Google webmail under scrutiny

Following universal condemnation from privacy groups, Google has hit back at accusations that its free webmail service violates data protection laws. **Eugene Oscapella** looks at the arguments.

Google's new "Gmail" service has become the catalyst for complaints by a wide range of privacy and consumer groups across Europe, Australia and North America. Gmail may well serve as a test case for how far regulators are willing to allow access to the personal data of users of "free" webmail services.

How Gmail works

Google launched the Gmail programme in April, although it is yet to be fully rolled out. As of early June, Google's website described the service as "an experiment in a new kind of webmail", a system still in "preview mode" as the company attempts to iron out the kinks.

Gmail is described as a free search-based webmail service that includes 1 gigabyte of storage space. Google plans to offset the cost of this storage by placing targeted advertising based on the actual content of e-mails.

Google argues the point that all major free webmail services carry advertising, but that most of it is irrelevant to those who see it. Showing relevant advertising, it claims, offers more value to users than displaying random pop-ups or untargeted banner ads. Accordingly, Gmail users would see text ads and relevant weblinks that are based on the content of their e-mail messages. When users open an e-mail, Google's systems scan the text and then instantaneously display advertising that is matched up to the contents.

Google has stresses that this process is completely automated and involves no humans.

The ads appear alongside the messages in a similar fashion to the ads used in Google's search engine. Once the message is closed, ads are no longer displayed. Google states that the ads generated by this matching process are dynamically generated each time a message is opened by the user. That means Google does not attach particular ads to individual messages or to users' accounts.

But as Hamlet - if confronted by Gmail - might respond: "There's the privacy rub." To decide which ads are "relevant", Google must acquire some knowledge about the content of the e-mail messages.

Gathering storm clouds

The introduction of Gmail caused an immediate and visceral response, with several pro-privacy organisations raising both public policy and specific legal concerns.

In early April, a coalition of 28 privacy groups (later that month expanding to 31) from Europe, Canada, Australia and (primarily) the US signed a letter to Google asking it to suspend Gmail until the privacy issues were adequately addressed. The letter argued that:

> Gmail may well serve as a test case for how far regulators are willing to allow access to the personal data of users of "free" webmail services.

- the proposed scanning of all incoming emails for ad placement violates the implicit trust of an e-mail service provider
- the proposed unlimited period for data retention poses unnecessary risks of misuse
- Google has not set specific, finite limits on how long it will retain user account, e-mail, and transactional data
- Google has not set clear written policies about its data sharing between business units; and
- Gmail sets potentially dangerous precedents and establishes reduced expectations of privacy in e-mail communications that may be adopted by other companies and governments for many years after Google has gone.

The coalition's letter stated that "Google needs to realise that many different companies and even governments can and likely will walk through the e-mail scanning door once it is opened. As people become accustomed to the notion that e-mail scanning for ad delivery is acceptable, 'mission creep' is a real possibility."

The Washington-based Electronic Privacy Information Center (EPIC), along with the Privacy Rights Clearinghouse and the World Privacy Forum, called Gmail "an unprecedented invasion into the sanctity of private communications." Their letter to the California attorney general in May also raised specific legal objections to Gmail. The groups asked the attorney general's office to investigate Gmail for allegedly violating a provision of the California Penal Code that prohibits any person from attempting to read or learn the contents or meaning of any message without the consent of all parties to the communication.

The letter argued that Gmail, in scanning non-subscribers' private communications for targeted marketing, violates that provision: "Google has failed to gain the consent of all parties to the communication because individuals directing e-mail to the gmail.com domain have no way of knowing that the company is extracting content from the messages, or consenting to such scanning."

According to the group, violating this "wiretap" law could result in civil and criminal penalties for both Google and - surprisingly - Gmail users. The letter acknowledged that it was within Google's discretion whether it wishes

to risk violating California's wiretapping law, "but the company should not subject Gmail account holders to those risks, especially where there is a potential for civil and criminal penalty."

Furthermore, the group was highly critical of the Gmail terms of use. These required users to indemnify Google against any third party claim "arising from or in any way related to your use of the service, including any liability or expense arising from all claims of every kind and nature." Said the letter: "It is one matter for Google to take on the risk of [violating the section of the wiretap law], it is quite another for Google to expose its users to these risks and require them to indemnify the company from suit."

Privacy International has raised concerns that the precedent set by Google is likely to lead to a global trend to greater US-based centralisation and storage of personal e-mails and a more comprehensive linkage between content and advertising.

THE STORM CROSSES THE POND

Several European and Australian privacy groups signed on to the coalition's original letter although there was no detailed discussion about Gmail's compliance with the EU Data Protection Directive and related legislation. However, midway through April, Privacy International filed a complaint with 16 national data protection authorities, as well as the European Commission and the Article 29 Data Protection Working Group, arguing that Gmail violates several elements of EU data protection law. According to Privacy International, Gmail failed to comply with a range of legal requirements, including:

- the Gmail 'Terms of Use' state that Google disclaims all responsibility and liability for the availability, timeliness, security or reliability of the service. This may violate article 17 of the Data Protection Directive, which requires a data controller to take full responsibility and accept liability for the security of personal information.

- As noted by the Article 29 Group in its online privacy guidelines, everyone has the right to send mail without that mail being read by an indirect third party. Article 5 of the old telecoms directive (97/66/EC), which covers communications and related traffic data (ie. information sent by e-mail), lays down requirements on the confidentiality of communications.

- Data protection law ensures that individuals will have the ability to control their own data, but the 'Terms of Use' for Gmail require users to agree not to copy, reproduce, alter, modify, or create derivative works from the service. This may mean that users are not permitted to take their own e-mails out of the service.

- The 'Terms of Use' state that Google may at any time and for any reason terminate the service, terminate the agreement with a user, or suspend or terminate the user's account. The account will then become disabled and users may not be granted access to their account or any files or other content contained in their account, even if residual copies of information may remain in the Gmail system. Privacy International has called this condition "unacceptable", although it is not unusual among webmail service providers.

- Article 16 of the directive (relating to the confidentiality of data processing) requires that any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process it except on instructions from the controller, unless he is required to do so by law. Privacy International has argued that Gmail's 'Terms of Use' conflict with this provision.

- Article 7 of the directive requires member states to ensure that personal data is processed only if the consumer has given unambiguous consent. This consent must be given in full knowledge of the circumstances of the processing. Such informed consent cannot be possible under the current Gmail contract. Customers must be explicitly warned that their data will not be afforded the level of protection that applies in the EU. It appears that the Gmail service is in material breach of the consent provisions of data protection law.

In addition, consent can only be given by a Gmail account-holder. Those who send e-mail to a Gmail customer will have no opportunity to consent to having their e-mail scanned for content.

- Article 8 of the directive deals with the processing of special categories of data. In part, it requires member states to prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life, unless the consumer has given explicit consent. To what extent, Privacy International has asked, can or should Gmail (or any other e-mail service provider) conform to these requirements?

Privacy International has raised concerns that the precedent set by Google is likely to lead to a global trend to greater US-based centralisation and storage of personal e-mails and a more comprehensive linkage between content and advertising. Google's competitors have already moved to increase their storage capacity, it has argued. This increased storage and functionality will "fundamentally change the privacy expectation for electronic communication and will create additional security and data protection threats."

GOOGLE'S REACTION

Google responded to the privacy criticisms of Gmail with a forceful salvo posted on its website:

> What we did not anticipate was the reaction from some privacy activists, editorial writers and legislators, many of whom condemned Gmail without first seeing it for themselves. We were surprised to find that some of these activists and organisations refused to even talk

to us, or to try first-hand the very service they were criticising.

As we read news stories about Gmail, we have regularly noticed factual errors and out-of-context quotations. Misinformation about Gmail has spread across the web...This misinformation threatens to eliminate legitimate and useful consumer choices by means of legislation aimed at innocuous and privacy-aware aspects of our service, while simultaneously deflecting attention from the real privacy issues inherent to all e-mail systems.

Google also offered a detailed explanation of the service on its website, asserting strongly that Gmail does not represent a compromise or invasion of anyone's privacy. The website addresses several privacy criticisms directly. Responding to several of the criticisms raised by opponents of Gmail, it asserts, for example, that:

- automatic scanning of e-mail does not amount to a violation of privacy

- Google will make reasonable efforts to remove deleted e-mails from its systems as quickly as is practical

- no e-mail content or other personally identifiable information is ever shared with advertisers or other third parties; and

- using Gmail does not violate the privacy of senders since no one other than the recipient is allowed to read their e-mail messages, and no one but the recipient sees targeted ads and related information.

Google has acknowledged that there are issues with e-mail privacy, but that these issues are common to all e-mail providers. For example, it scans the text of Gmail messages in order to filter spam and detect viruses, making the argument that all major webmail services do the same.

The main issue, Google says, is that the contents of e-mail messages are stored on mail servers for some period of time. "There is always a danger that these messages can be obtained and used for purposes that may harm you." Thus, according to Google, there exists a real opportunity for misuse of personal information by governments, as well as by e-mail providers. The best defence is "careful consideration of the relevant issues, close scrutiny of e-mail providers' practices and policies, and suitable vigilance and enforcement of appropriate legislation."

Google also lists several exceptions to this non-disclosure policy, including requests by users that Google's support staff access their e-mail messages in order to diagnose problems; when Google is required by law to do so; and when Google is "compelled to disclose personal information because we reasonably believe it's necessary in order to protect the rights, property or safety of Google, its users and the public."

Google also presented several editorial comments from US publications criticising the privacy concerns raised over Gmail. Several editorials used the same term, calling the privacy concerns "overblown". Others called the privacy concerns "silly" or "bogus".

Conclusion

The Gmail saga, and the acceptance or rejection by legislators and policy makers of similar "scanning" by other service providers, is far from over. Gmail has become the focal point of privacy concerns about webmail providers in general. This has been unfortunate, in the short term at least, for Google, but fortunate for those both in the corporate world and the world of public policy who want these issues resolved in a way that doesn't inhibit innovation but that also respects privacy.

Web links: Google Gmail: https://gmail.google.com; The Electronic Privacy Information Center: www.epic.org; The World Privacy Forum: www.worldprivacyforum.org