
# White Hat Privilege

## The Legal Landscape for a Cybersecurity Professional Seeking to Safeguard Sensitive Client Data

GOODWIN

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# White Hat Privilege

## What legal or technical tools can security experts use to protect customer data?

# Protect Sensitive Customer Data from Whom?

- The public
  - Third parties (e.g., competitors)
- Bad actors
  - Hackers, enemies, opportunists
- The government
  - Courts, law enforcement

# Tool #1: Privilege

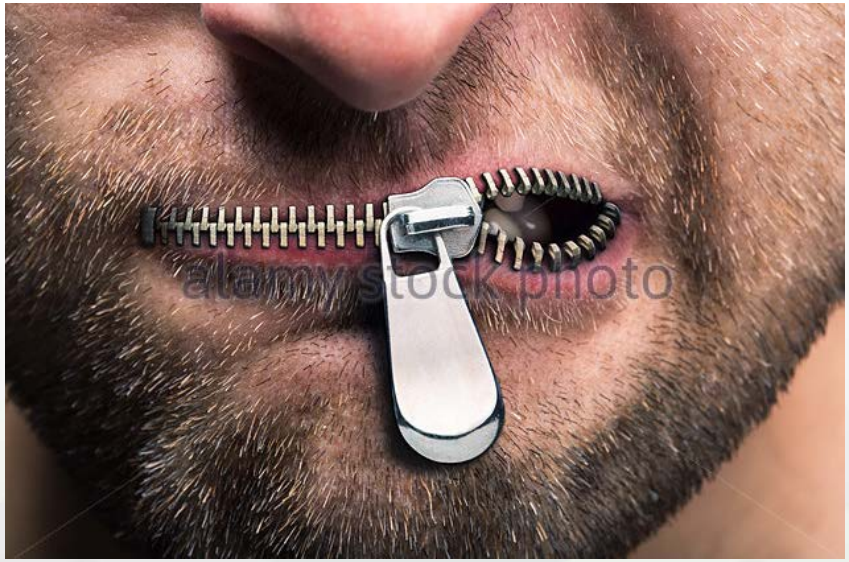
- Limited evidentiary protections
- Protects against disclosure to the government or to third parties in an adversarial context
  - Criminal cases
  - Civil cases
  - Subpoena demands

# Attorney-Client Privilege

- "A gentleman does not give away matters confided to him."
  - Hazard, Geoffrey C. Jr., "An Historical Perspective on the Lawyer-Client Privilege" (1978), *Yale Law School Faculty Scholarship Series*, Paper 2406.

# Lawyer's Duty of Confidentiality

- "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ."
  - American Bar Association Model Rules of Professional Conduct, Rule 1.6.



## Security Consultant - Client Privilege???

- Nope

## *In re Experian Data Breach Litigation* (C.D. Cal., May 18, 2017)

- Experian suffered data breach
- Experian immediately hired outside legal counsel, who retained Mandiant to investigate
- Class action lawsuit against Experian
- Experian's lawyers refused to provide the Mandiant report and documents to plaintiffs
- Mandiant report and documents protected under work product performed in "anticipation of litigation"

# Takeaway

- Consider when a situation might benefit from attorney-client privilege or work-product privilege.
- Get outside lawyers involved early to help navigate how to protect information from legal demands.

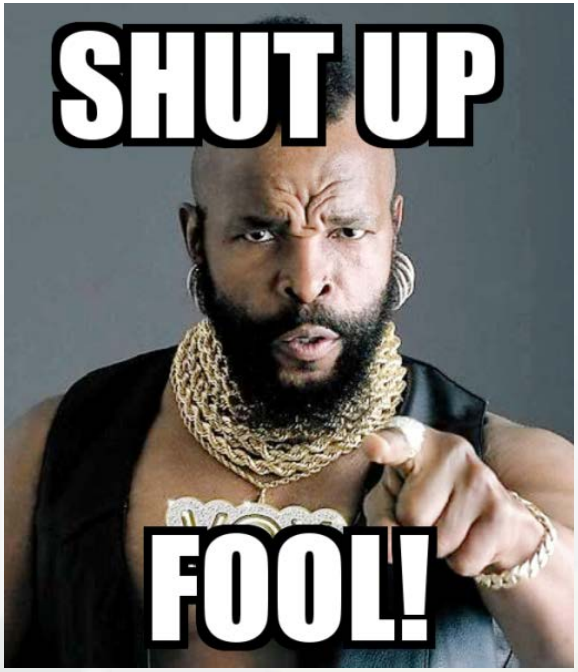
# Tool #2:  Contractual Protections

# It’s all about the contract, dummy.

- DTR talk
  - Who will be performing the services?
  - What will they be doing?
  - What tools will they use?
  - Where will they be doing it?
  - When is it to be done?
  - What is the end product?

# It’s all about the contract, dummy.

- Keep yo’ trap shut.
  - Confidentiality clauses
  - NDAs



# It’s all about the contract, dummy.

- Oops, did I do that?
  - Allocate risk and limit liability
  - Insurance coverage?

# It’s all about the contract, dummy.

- That’s mine!
  - Intellectual property ownership and use

# It’s all about the contract, dummy.

- Termination clause
  - When you discover you are married to a Scientologist

# It’s all about the contract, dummy.

## BAD CONTRACT

USE SMALLER FONT

## GOOD CONTRACT

USE SMALLER FONT
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# But not ALL about the contract, dummy.

- Data privacy laws and regulations
- Export control regulations
- Financial regulations
- Healthcare data regulations
- Public company regulations
- Subpoenas; technical assistance demands
- Etc.

# But not ALL about the contract, dummy.

- Data privacy laws and regulations
  - Interests are mostly aligned – security for individuals' personally identifiable information
  - What about data breach notification laws?
    - State law

# But not ALL about the contract, dummy.

- Export control laws
  - ITAR-controlled data or technology?
  - EAR controlled technology?


# But not ALL about the contract, dummy.

- Pay attention to Wassenaar
  - “Intrusion software” controls?
  - 0-day exploits and related technology

## Tool #3: Technical Mechanisms

- Can protect against:
  - Public
  - Bad actors
  - The government

## Tool #3: Technical Mechanisms

- Identify where information is stored
  - Internal corporate network
  - Private servers
  - Public/private cloud
  - Email
  - Chat (slack, basecamp, hipchat)
  - Laptops
  - Other mobile devices (text?)

## Tool #3: Technical Mechanisms

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  - Laptops
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# Physical movement of electronic devices

- What are your rights if government agents want to search your electronic devices?

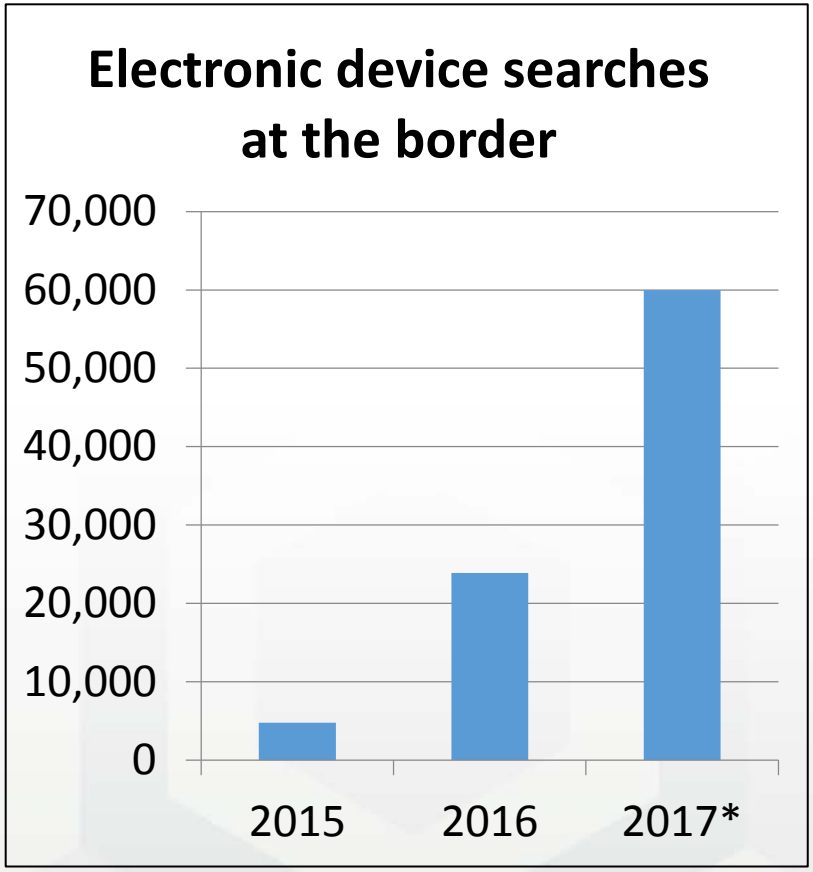
# Domestic travel

- Department of Homeland Security (DHS)
  - Transportation Security Administration (TSA)
    - Charged with “screening” for safety at the airport
    - No right to conduct a comprehensive “search” of data on your electronic devices
    - Constitutional protections apply to domestic travel

# Entry into the United States

- Department of Homeland Security (DHS)
  - Customs and Border Protection (CBP)
    - Limited Legal Protections
    - DHS Privacy Impact Assessment for the Border Searches of Electronic Devices and CBP fact sheet

# Hand over your device; give me your data




*2017 data projection

# Hand over your device; give me your data

- Think you can say no?
  - CBP has broad authority at the border
  - Limited 4th amendment protection
  - Broad authority to conduct cursory searches
  - Forensic searches more limited in *some states*

# Hand over your device; give me your data

- Hold up a minute . . .
  - Destroying evidence: CRIME
  - Making a false statement: CRIME
  - Taking the device?
    Get a receipt.
  - Withholding your password
- Don’t count on legal protections

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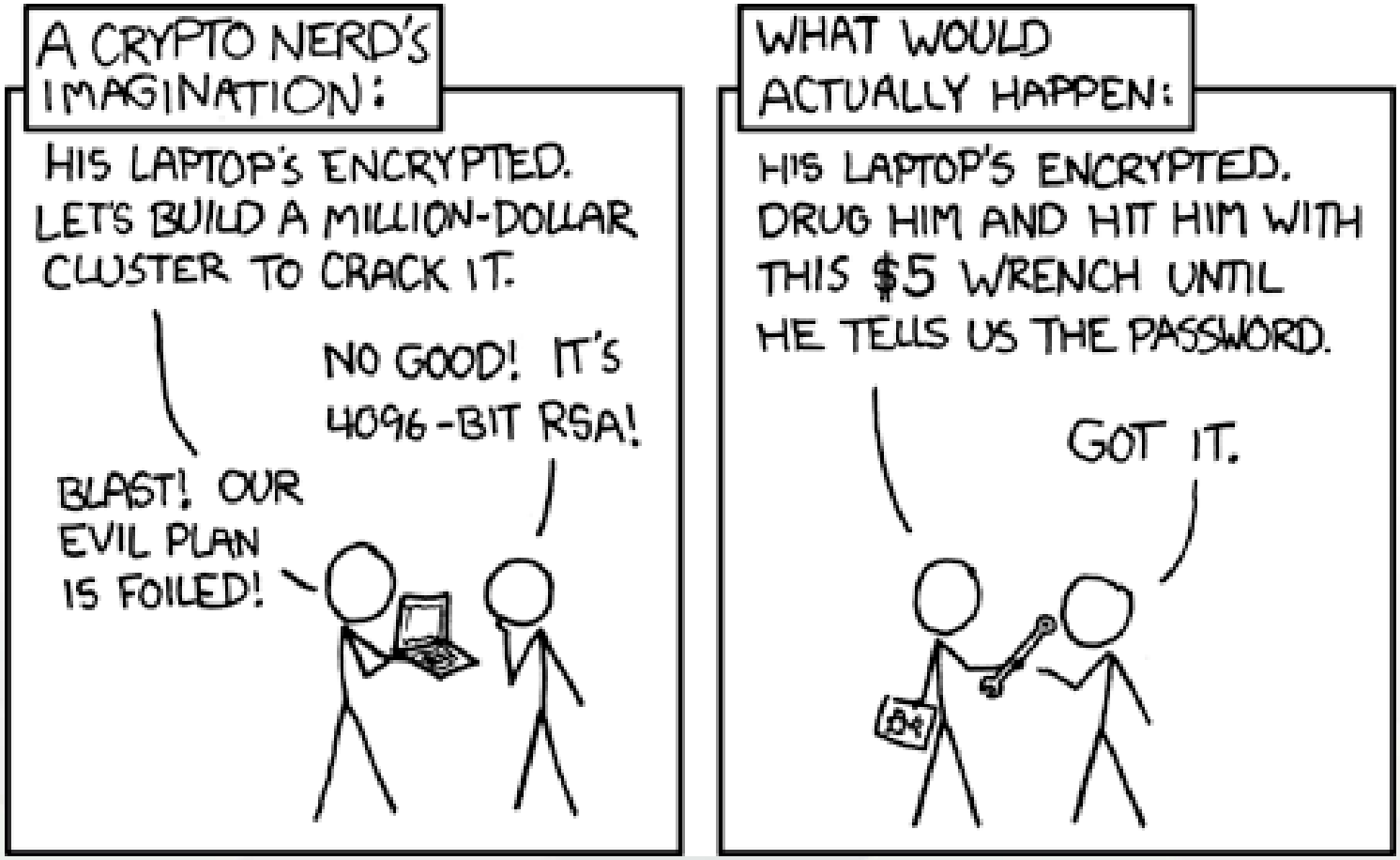

# Hand over your device; give me your data

- Takeaway
  - Don’t count on legal protections
  - Don’t make false statements
  - Don’t destroy evidence

# Hand over your device; protect your data

- Limit data stored and downloaded on the device
- All device data should be encrypted
- Disable automatic logins to email, cloud storage and social media
- Don’t give your password
- Assert privilege?
- Contact employer or lawyer
- Make them work for it
- Be creative . . .

# Technical tools

- Encrypt data and separately send key?
- Other technical tools to encrypt data for device transport
  - 1password Travel Mode tool
  - Kali Linux Full Disk Encryption with LVM / LUKS NUKE feature


# The End

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