

# BACK STORY

## BEFORE YOU HIT SEND: AMENDMENTS TO NEVADA'S ENCRYPTION REQUIREMENT

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While closing a deal, it's not uncommon for a lawyer to email certain personal information of a client to a lender, title company or some other third party. Of course, all lawyers know (or should know) to provide such information only with the client's prior consent and in accordance with a lawyer's duty of confidentiality as set forth in Rule 1.6 of the Nevada Rules of Professional Conduct. However, less at the front of a lawyer's mind may be the requirements of Nevada Revised Statutes Chapter 603A, titled "Security of Personal Information," which has recently been amended by Assembly Bill 179, and which imposes certain restrictions upon law firms (and other businesses) when disseminating such personal information.

What constitutes personal information for the purposes of NRS Chapter 603A is defined in NRS 603A.040. Prior to the enactment of AB 179, the definition of personal information included the following:

"Personal Information" means a natural person's first name, or first initial and last name, in combination with any one or more of the following data elements, when the name and data elements are not encrypted:

1. A social security number;
2. A driver's license number or identification card number; and
3. An account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person's financial account.

However, AB 179, signed into law by Governor Sandoval on May 13, 2015, added the two following classifications of personal information to the above list:

4. A medical identification number or a health insurance identification number; and
5. A user name, unique identifier or electronic mail address, in combination with a password, access code, or security question and answer that would permit access to an online account.

At the same time, AB 179 narrowed the "publicly available information" exception to the definition of personal information, clarifying that information that would otherwise constitute personal information is only exempt if the publicly available information is made available "from federal, state or local governmental records."

What is included in the definition of personal information is significant to those doing business in

Nevada. Pursuant to NRS 603A(2)(a), any data collector<sup>1</sup> is prohibited from transferring any "personal information through an electronic, non-voice transmission other than a facsimile to a person outside of the secure system of the data collector unless the data collector uses encryption to ensure the security of electronic transmission." Thus, any personal information a lawyer transmits through an electronic, non-voice transmission (such as the ubiquitous email), must be encrypted. The requirements for proper encryption are themselves codified in NRS 603A.215(5)(b).

In light of these amendments, it is not difficult to imagine a scenario in which a lawyer emails a pdf of a client's driver's license, health insurance card, or banking or wiring information to a lender or title company and, unless the data has been encrypted, violates NRS 603A.040 as a result. To avoid such a violation, a lawyer should be careful to ensure that emails sent from his or her office meet the encryption requirements set forth in NRS 603A.216(5)(b) (some email servers offer automatic encryption, and software can be purchased for this purpose), and advise his or her clients doing business in Nevada to do the same.

Interestingly, in addition to creating data security requirements, NRS 603A.215 also creates a liability shield for those who adhere to it; pursuant to NRS 603A.215(3), a data collector shall not be liable for damages for a security breach if the data collector in question has complied with the requirements of NRS 603A.215, and the breach is not caused by the data collector's gross negligence or intentional misconduct.

AB 179 went into effect on July 1, 2015, but compliance with its amendatory provisions is not required until July 1, 2016. **NL**

1. NRS 603A.040 defines a "Data Collector" as "any governmental agency, institution of higher education, corporation, financial institution or retail operator or any other type of business entity or association that, for any purpose, whether by automated collection or otherwise, handles, collects, disseminates or otherwise deals with nonpublic personal information."

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