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KEEPING BUSINESS OUT OF THE BEDROOM: PROTECTING PERSONAL PRIVACY INTERESTS FROM THE RETAIL WORLD

I. INTRODUCTION

The federal government and private companies maintain extensive database records of detailed and highly sensitive personal information in personality profile lists.¹ The private data incorporated into these lists touch on nearly every aspect of an individual's life, and originates from commercial contracts such as a magazine subscription or a credit card application.² Some companies seek to buy or rent personality profile lists from other businesses ("list creators") or the federal government in

1. See Robert Moskowitz, *Protecting Your Privacy Requires Planning*, INVESTOR'S BUS. DAILY (L.A.), Sept. 16, 1994, at News For You 1. In the United States, there are about five billion computerized records. *Id.* In addition, three credit reporting companies maintain 450 million of those records. *Id.* There are also nearly two hundred separate federal government agencies and departments that openly maintain another two thousand databases, each with tens of millions of records containing private information. *Id.* See also Paula Crawford Squires, *Transactions Go Into a Database; Businesses Compile Dossiers on Customers*, RICHMOND TIMES DISPATCH, July 28, 1996, at A12 (stating that the Direct Marketing Association, which is the largest marketing association, estimates that there are at least fifteen thousand consumer mailing lists, containing two billion names, not including duplicates).

2. See, e.g., Squires, *supra* note 1, at A12 (stating that personal lifestyle and demographic information which originates from consumer registration questionnaires can end up on a database which is then sold to other businesses). See also Kevin DeMarrais, *Big Brother Is Watching Your Database*, THE RECORD (Hackensack, N.J.), Apr. 30, 1995, at A1. Some supermarkets now offer customers a club card that entitles members to discounts on groceries. *Id.* However, supermarkets use these club cards to track individual customers' specific purchases, such as brands of home pregnancy test kits and over-the-counter medicine. *Id.* In 1993, Johnson & Johnson created a list containing 4.4 million people who called a toll-free number for free samples of a product, and then tried to sell the list to other companies. *Id.* See also R.J. Ignelzi, *Mail and Telejunk U.S. Marketers Have Your Number, Your Age and Shoe Size, Too*, S. D. UNION-TRIB., July 4, 1995, at E1. Mail solicitors possess personal information, and they also are likely to be privy to a consumer's income, age, marital status, and level of education. *Id.* See also Stephen M. Silverman, *Information Backlash*, INC., June, 1995, at Point of Sale (stating that businesses deriving addresses from credit card numbers is known as "credit card siphoning").

order to locate new markets and to increase sales.³ Specifically, companies that obtain personality profile lists analyze the private data that individuals initially disclose in confidence to the list creator, and then target mail solicitations to those persons who, based on their profile, are most likely to purchase their product or service.⁴ Some companies usurp list creators and create their own personality profile lists; they also earn additional profits by selling their lists to other businesses.⁵ These target marketing schemes result in tremendous amounts of junk mail for consumers.⁶

Consequently, when consumers receive junk mail from other companies who were not initially privy to their personal information, they feel

3. See Sonia Ossorio, *With Target Marketing, Lists Get More Sophisticated*, GANNETT SUBURBAN NEWSPAPERS (Harrison, N.Y.), Mar. 28, 1994, at B10 (stating that marketing companies size up the public by locating records containing credit card charges, credit reports, mail orders, memberships, and product warranties). See, e.g., Squires, *supra* note 1, at A12 (stating that one company, R.L. Polk & Co. of Detroit, Michigan, sells their personality profiles at the rate of \$74 per 1,000 names). See also, e.g., Larry Jaffee, *27 Million E-Mail Address File Shopped; List Sparks Formation of Internet Regulatory Trade Association*, D.M. News, Jan. 15, 1996, at 4. E-mail America sells e-mail address lists to the general public. *Id.* In 1995, a list of 20 million e-mail addresses cost \$359.00. *Id.* See also *HMG Marketing Assoc. v. Freeman*, 523 F. Supp. 11, 16 (S.D.N.Y. 1980) (demonstrating an instance where a business attempted to obtain a personality profile list from the General Services Administration, a government agency).

4. DeMarrais, *supra* note 2, at A1. Metromail Corporation possesses several marketing lists. *Id.* One of their lists, a medical database, contains fifteen million patients, and drug makers purchase portions of these lists to send solicitation letters to these patients who need their specific pharmaceutical products. *Id.* See also, e.g., Squires, *supra* note 1, at A12 (reporting how one company, a list creator, received personal information from some businesses, created a lifestyle database containing 36 million people, and then sold that personal information to other businesses, such as catalog mail-order sales, finance, insurance, and credit card companies).

5. See, e.g., Squires, *supra* note 1, at A12 (stating that *U.S. News and World Report*, a world-wide magazine, sells their list containing names of 1.6 million subscribers, called U.S. News Powerbase, along with other personal information, to other businesses). See also, e.g., DeMarrais, *supra* note 2, at A1. The personal information that a consumer discloses in almost every contact with the outside world is stored on some type of a computer file, which ultimately gets incorporated into a personality profile. *Id.* For example, American Airlines offers the public a frequent flier club called American Airlines Advantage Club. *Id.* American Airlines keeps track of members' choice of airlines, hotels, and car rentals. *Id.* Then, American Airlines shares this information with business partners, such as Avis, Holiday Inn, and Citibank. *Id.* Subsequently, these partners use this information to target specific consumers. *Id.*

6. See Ossorio, *supra* note 3, at B10. According to the Direct Marketing Association in New York, from 1987 to 1992, Americans received approximately 3.8 million tons of bulk-rate junk mail every year which, by volume, is about sixty million pieces a year. *Id.* See also Nora Carrera, *One Man's Junk Is Another's Mail*, ROCKY MOUNTAIN NEWS (Denver, Co.), Sept. 25, 1995, at 38A (stating that 65.7 billion pieces of mail solicitations were delivered in 1994).

that the list creator has invaded their privacy.⁷ The personal information that consumers initially disclose to a business in confidence has become public knowledge and, subsequently, is shared between all types of businesses.⁸ Moreover, consumers are helpless in protecting their right to privacy when they have no choice but to disclose their personal information to the list creators.⁹

From the businesses' perspective, personality profile lists enable them to improve their customers' shopping convenience and enhance customer service.¹⁰ Thus, a conflict of interests exists between an individual's right to keep personal information private, and a business' interest in the disclosure of information for commercial use.¹¹

7. See, e.g., Joe Queenan, *My Mail Insecurity; What If the Neighbors See What the Junk Marketers Send Me?*, THE WASH. POST, Oct. 22, 1995, at C5. Mr. Ram Avrahami sued U.S. News and World Report ("U.S. News") for selling his name and address to a second publication company upon receiving subscription offers from the second publication. *Id.* He argued that by selling his personal information, U.S. News invaded his privacy. *Id.* This case was brought in a Virginia state court. *Id.* Although this case was originally dismissed for lack of jurisdiction, Avrahami is appealing to the Virginia Supreme Court. *Virginia Case Fights Unauthorized Sale of Names*, NEWSBYTES, Oct. 11, 1996. See also Carrera, *supra* note 6, at 38A (stating that in a 1991 Lou Harris and Associates survey, commissioned by Equifax, a credit bureau, 55% of the 1,255 people surveyed felt that junk mail is an invasion of privacy).

8. For example, if a consumer rents a sexually explicit movie from a movie rental store, the rental store could sell the member's name, address, and movie preferences to a mail order catalog company, and that company subsequently could sell this information to a magazine company. In the process, a personality profile exists that contains this consumer's preferences—all just from renting a movie. See, e.g., G. Bruce Knecht, *Sneak Attack On Direct-Mail Industry*, WALL ST. J., Oct. 15, 1995, at Business 8 (explaining that U.S. News and World Report sells the names of its subscribers for \$80 per 1,000 names to the public).

9. *Id.* To subscribe to a magazine, a consumer obviously must give the publisher his or her name and address. See also Squires, *supra* note 1, at A12 (stating that many consumers do not know that filling out product registration forms will result in a personality profile of them). See also *Private Eyes*, MARKETING TOOLS, Jan./Feb. 1996, at 31 (reporting an Equifax-Harris study where in 1995 80% of those individuals surveyed believe that consumers have lost all control over how personal information about them is circulated and used by companies).

10. See Ignelzi, *supra* note 2, at E1 (explaining that personal information allows marketers to reach those individuals who are more likely to purchase their goods or services). See also Ossorio, *supra* note 3, at B10 (stating that marketers argue that mail solicitations are beneficial to customers where more products are offered at lower prices). *But see* Kelly Barron & Jay Greene, *They Just Keep Trying*, ORANGE COUNTY REG., Apr. 22, 1996, at D3. Some companies can offer discounts on their goods when they utilize personality profile lists, because they send fewer mail advertisements, and they send them only to those persons who are likely to purchase the product. *Id.* However, many consumers sometimes would still rather not receive the junk mail at all. *Id.*

11. See, e.g., Ignelzi, *supra* note 2, at E1 (quoting Robert Ellis Smith, editor of Privacy Journal, as stating, "using one's name without compensation or consent raises substantial privacy concerns . . . people have the right to know when information is being collected, and

Congress partially addressed this public concern by passing the Freedom of Information Act ("FOIA").¹² Federal courts have consistently interpreted the FOIA as prohibiting disclosures of personal information contained in government records to businesses, when sought for commercial use¹³ by viewing the disclosures of information as an invasion of an individual's privacy.¹⁴ When individuals challenge list creators from selling their personal information to other businesses, however, state law controls.¹⁵ Although a majority of states have not encountered this type of action,¹⁶ nearly all states lack applicable statutes for this type of privacy invasion.¹⁷ Instead, state courts have adopted Restatement (Second) of Torts ("Restatement")¹⁸ standards into their common laws.¹⁹

A small number of businesses, however, initially give individuals an opportunity to protect their privacy interests and notify the company if

to chose whether to make it available"). See also DeMarrais, *supra* note 2, at A1. Alan Westin, a Columbia University professor and a founder of the Privacy and American Newsletter, was quoted as stating that people want to be assured that the information contained in personality profiles is not going to be misused. *Id.* Marketers, however, argue that they have the right to sell and advertise their products under the freedom of speech. *Id.*

12. 5 U.S.C. § 552 (1995).

13. See, e.g., *Minnis v. United States Dep't of Agric.*, 737 F.2d 784, 787 (9th Cir. 1984) (holding pursuant to FOIA that a lodge owner cannot obtain a list of names and addresses from the Forest Service to locate individuals to send mail solicitations); *HMG*, 523 F. Supp. at 14 (holding under FOIA that the plaintiff, a business, cannot for commercial purposes force a government agency to disclose records of persons who ordered historic coins).

14. See *Minnis*, 737 F.2d at 787.

15. Few states have entertained this type of personal privacy infringement action. See, e.g., *Dwyer v. American Express*, 652 N.E.2d 1351, 1353-54 (Ill. App. Ct. 1995), *appeal denied*, 662 N.E.2d 423 (Ill. 1996) (applying Illinois common law to the case where American Express, a credit card business, rented its cardholder list to another business).

16. This does not include unreported cases in small claims court. See, e.g., *Barron & Greene*, *supra* note 10, at D3 (reporting how a consumer won \$1,021.00 against Computer City for breaching a consumer contract in a California small claims court). Only two states, Ohio and Illinois, have cases in reporters for businesses selling mailing lists. See *Dwyer*, 652 N.E.2d at 1353; *Shibley v. Time*, 341 N.E.2d 341, 345 (Ohio Ct. App. 1975).

17. Although several states have appropriation statutes, state courts have not applied them to a case concerning the sale of consumer information from one business to another business. See, e.g., *Dwyer*, 652 N.E.2d at 1353. *Dwyer*, a case of first impression in Illinois, applied the common law of other states and legal treatises. *Id.* at 1354-55. *Dwyer* represents the most recent decision in this area of law. In *Dwyer* there was no statutory law applied to the issue of the transfer of the mailing list. *Id.* Also, many state invasion of privacy statutes parallel the Restatement, and discussing the Restatement serves as a good model for all states. See, e.g., FLA. STAT. ANN. § 540.08 (West 1995). See also Tim Reason, *Geographic Information Systems*, ELECTRICAL WORLD, May, 1995, at 79. Privacy laws vary from state to state, and their application depends on whether the personality profile list originates from a public or private entity. *Id.*

18. See RESTATEMENT (SECOND) OF TORTS § 652 (1977).

19. *Id.* See also, e.g., *Dwyer* 652 N.E.2d at 1353-54 (adopting the Restatement as the framework for the analysis of an Illinois misappropriation case).

they do not want their personal information released²⁰—an opt-out provision.²¹ Individuals who accept the opt-out provision thereby preclude the list creator from renting or selling their personality profile to other businesses.²² Nevertheless, individuals' general lack of control in keeping their personal information out of the hands of businesses for commercial exploitation is a privacy dilemma that frustrates consumers.²³

This Comment focuses on the inconsistent state and federal consumer privacy standards when government agencies and businesses re-release personal information to other businesses.²⁴ Within this setting, Section II of this Comment discusses the big business of personality profile lists, and examines what personal information courts consider protected information pursuant to the FOIA and Restatement standards. Section III argues that the state/federal personal privacy standard dilemma could be alleviated by applying a quasi-FOIA standard to state law concerning consumer-business transactions, or in the alternative, by drafting state legislation requiring opt-out provisions in business-consumer contracts. Finally, Section IV of this Comment demonstrates the need for a solution to this privacy conflict in light of future commercial and technological trends.

II. BACKGROUND

A. MARKETERS AND PERSONALITY PROFILE LISTS

Businesses constantly develop innovative marketing schemes to maximize their profits;²⁵ and in today's high-tech information world,²⁶

20. See, e.g., John N. Frank, *The Brouhaha Over Privacy*, CREDIT CARD MGMT., May, 1996, at 32-35 (recognizing that Citibank is now offering opt-out provisions).

21. See Beth Negus & Lynn Jones, *An Outing Frenzy; Prodigy and Other On-Line Services Begin Promoting E-Mail Opt-Out Availability*, DIRECT, Oct., 1995, at 1. An opt-out provision, if signed by a consumer, keeps the soliciting company from releasing the consumer's data to other businesses. *Id.*

22. See also *What's In a Name? Big Bucks*, THE TIMES UNION (Albany, N.Y.), May 8, 1996, at A14 (stating that opt-out provisions also reduce objections by those people on lists from having their names sold to other companies).

23. See *supra* note 8 (discussing creation of a person profile list). See also *Private Eyes*, *supra* note 9, at 31 (including an Equifax-Harris study that in 1995 found that 83% of those surveyed believe that consumer privacy protection will either remain the same or get worse between 1995 and 2000). See also DeMarras, *supra* note 2, at A1 (quoting Alan F. Westin, a Columbia University professor of political science, as stating that Americans are concerned that they have lost the ability to control who has access to their private information). See also David Washburn & Jack Kraft, *Privacy Advocates Say Computers Open Windows on Citizens' Lives*, THE MORNING CALL (Allentown, N.Y.), Feb. 20, 1995, at A1 (stating that consumers' loss of control translates into loss of privacy).

24. See generally, e.g., HMG, 523 F. Supp. at 11 (defining federal FOIA standards); *Dwyer*, 652 N.E.2d at 1351 (defining state standards).

25. Tracy Finley, *Targeting Consumers in Motion*, MARKETING NEWS, Aug. 28, 1995, at 7. Business in the 1990's is more competitive than ever. *Id.* By using proper marketing

businesses utilize personality profile lists to discover marketable new customers.²⁷ An updated²⁸ personality profile list can supply a company with millions of potential customers.²⁹ A list generally contains a person's name, address, and telephone number.³⁰ Since companies can currently sell their lists to each other,³¹ many businesses combine their distinct informational profiles of the same person, and develop a single, highly detailed personality profile.³²

A marketer analyzes the millions of personality profiles in order to target the specific individuals who, based on purchasing trends and other personal information, would be most likely to purchase that business' products.³³ Frustrated consumers, tired of having their privacy in-

techniques, a company can spend advertising dollars more wisely, and gain a better return on investment. *Id.* See also Susan Greco, *Up and Coming; Smart Marketing or Invasion of Privacy?*, Inc., May, 1995, at 135. The more a company knows about consumers, the better that company can fine tune its advertising campaign. *Id.* See also, e.g., Barron & Greene, *supra* note 10, at D3 (stating that Burger King monitors the birthdays of approximately five million children who are members of its kids club so that Burger King can send them birthday promotions and coupons).

26. See Finley, *supra* note 25, at 7 (calling the 1990's the information age).

27. See DeMarrais, *supra* note 2, at A1. See also Ossorio, *supra* note 3, at B10 (stating that personality profile lists are the lifeline of the direct marketing industry).

28. See, e.g., Jaffee, *supra* note 3, at 4 (stating that some lists get updated monthly).

29. See DeMarrais, *supra* note 2, at A1 (calling a consumer database list "potential gold" to enterprising merchants and mail-order companies seeking the most likely consumers for their goods). See also Jaffee, *supra* note 3, at 4. For instance, an Internet user list offered for rental to direct marketers in the fall, 1995, contained 280,000 e-mail addresses. *Id.* Also, in January, 1996, a company could purchase a bulk marketing list containing twenty million e-mail addresses. *Id.* A bulk marketing list is a list which contains only names and information, and is not a sectioned database. *Id.* Further, this massive compilation of names and addresses has drawn negative attention, and has forced the creation of a trade group, the Direct Electronic Mail Marketing Association, to prevent the spread of unsolicited e-mail. *Id.*

30. See DeMarrais, *supra* note 2, at A1. This personal information usually originates from a national telephone directory. *Id.* Consequently, the only way for consumers to avoid placement on this list is to have an unlisted telephone number. *Id.* Further, a CD-Rom copy of this telephone list only costs about seven hundred dollars, including quarterly updates. *Id.*

31. See *Dwyer*, 652 N.E.2d at 1355-56 (holding that a credit card company may rent its cardholder list to other businesses).

32. For example, when a supermarket club, eyeglass store, movie rental store, and credit card company all combine their personality profiles together, the businesses know much more than a consumers' name, address, and telephone number. See also Ossorio, *supra* note 3, at B10 (stating that large-size clothing stores, health clubs, and diet food companies seek each other's personality profile lists).

33. See also Squires, *supra* note 1, at A12. One credit reporting company who sells personality profile lists has a specific list, called Upscale Retail Cardholders, consisting of the names and addresses of fifty million people who possess cards from prestigious, upscale stores. *Id.* This credit reporting company sells that list so that marketers can target those who are more likely to purchase perfume rather than overalls. *Id.*

vaded, attempt to keep such businesses from placing them on these personality profile lists.³⁴

B. AVOIDING PERSONALITY PROFILE LISTS

Motivated consumers must take several measures to have businesses remove their names and addresses from marketing lists.³⁵ These tactics, however, are not full-proof.³⁶ First, consumers must track down the company that initially possessed the personal information—the list creator.³⁷ Consumers then must contact directly the list creator and specifically request the company remove their personality profiles from the company's marketing list.³⁸ The problems for consumers continue, however, if the list creator has previously sold or rented the list to another company. In this situation, a personality profile of that consumer still exists, and the consumer must start the process over again with each additional company.³⁹

In the alternative, consumers can keep list creators from transferring their personal information to other businesses by signing an opt-out

34. See, e.g., Carrera, *supra* note 6, at 38A (providing some options that consumers have to keep from getting on marketing lists). See also Ossorio, *supra* note 3, at B10 (stating that even though the Direct Marketing Association offers a service where the Association will try to have consumers' names deleted from mailing lists, the Association cannot completely remove a consumer from all retailer, non-profit, and political organization lists).

35. See DeMarrais, *supra* note 2, at A1 (using the terms "marketing lists" and "mailing lists" synonymously).

36. See, e.g., Ignelzi, *supra* note 2, at E1. Ms. Davis, a Burbank resident, has written and called telemarketers and direct mailers for over three years asking them to stop the unwanted solicitations. *Id.* When Ms. Davis was pregnant four years ago, she ordered a maternity catalog. *Id.* Soon after this request, she received other catalogs, baby-product samples, baby photographer solicitations, and diaper service information. *Id.* However, Ms. Davis had a miscarriage, and even after requesting some companies to stop sending solicitations, she still received solicitation birthday cards for her non-existent baby from target marketers. *Id.*

37. Carrera, *supra* note 6, at 38A.

38. *Marketers Know Too Much About Us*, Bus. Wk., Sept. 5, 1994, at 98. The Direct Marketing Association maintains that consumers who want to get their names off mailing lists must telephone the Association, although the long distance call is at the consumer's expense. *Id.* See also Carrera, *supra* note 26, at 38A (suggesting consumers directly contact not only businesses but also non-profit and political organizations that could have a consumer's name).

39. See Ossorio, *supra* note 3, at B10 (stating that personality profile lists are rented or sold, and sold, and sold). See also, e.g., Paula Crawford Squires, *Payment Book Leads To Junk In the Mail; Bank Claims It Didn't Sell Recipients Name, Address*, THE RICHMOND TIMES DISPATCH, July 28, 1996, at A-12 (demonstrating that getting businesses to stop sending solicitations could be increasingly difficult if a misspelled name is entered onto a database).

provision.⁴⁰ An opt-out provision is a clause in a consumer contract, such as a credit card application, that allows consumers to control the destiny of their personal information by notifying list creators as to whether the creator can release personal data to other businesses.⁴¹ List creators generally place this clause in the fine print with other boilerplate terms of the contracts;⁴² thus the clause is not readily apparent to most consumers.⁴³ Moreover, opt-out provisions are not mandatory.⁴⁴

C. CURRENT PERSONAL INFORMATION PRIVACY STANDARDS

The United States Congress and legal scholars have drafted the FOIA and the Restatement, respectively, to establish standards which protect an individual's Constitutional right to privacy.⁴⁵ Textually, the

40. *Marketers Know Too Much About Us*, *supra* note 38, at 98. See also, e.g., Negus & Jones, *supra* note 21, at 1 (stating that Prodigy, an on-line service company, has initiated an opt-out policy to its members, and so has American Online, also an on-line service). But see Carrera, *supra* note 26, at 38A (quoting Joyce Vanni, coordinator of consumer relations of the Denver Post Office, as stating that anytime an individual takes out a loan or opens a charge account, the person can put on the application a statement forbidding the company to sell the applicant's name). See Barron & Greene, *supra* note 10, at 3 (reporting that a California small claims court upheld an opt-out provision written on a check by a consumer against Computer City, a computer retail store).

41. See Negus & Jones, *supra* note 21, at 1 (quoting Mark Rotenberg of the Electronic Privacy Information Center, as stating that an opt-out program gives consumers control over what solicitations they receive, and who can hold the personal information). Further, Prodigy spokesperson Brian Ek states that with e-mail addresses, a consumer can not opt-out of all solicitations because if someone has that consumer's e-mail address, the consumer can be contacted directly. *Id.* This notion can be reasonably inferred upon direct mail as well.

42. Boilerplate terms of a contract are those terms that are required by law as common language which has a definite meaning without variation, such as interest rates on a credit card application. BLACK'S LAW DICTIONARY 159 (6th ed. 1990).

43. *Marketers Know Too Much About Us*, *supra* note 38, at 98 (stating that the opt-out provision is likely to be buried of significant contract terms).

44. *Id.*

45. See 5 U.S.C. § 552. See also RESTATEMENT (SECOND) OF TORTS § 652C (1977) (defining misappropriation as an invasion of privacy). See also U.S. CONST. amends. I, IV, V, IX, XIV (delineating a right to privacy). See also *Griswold v. State of Connecticut*, 381 U.S. 479 (1965) (explaining the right to privacy as a penumbral right). Although the United States Constitution never textually states that persons have a fundamental right to privacy, the Supreme Court held that privacy rights are guaranteed through the penumbras of the Bill of Rights, specifically the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* at 484-86. The *Griswold* court held that a statute forbidding any person from aiding, abetting, or counseling another with respect to contraception was unconstitutional. *Id.* at 485-86. The United States Supreme Court, in an opinion by Justice Douglas, reasoned that this invasion by the state into the bedroom and into the marital interactions of the husband and wife was an invasion of privacy. *Id.* The *Griswold* court also reasoned that privacy is a right established by several Constitutional guarantees. *Id.* Further, "the penumbra doctrine is the permitting of one implied power to be grafted on another implied power." BLACK'S LAW DICTIONARY 1135 (6th ed. 1990).

FOIA and the Restatement both appear to protect an individual's right to keep personal information private and free from commercial exploitation.⁴⁶ A recent state court's interpretation of the extent of privacy protection that the Restatement provides, however, opposes the federal court's interpretation of the extent of privacy protection pursuant to the FOIA.⁴⁷

1. *The Freedom of Information Act—Exemption Six*

The FOIA,⁴⁸ codified in 1966, establishes when the public may obtain information in government agency records.⁴⁹ The legislative intent of the FOIA was to increase the public's access to government records, so that the public can learn how their government works.⁵⁰ Congress also drafted the FOIA to consider the conflicting interests of an individual's right to keep information private and the public's right to government records.⁵¹ Section 552(b) of the FOIA identifies nine exemptions which forbid government agencies from releasing their personal information records to the general public.⁵²

Specifically, exemption six of Section 552(b) precludes government agencies from disclosing records that apply to personnel, medical, and

46. See 5 U.S.C. § 552. See also RESTATEMENT (SECOND) OF TORTS § 652C (stating that selling one's name or likeness for profit is an invasion of privacy).

47. See *Wine Hobby, Inc. v. United States Internal Rev. Serv.*, 502 F.2d 133, 135 (3d Cir. 1974) (applying FOIA standards); *Dwyer*, 652 N.E.2d at 1355 (applying Restatement standards).

48. 5 U.S.C. § 552.

49. *Id.* This subsection sets forth the types of information that each federal government agency must make available to the public. *Id.*

50. *HMG*, 523 F. Supp. at 13 (stating the legislative intent). See also, e.g., *Federal Labor Relations Authority v. United States Dep't of Defense*, 977 F.2d 545, 547 (11th Cir. 1992) (stating that FOIA's central purpose is to ensure that the Government's activities are open to the sharp eye of public scrutiny); *Wine Hobby*, 502 F.2d at 135 (stating that the purpose of FOIA is to make government information available to the public, and thus maintaining an informed electorate). See also H.R. REP. NO. 1497, 89th Cong., 2d Sess. at 9, 11 (1966), reprinted in 1966 U.S.C.A.N. 2418, 2429. Pursuant to FOIA, the public has access to nearly all governmental materials, such as federal agency operating procedures, administrative staff manuals, and final court opinions. 5 U.S.C. § 552.

51. 5 U.S.C. § 552(b) (1995). See *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.R. REP. NO. 104-156, (1995 WL 376908) (1st Sess. 1995). Exemption six requires federal agencies to find a balance between an individual's privacy interests and the public's right to know. See also *HMG*, 523 F. Supp. at 16 (holding that a government record of names and addresses of individuals who ordered silver dollars could not be released to marketers pursuant to FOIA).

52. 5 U.S.C. § 552(b). Although there are nine exemptions that bar federal governmental disclosure of information to requestors, this comment focuses only on exemption-six. *Id.*

similar files⁵³ that would constitute a clearly unwarranted invasion of personal privacy.⁵⁴ Although textually a bright-line test, federal courts have interpreted the term "similar file" of exemption six as requiring a discretionary balancing test to determine what information, when released to the public, such as a list creator, is clearly an unwarranted invasion of privacy.⁵⁵

Federal courts apply this balancing test for similar files by comparing the individual's privacy interests with the public's purpose for disclosure.⁵⁶ In a majority of the FOIA exemption six cases, federal courts have held that an individual's privacy interests outweigh the public's interest in disclosure when businesses seek the personal information in government records for commercial purposes.⁵⁷ Thus, government disclosure of personal information under these circumstances is an unwarranted invasion of the individual's privacy.⁵⁸ In *Wine Hobby USA, Inc. v. United States Internal Rev. Serv.*, the Third Circuit Court of Appeals held that government records could not be released to the public, pursu-

53. 5 U.S.C. § 552(b)(6) (1995). Although this exemption controls personnel and medical files and similar files, this comment only concerns with information contained in a similar file. See also, e.g., *Wine Hobby*, 502 F.2d at 135 (establishing that the requirements for a similar file to be resemble a medical or personnel file is merely to contain a name and address).

54. Exemption six of the FOIA "does not extend to matters that are personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). See also, e.g., *Wine Hobby*, 502 F.2d at 137. The *Wine Hobby* court broadly interpreted exemption six, and held that a marketer's commercial interest in obtaining government records of individuals registered to make wine at home was an unwarranted invasion of privacy. *Id.*

55. *Id.* at 135-36 (comparing the competing public and wine registrants' interests in disclosure). See also, e.g., *HMG*, 523 F. Supp. at 15 (balancing the interests of the coin purchasers and the business).

56. See *Minnis*, 737 F.2d at 786 (initiating a four-part balancing test for releasing government information: (1) the plaintiff's interest in disclosure, (2) the public's interest in disclosure, (3) the degree of the invasion of personal privacy, and (4) the availability of any alternate means of getting the desired information).

57. See, e.g., *Wine Hobby*, 502 F.2d at 135-36 (holding that the privacy interests of individuals who apply for amateur wine making permits outweighed a mail soliciting business' commercial interest in obtaining the government record). But see *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973) (illustrating a case in which there is no invasion of privacy for disclosure of personal information to a requestor). In *Robles*, the court held that the government could disclose names and addresses of persons who occupied buildings that the Environmental Protection Agency monitored for radiation levels and possible radioactive emissions to the public. However, the policy reason permitting disclosure was public health and welfare, and not commercial purposes. *Id.*

58. See, e.g., *Professional Programs Group v. Dep't of Commerce*, 29 F.3d 1349, 1354-55 (9th Cir. 1994) (holding that a patent bar examination preparation company's request for names of persons registered to take the patent bar exam is an unwarranted invasion of their personal privacy).

ant to exemption six of the FOIA.⁵⁹ The Court reasoned that the personal quality of the information in the federal records was the key consideration in balancing the competing interests.⁶⁰ The court also reasoned that a company's commercial interests in obtaining a government list of names and addresses of persons seeking federal permits to make wine at home did not outweigh those individuals' privacy interests.⁶¹

In the *United States Dep't of State v. Washington Post*, the United States Supreme Court interpreted the legislative intent of exemption six even broader than the *Wine Hobby* court by barring disclosure of any personal information that is identifiable as applying to that individual.⁶² The Court interpreted the legislative intent of exemption six as keeping personal information confidential, thereby precluding public disclosure of the information when requested for commercial purposes.⁶³

2. *Controlling Law For Non-Freedom of Information Act Privacy Cases*

State law controls invasion of privacy actions, and all states have encountered invasion of privacy actions between individuals and businesses.⁶⁴ Only a couple of states, however, have entertained invasion of privacy disputes between individuals and companies concerning the selling or renting of personality profile lists;⁶⁵ and of the states who have

59. 502 F.2d 133, 135 (3d. Cir. 1974).

60. *Id.* at 135.

61. *Id.* at 137 (stating that the disclosure of potential customers names for commercial gain is unrelated to the legislative intent of the FOIA; Congress never contemplated disclosure for this reason). *See also, e.g., HMG*, 523 F. Supp. at 14 (reasoning that none of the traditional purposes of FOIA are served by disclosing names and addresses of coin purchasers in the General Service Administration records to businesses for commercial purposes).

62. *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

63. *Id.* *See also, e.g., Professional Programs Group*, 29 F.3d at 1354 (holding that the government must keep record patent bar applicants' names and addresses confidential when the applicants involuntarily gave their names and addresses to the government).

64. *See, e.g., J.C. & C.C. v. WALA-TV, Inc.*, 675 So.2d 360 (Ala. 1996) (deciding a privacy conflict between a child and a television station); *Gaeta v. Home Box Office*, 645 N.Y.S.2d 707 (N.Y. 1996) (deciding a privacy conflict between a woman and a cable television network); *Shreve v. World Championship Wrestling, Inc.*, 454 S.E.2d 555 (Ga. Ct. App. 1995) (deciding a privacy conflict between a professional wrestler and a wrestling association); *Eskeu v. Plantation Foods, Inc.*, 905 S.W.2d 461 (Tex. Ct. App. 1995) (deciding a privacy conflict between employees and their employer); *Montana v. San Jose News, Inc.*, 34 Cal. App. 4th 790 (Cal. Ct. App. 1995) (deciding a privacy conflict between a professional football player and a newspaper); *Jones v. Palmer Communications, Inc.*, 440 N.E.2d 884 (Iowa 1989) (deciding a privacy conflict between a firefighter and a television station); *Loft v. Fuller*, 408 So.2d 619 (Fla. Dist. Ct. App. 1981) (deciding a privacy conflict between a family and an author).

65. *See, e.g., Dwyer*, 652 N.E.2d at 1351; *Shibley*, 341 N.E.2d at 339. *See also* Queenan, *supra* note 7, at C5 (reporting on a case in its early stages: *Avrahami v. U.S. News & World Report*). *See also* Barron & Greene, *supra* note 10, at D3 (reporting that San Diego

addressed these disputes, no appropriate privacy statutes have applied.⁶⁶ Instead, those state courts have adopted the Restatement standard or relied on public policy as controlling common law for these invasions of privacy.⁶⁷

The Restatement establishes four branches of privacy invasion: intrusion, appropriation, public disclosure of private facts, and false light.⁶⁸ In *Dwyer v. American Express Co.*, a recent state invasion of privacy action between consumers and a business who disclosed private consumer information for commercial gain, an Illinois state court applied the Restatement appropriation branch to the facts.⁶⁹ The Restatement appropriation subsection textually provides that an individual's name or likeness is not to be used by others for profit.⁷⁰ However, a comment within the Restatement suggests that consent is a valid defense to an appropriation claim.⁷¹

Although the appropriation section in the Restatement textually appears to protect individuals' privacy interests, when businesses rent or sell their personality profile lists, state courts have held the opposite.⁷² In *Dwyer*, the Illinois Court of Appeals held that the Restatement appropriation standard did not protect consumers' right to privacy when a credit card company rented their list of names and addresses to other businesses.⁷³ The Illinois court reasoned that personal information con-

small claims court held that computer retail store, Computer City, breached contract where consumer wrote in opt-out provision on his check and retail store still placed him on mailing list).

66. See *Dwyer*, 652 N.E.2d at 1351 (applying the Restatement standard); *Shibley*, 341 N.E.2d at 339 (suggesting that this is an issue for legislature).

67. See RESTATEMENT (SECOND) OF TORTS § 652; *Dwyer*, 652 N.E.2d at 1351 (discussing the most recent relevant case law applying Restatement standards).

68. RESTATEMENT (SECOND) OF TORTS § 652(B)—(E) (1977). See also *Dwyer*, 652 N.E.2d at 1353 (setting forth the four branches of the invasion of privacy tort).

69. See RESTATEMENT (SECOND) OF TORTS § 652(C). This Comment focuses primarily on section 652(C), discussing elements of appropriation. Section 652(C) specifically states that one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy. *Id.*

70. RESTATEMENT (SECOND) OF TORTS § 652(C). See also, e.g., RESTATEMENT (SECOND) OF TORTS § 652(C) cmt. c (1977) (discussing how the rule states that in order for there to be liability, the defendant must appropriate to his own use or benefit the reputation, prestige, social or commercial standing, public interest, or other values of the plaintiff's name or likeness); *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985) (holding a magazine company liable for violating a model's right to privacy when the company published the model's pictures for economic gain that were not already published in public domain). If a company sells lists of names and addresses to other companies, then the company has profited through the sale of the list. The company who purchased the consumer list then uses the list to elevate sales profits based on that purchased information.

71. RESTATEMENT (SECOND) OF TORTS § 652(C) cmt. c (1977).

72. See *Dwyer*, 652 N.E.2d at 1355-56.

73. See *id.*

tained in the list had no value, and that the company had not denied consumers any of that the value their names possess.⁷⁴ Consequently, a business can disclose any personal information to the public. Thus, what generally occurs on in a consumer's house is in the public domain.

III. ANALYSIS

A. RECONCILING INCONSISTENCIES IN THE PERSONAL INFORMATION PROTECTION STANDARDS

Although the FOIA exemption six and consumer-business cases both deal with businesses attempting to obtain personal information for commercial exploitation, they lack harmonization in their degree of personal privacy protection. In the few state decisions that have considered consumer-business conflicts, state courts have generally failed to notice similarities between their issues and the FOIA exemption six issues.

1. *Right to Keep Lifestyle Choices Private*

In the penumbras⁷⁵ of the Bill of Rights to the United States Constitution, United States citizens have a Constitutional right to privacy.⁷⁶ In *Griswold v. Connecticut*, the Supreme Court held that individuals' right to privacy includes keeping private any intimate personal information known only between a married couple.⁷⁷ The right to privacy mandates that individuals have the right to be unknown, and to keep that information out of the public domain.⁷⁸

In the public spotlight, an individual's decisions define that individual.⁷⁹ The right to privacy allows individuals to decide which lifestyle choices are public and which are private.⁸⁰ The Congress incorporated this fundamental right into exemption six of the FOIA.⁸¹ For example, if

74. *Id.*

75. *See supra* note 45 (discussing penumbra rights).

76. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

77. *Id.* In *Griswold*, the Court held that a Connecticut statute forbidding the instruction, dissemination of information, and medical advice for the prevention of contraception for a married couple was unconstitutional as an invasion upon the right of marital privacy. *Id.* at 480.

78. *Federal Labor Relations Authority v. United States Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992). Although this case is not a dispute between a consumer and a business for the sale of a marketing list, this case provides substantial guidance in the federal court's interpretation of FOIA exemption six. An address tells much more than where one lives, such as one's choice of neighborhoods and one's affluence. *Id.* The court held that names and addresses from the public domain go to the core of privacy. *Id.*

79. *Id.* *See also The Privacy Protection Study Commission, PERSONAL PRIVACY IN AN INFORMATION SOCIETY*, 8 (1977) (stating that much of a person's life is shaped by his relationships with organizations).

80. *Federal Labor Relations Authority*, 977 F.2d at 549.

81. *See* 5 U.S.C. § 552(b)(6).

an individual wants to canoe down certain scenic rivers, the individual must get a federal permit.⁸² But to get the permit, however, the individual must first divulge personal information to the federal government.⁸³ Federal courts have interpreted exemption six of the FOIA as protecting that individual's privacy interests, and they have thereby prevented businesses from learning about the person's lifestyle by barring disclosure of the government record.⁸⁴ Federal courts have consistently held that the right to keep personal information private is stronger than a business knowing that person's lifestyle choices; consequently, releasing of that personal information is an unwarranted invasion of privacy.⁸⁵ This invasion of privacy includes such personal information as individuals' names and addresses.⁸⁶

When the same request is made from one business to another, state courts should consider the disclosure as an unwarranted invasion of the consumers' privacy, and view these two requests as similar transactions. Regardless of whether a person goes canoeing on a federally protected river or subscribes to a certain magazine, the information disclosed in both situations is equally informative of the individual's lifestyle.⁸⁷ In addition, no matter how little personal information a single company may obtain, when multiple companies share the information, extensive personality profiles result—such that nearly every commercial movement that an individual makes can then be tracked.⁸⁸ Hence, individuals have lost their right, to keep their lifestyle choices private and their identity unknown.⁸⁹

2. Consumers' Lack of Choice in Disclosing Information to Businesses

Although federal courts and state courts view disclosures of personal information differently, a common factor exists when an individual releases personal data to a federal government agency or business—the

82. *Minnis*, 737 F.2d at 785 (citing 16 U.S.C. §§ 1271-87 (1982)).

83. *Id.*

84. *Id.*

85. See, e.g., *Washington Post*, 456 U.S. at 599, 602-03; *Professional Programs Group*, 29 F.3d at 1354; *Federal Labor Relations Authority*, 977 F.2d at 548; *Minnis*, 737 F.2d at 787; *Wine Hobby*, 502 F.2d at 136; *News Group Boston, Inc. v. National R.R. Passenger Corp.*, 799 F. Supp. 1264, 1270 (D. Mass. 1992); *HMG*, 523 F. Supp. at 14.

86. See *supra* note 84 (discussing federal courts consistency in finding that individuals have right to keep personal information private and that release of such information is unwarranted invasion of privacy).

87. In one case, a marketer would know that the consumer enjoys the outdoors, and in another case, the marketer would know that the consumer is interested in publications and magazines discussing golf.

88. See *The Privacy Protection Study Commission*, *supra* note 78, at 9 (stating that much of a person's life is shaped by his relationships with organizations).

89. *Federal Labor Relations Authority*, 977 F.2d at 549.

individual has no choice.⁹⁰ State courts must recognize that where consumers do not have a choice, yet must disclose personal information to a business, they are not necessarily consenting to the global release of their information.⁹¹

If an individual wants to make wine at home, there are statutes that require the individual to first register with the Bureau of Alcohol, Tobacco and Firearms ("BATF").⁹² Similarly, if a law student wants to become a patent attorney, the student must first register with the federal government to take the patent bar examination.⁹³ In both instances, individuals have no choice but to divulge personal information about themselves, that they may not ordinarily disclose, to another person.⁹⁴ In *Wine Hobby* and *Professional Programs Group*, federal courts protected the individuals' names and addresses from the hands of business.⁹⁵

Similarly, individuals also have a lack of choice in disclosing private information to businesses.⁹⁶ A business can obtain an individual's personal information when a person pays by check or credit card, or leaves some other paper trail.⁹⁷ Consumer transactions also generally require individuals to disclose personal information before completion.⁹⁸ There-

90. See also Queenan, *supra* note 7, at C5. The Ram Avrahami's lawsuit discusses exactly this point. *Id.* Mr. Avrahami could not stop mail solicitors from sending him junk mail. *Id.* One company would sell his personal information to another company, and consequently he received one to seven pieces of junk mail a day. *Id.* See also Knecht, *supra* note 8, at Business 8. Knecht quotes Georgetown Business School Associate Professor Mary J. Coleman as stating, "everyone is watching the Avrahami case very carefully because they [direct marketers] are afraid he has a good case, and it could set an undesirable precedent for the industry." *Id.*

91. See *The Privacy Protection Study Commission*, *supra* note 78, at 10 (suggesting that an individual is helpless in the prevention of companies disclosing private information).

92. 26 U.S.C. §§ 5401(a), 5401(d), 5043(a), 5403(b). *Wine Hobby*, 502 F.2d at 134 (citing 27 U.S.C. § 203(b)(1) (amended 1988)).

93. See generally, e.g., *Professional Programs Group*, 29 F.3d at 1349 (discussing personal privacy issues of patent bar applicants).

94. See *supra* notes 91 and 92 (discussing individual helplessness in divulging personal information).

95. *Professional Programs Group*, 29 F.3d at 1355; *Wine Hobby*, 502 F.2d at 137-38.

96. See, e.g., Ossorio, *supra* note 3, at B10. Unless a consumer pays with cash for every commercial transaction, from groceries to gasoline, marketers will collect the consumer's information and put the data into a personality profile list. *Id.* Marketers can put consumers on mailing lists with checks or credit cards. *Id.* In addition, memberships, rebates, warranties, and credit reports also are mediums for businesses to collect personal information that consumers have no choice but to disclose. *Id.*

97. See *id.*

98. See *The Privacy Protection Study Commission*, *supra* note 78, at 10. See also Moskowitz, *supra* note 1, at 1 (mentioning that to rent a movie, a consumer must first join a movie-rental club, and that once the consumer joins the club, the records are often sold or used for other purposes).

fore, if an individual wanted to keep all personal information private, the individual would have to pay for everything with cash.

Today, a consumer would have an extremely difficult time functioning in a high technology society based solely on cash.⁹⁹ For example, businesses have rendered it nearly impossible for consumers to purchase expensive items ahead of time, such as airline tickets or entertainment events, without paying by a credit card or check.¹⁰⁰ In addition, many consumer items are also more expensive when paying by cash as opposed to by credit cards or by subscription.¹⁰¹ Consumers further have no choice but to disclose personal information when all companies offering the same service require the personal information.¹⁰²

Consumers must continuously guard against companies that employ sales gimmicks which obtain consumers names and addresses in order to make personality profile lists.¹⁰³ For example, businesses use warranty forms as mediums for gaining information on specific consumers; however, consumers generally do not know that their receipt is their warranty.¹⁰⁴ Direct marketers are under no obligation to initially tell consumers that the information they give can go to a personality profile list which is then sold to other companies.¹⁰⁵ Without state governments or courts providing privacy assistance to consumers, personality

99. See, e.g., *Marketers Know Too Much About Us*, *supra* note 38, at 98. Where consumers today have to conserve every dollar, they have a hard time turning down discount offers from restaurants and credit card companies, and lower long distance rates from telephone companies. *Id.*

100. Higher priced items make keeping private personal information difficult. Even if a consumer buys a couch and pays with cash, the consumer must still get the couch home. If the couch is delivered by the seller, the address of the consumer must be disclosed. If the consumer rents a vehicle, the consumer's information must be disclosed to the vehicle rental company. The only way for any large furniture item to arrive at a consumer's residence without disclosing the consumer's identity and residence is if every consumer in the world owns a truck.

101. Mail order catalogs often offer goods at lower prices than retail stores.

102. See *The Privacy Protection Study Commission*, *supra* note 78, at 14.

103. See, e.g., David Evans, *Friendly Fire*; Mary Culnan on *Direct Marketing, Consumer Data, and Privacy*, *DIRECT*, Jan., 1994, at 65. In June, 1993, Johnson & Johnson created a list of five million individuals who called a 1-800 telephone number to receive a free sample of adult health products-incontinence aids. *Id.*

104. Carrera, *supra* note 6, at 38A.

105. See Evans, *supra* note 102, at 65. In a letter by Johnson & Johnson's chairman and chief executive officer, Ralph Larsen, concerning a marketing campaign aimed at obtaining personal information for a mailing list, he stated that "they [the consumers] were not informed at the time that their name and address would be given to anyone else which is consistent with the current marketing practices." *Id.* Yet, in the same letter, Larsen said that "the consumers volunteered their name, address, sample product they wanted, and the product they were currently using." *Id.* Then, Johnson & Johnson announced that the list was available to other businesses. *Id.*

profiles will become more detailed and the power more one-sided.¹⁰⁶

B. EXTENDING THE SCOPE OF THE RESTATEMENT TO THE FOIA-
EXEMPTION SIX STANDARD

One possible solution for states to protect individuals' rights is for state courts to broaden the scope of the Restatement privacy standard to the level of the FOIA exemption six.¹⁰⁷ Under the Restatement, the appropriation tort protects individuals from businesses using their names or images for commercial gain.¹⁰⁸ State courts should recognize the value in keeping personal information private, regardless of whether the name, address, and personal data is worth one cent or one hundred dollars to a business.¹⁰⁹

Generally, when a business utilizes a famous person's name or likeness for large commercial gain, such as in an advertisement, courts are likely to hold that the business invaded that person's privacy.¹¹⁰ Yet, in *Dwyer*, however, where the consumers' names and addresses were used for commercial gain in which the profit per name and address was small, the court held that there was not an invasion of privacy.¹¹¹ In both instances, individuals' names and likenesses are being used for the businesses' benefit.¹¹²

The profit-per-name ratio should not be a consideration for courts. Instead, state courts should consider that without the names and identities of the list-members, the companies would not have the personality profile list that is sold to other businesses for profit. As long as a company realizes an economic gain from the sale or renting of a personality profile list, the amount should not be relevant. In both instances, individuals have lost control over their identities. If the state courts cannot adopt the FOIA standards into their appropriation common laws, state legislatures should require businesses to at least give consumers an opportunity to opt-out of having their personal information sold to other businesses.

106. See also *Private Ayes*, *supra* note 9, at 31. In the Monitor survey, nine out of ten respondents favor government regulation of the business using consumer information, and 45% of those polled believe that privacy legislation is necessary. *Id.*

107. 5 U.S.C. § 552(b)(6). See also Moskowitz, *supra* note 1, at 1 (reporting that in some foreign countries, privacy statutes make data-gathering companies liable if private information leaks out).

108. See RESTATEMENT (SECOND) OF TORTS § 652(C).

109. See *supra* note 8 (discussing companies selling names of subscribers to the public).

110. See, e.g., *Douglass*, 769 F.2d at 1138 (holding that a magazine that published pictures of an actress without her permission was an invasion of privacy).

111. *Dwyer*, 652 N.E.2d at 1356.

112. See *id.* (stating that the name has a little value to the individual, yet still exists).

C. REQUIRING OPT-OUT PROVISIONS

Realistically, state courts may not be able to halt the big business of collecting and selling personality profile lists.¹¹³ Nevertheless, individuals have another protective tools to prevent list creators from disseminating their personal information to the public. As an alternative, states can fill this personal privacy protection void by enacting legislation that requires all businesses to include opt-out provisions in their consumer contracts.¹¹⁴ Mandatory opt-out provisions in consumer contracts would allow individuals to initially decide, when entering into consumer agreements, which companies can disclose their personality profile lists to other businesses.¹¹⁵ For instance, if consumers do not want businesses transferring their personal spending habits, physical characteristics, or familial status to other businesses, consumers can just sign the opt-out provision on the consumer-company contracts.¹¹⁶

There is no public benefit in individuals receiving an abundance of unwanted mail solicitations.¹¹⁷ Businesses anger solicitation recipients,¹¹⁸ and the solicitation mailings waste paper.¹¹⁹ In some circum-

113. See Squires, *supra* note 1, at A12 (noting that in 1995 the direct marketing industry was a \$600 billion-a-year business).

114. See *The Privacy Protection Study Commission, supra* note 78, at 151. In 1977, the Privacy Protection Study Commission realized the problems with businesses compiling detailed personality profile lists. The Commission recommended to then President of the United States, Jimmy Carter, that:

a private-sector organization which rents, sells, exchanges, or otherwise makes the addresses, or names and addresses, of its customers, members, or donors available to any other person for use in direct-mail marketing or solicitation, should adopt a procedure whereby each customer, member, or donor is informed of the organization's practice in that respect . . . and, in addition, [the consumer] is given an opportunity to indicate to the organization that he does not want to have his address, or name and address, available for such purposes. Further, when a private-sector organization is informed by one of its customers, members, or donors that he does want his address, or name and address, made available to another person for use in direct-mail marketing or solicitation, the organization should promptly take whatever steps are necessary to assure that the name and address is not used.

Id.

115. See Squires, *supra* note 1, at A12 (noting that the Direct Marketing Association recommends that businesses give consumers an opportunity to opt out).

116. See DeMarrais, *supra* note 2, at A1 (stating that if consumers do not specifically ask not to be placed on a mailing list, every piece of information that the business possesses about that person can be sold to another company).

117. When people throw away unwanted mail solicitations, the business loses money on a wasted advertisement, and there is more trash, more wasted paper, and more harm to the environment. See also Ossorio, *supra* note 3, at B10 (reporting that there are environmental concerns with junk mail).

118. See *supra* note 36 (discussing a consumer's request to end solicitation by marketers).

119. See Ossorio, *supra* note 3, at B10 (stating that junk mail is an environmental concern).

stances, junk mail can even be traumatic to individuals.¹²⁰

Thus, from the businesses' perspective, if the objective of sales is truly to increase consumer satisfaction and customer service, requiring opt-out clauses would be a great provision.¹²¹ Only consumers that want their personal information freely traded from business to business would receive mail advertisements.¹²² Mailing advertisements only to interested individuals will enable businesses to streamline their mail advertisement programs into profitable marketing campaigns, thus saving money for postage and paper—there are environmental advantages as well.¹²³ Further, these savings may lower the prices of goods.¹²⁴ Lastly, opt-out provisions would substantially diminish the amount of angered and annoyed consumers in that they will not receive unwanted junk mail anymore.¹²⁵ Therefore, legislation requiring opt-out clauses would be beneficial to both consumers and businesses.¹²⁶

IV. CONCLUSION

As technology advances away from cash transactions and towards electronic records, individuals disclose personal information to businesses more out of necessity and lack of choice than as a voluntary ac-

120. See *supra* note 36 (discussing a consumer's request to end solicitation by marketers).

121. See Jaffee, *supra* note 3, at 4 (recognizing that opt-out provisions are a method for businesses to test consumer preferences).

122. See *id.*; see also, Negus & Jones, *supra* note 21, at 1 (stating that computer on-line services offer these provisions, giving consumers the chance to choose the type of on-line service that they want).

123. See *supra* note 118 (discussing junk mail as an environmental concern).

124. See Ossorio, *supra* note 3, at B10 (stating that target marketing offers better prices); see also Ignelzi, *supra* note 2, at E1 (quoting John Tomkiw, corporate communications manager at Metromail corporation, as stating that target marketing costs less than mass mailings). However, if a company could further narrow down the number of consumers to mail solicitations based on opt-out provisions, a company could save more money and become more efficient. *Id.*

125. See Negus & Jones, *supra* note 21, at 1. Opt-out provisions give consumers control over the circumstances when they want businesses to exploit their personal information. *Id.* Some businesses feel that opt-out provisions also benefit them, where only the customers who want the solicitation receive one. *Id.*; see also Knecht, *supra* note 8, at Business 8 (explaining that some consumers feel that with junk mail they lose twice: consumers do not receive any of the money when a company sells their names, and again when they must spend time opening and reading the junk mail). Further, consumers are increasingly angered when they have to pay for services, that do not always work, to have their names removed from mailing lists. *Id.*

126. See *id.*; see also DeMarrais, *supra* note 2, at A1 (stating that consumers want to be assured that companies will not misuse their personal information). See also 1996 Cal. Legis. Serv. ch. 1025 (S.B. 1629) (West) (proposing the establishment of a Joint Task Force on Personal Information and Privacy to make recommendations as to existing laws—namely target marketing).

tion.¹²⁷ Further, more businesses are entering into the direct mail solicitation industry, and consequently, businesses are creating more detailed personality profile lists.¹²⁸ In addition, information from other forums such as e-mail addresses and the world wide web are new mechanisms for target marketing.¹²⁹ For example, some businesses can track the specific internet browsers who visit their homepages.¹³⁰ This tracking of e-mail addresses can also lead to increasingly detailed personality profile lists, additional junk mail, and more invasions of privacy.

Other than the standard set forth in the Restatement, consumers lack any legal protection to preclude businesses from trading their personal information.¹³¹ Consumers need privacy protection reform,¹³² and pursuant to the Constitution, consumers are entitled to increased control over their personal information. This Comment suggests two reasonable mechanisms to alleviate this lack of personal privacy protection: either (1) states adopt into their common law a FOIA exemption six standard or (2) legislation enact statutes requiring opt-out clauses in consumer contracts. There is no public interest in disclosing the personal data contained in government records pursuant to the FOIA, a statute created to further the public's knowledge of their own government, and businesses should be held to the same level of responsibility of keeping personal information confidential.

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127. See generally Ossorio, *supra* note 3, at B10 (explaining consumers' lack of choice).

128. See, e.g., Jim Erickson, *Are Those Who Go Online to Send Junk Mail Out of Line? Growth of Unsolicited Direct Mail on Internet Raises Questions of Privacy*, STAR TRIB., June 30, 1996, at 3D (noting that the growth of unsolicited direct mail appears to be on the increase).

129. See, e.g., Jim Erickson, *Virtual Junk: On-Line Ads Invade 'Net*, ST. LOUIS POST-DISPATCH, July 3, 1996, at 15C. Direct marketers are using the Internet to send direct mail solicitations, junk e-mail, and to obtain more information for personality profile lists. *Id.* For example, some direct marketers practice "spamming," which is when a direct marketer joins an Internet news group, merely to get the list of members in order to send solicitations. *Id.*

130. *Id.* On-line advertisers are creating database programs to record and track what web-site browsers view when on the world wide web. *Id.* Direct marketers can take that information and match it in with an individual's e-mail account. *Id.*

131. See Jaffee, *supra* note 3, at 4 (reporting that already there is a company that constantly collects e-mail addresses, and sells their list of five million addresses for \$99).

132. See Ignelzi, *supra* note 2, at E1. Most privacy experts believe that privacy laws do not go far enough. *Id.* Also, Barry Fraser, a research associate for the University of San Diego's Privacy Rights Clearinghouse, believes that phone and mail soliciting laws are behind the times. *Id.*