36 delay, consistent with the legitimate needs of law enforcement, as
37 provided in subdivision four of this section, or any measures necessary
38 to determine the scope of the breach and restore the ~~[reasonable]~~ integ-
39 rity of the data system. The state entity shall consult with the state
40 office of information technology services to determine the scope of the
41 breach and restoration measures. Within ninety days of the notice of the
42 breach, the office of information technology services shall deliver a
43 report on the scope of the breach and recommendations to restore and
44 improve the security of the system to the state entity.

45 (a) Notice to affected persons under this section is not required if
46 the exposure of private information was an inadvertent disclosure by
47 persons authorized to access private information, and the state entity
48 reasonably determines such exposure will not likely result in misuse of
49 such information, or financial or emotional harm to the affected
50 persons. Such a determination must be documented in writing and main-
51 tained for at least five years. The state entity shall provide the writ-
52 ten determination to the state attorney general within ten days after
53 the determination.

54 (b) If notice of the breach of the security of the system is made to
55 affected persons pursuant to the breach notification requirements under
56 any of the following laws, nothing in this section shall require any

1 additional notice to those affected persons, but notice still shall be
2 provided to the state attorney general, the department of state and the
3 office of information technology services pursuant to paragraph (a) of
4 subdivision seven of this section and to consumer reporting agencies
5 pursuant to paragraph (b) of subdivision seven of this section:

6 (i) regulations promulgated pursuant to Title V of the federal Gramm-
7 Leach-Bliley Act (15 U.S.C. 6801 to 6809), as amended from time to time;

8 (ii) regulations implementing the Health Insurance Portability and
9 Accountability Act of 1996 (45 C.F.R. parts 160 and 164), as amended
10 from time to time, and the Health Information Technology for Economic
11 and Clinical Health Act, as amended from time to time;

12 (iii) part five hundred of title twenty-three of the official compila-
13 tion of codes, rules and regulations of the state of New York, as
14 amended from time to time; or

15 (iv) any other data security rules and regulations of, and the stat-
16 utes administered by, any official department, division, commission or
17 agency of the federal or New York state government as such rules, regu-
18 lations or statutes are interpreted by such department, division,
19 commission or agency or by the federal or New York state courts.

20 3. Any state entity that maintains computerized data that includes
21 private information which such agency does not own shall notify the
22 owner or licensee of the information of any breach of the security of
23 the system immediately following discovery, if the private information
24 was, or is reasonably believed to have been, acquired by a person with-
25 out valid authorization.

26 6. Regardless of the method by which notice is provided, such notice
27 shall include contact information for the state entity making the
28 notification, the telephone numbers and websites of the relevant state
29 and federal agencies that provide information regarding security breach
30 response and identity theft prevention and protection information and a
31 description of the categories of information that were, or are reason-
32 ably believed to have been, accessed or acquired by a person without
33 valid authorization, including specification of which of the elements of
34 personal information and private information were, or are reasonably
35 believed to have been, so accessed or acquired.

36 7. (a) In the event that any New York residents are to be notified,
37 the state entity shall notify the state attorney general, the department
38 of state and the state office of information technology services as to
39 the timing, content and distribution of the notices and approximate
40 number of affected persons and provide a copy of the template of the
41 notice sent to affected persons. Such notice shall be made without
42 delaying notice to affected New York residents.

43 (b) In the event that more than five thousand New York residents are
44 to be notified at one time, the state entity shall also notify consumer
45 reporting agencies as to the timing, content and distribution of the
46 notices and approximate number of affected persons. Such notice shall be
47 made without delaying notice to affected New York residents.

48 8. The state office of information technology services shall develop,
49 update and provide regular training to all state entities relating to
50 best practices for the prevention of a breach of the security of the
51 system.

52 9. Any entity listed in subparagraph two of paragraph (c) of subdivi-
53 sion one of this section shall adopt a notification policy no more than
54 one hundred twenty days after the effective date of this section. Such
55 entity may develop a notification policy which is consistent with this

1 section or alternatively shall adopt a local law which is consistent
2 with this section.
3 § 6. This act shall take effect on the ninetieth day after it shall
4 have become a law; provided, however, that section four of this act
5 shall take effect on the two hundred fortieth day after it shall have
6 become a law.