

AMENDMENT No 1

Sen. Therriault

OFFERED IN THE SENATE

TO: SCS CSHB 65(FIN), Draft Version "F"

- 1 Page 2, line 19:
- 2 Delete "or"
- 3 Insert "and"

line 24

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**MEMORANDUM**

April 11, 2008

**SUBJECT:** SCS CSHB 65(FIN) relating to personal information  
(Work Order No. 25-LS0311F)

**TO:** Senator Gene Therriault  
Attn: Heather Brakes

**FROM:** *JB*  
Theresa Bannister  
Legislative Counsel

You have asked for an analysis of sec. 45.48.010(c) as to any loopholes that would allow a company whose information was breached to not have to notify individuals. You have provided some questions to be used in the analysis. The amendment reads as follows:

(c) Notwithstanding (a) of this section, disclosure is not required if, after an appropriate investigation or after written notification to the attorney general of this state, the covered person determines that there is not a reasonable likelihood that harm to the consumers whose personal information has been acquired has resulted or will result from the breach. The determination shall be documented in writing and the documentation shall be maintained for five years.

One significant loophole is that the disclosure of the breach is not automatic (as it now is in (a)) when there is a breach, because the information collector determines, under the criteria of the new language, whether notification is required. The criteria for determining whether disclosure is required are not clear and are subject to interpretation. The time for the information collector to make its determination is open-ended, whereas for (a), as indicated by (b), the information collector must make the disclosure "in the most expeditious time possible and without unreasonable delay."<sup>1</sup> There is no requirement when the required documentation is to be made available and no requirement that the information collector must provide the documentation to anyone.

As I have indicated, the criteria for the determination are not clear and are subject to interpretation by the information collector, by other persons, and by the courts. What constitutes an "appropriate investigation" is not indicated. It is likely to be interpreted to

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<sup>1</sup> Except as provided by sec. 45.48.010(b) and 45.48.020.

Senator Gene Therriault  
April 11, 2008  
Page 2

require that the investigation be suitable or fit for the purpose, but the parameters of that in a particular situation are not indicated.

The information collector is not required to disclose the breach to anyone if the information collector, after an appropriate investigation, makes its own determination that there is not a reasonable likelihood that harm has resulted or will result. It is possible that no person other than the information collector will know that the breach occurred, with the result that no person will be monitoring compliance with the criteria.

With regard to the enforcing agencies, sec. 45.48.080(c) states that the Department of Administration may enforce sec. 45.48.080(a) against a governmental agency. In sec. 45.48.080(b), the violations of a non-governmental agency are unfair or deceptive acts under AS 45.50.471 - 45.50.561, and the Attorney General enforces AS 45.50.471 - 45.50.561.<sup>2</sup>

The term "reasonable likelihood" requires a judgment call by the information collector, not by an unbiased third party of when a consumer will suffer harm. The term also allows the information collector not to disclose if the information collector determines that the likelihood is not a reasonable one. Because the judgment call is based on a reasonable likelihood of harm to the consumers whose information has been acquired, this is a different test from sec. 45.48.010(a), which requires disclosure if there is a breach.<sup>3</sup> Leaving the call to the information collector allows the information collector to make the determination of what is considered harmful for the consumer. In addition, an information collector may not be aware of how an individual consumer is actually harmed by the breach.

If I may be of further assistance, please advise.

TLB:med  
08-276.med

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<sup>2</sup> See AS 45.50.501.

<sup>3</sup> Except as provided in secs. 45.48.010(b) and 45.48.020.