

Survey: The best privacy advisers in 2008

Jay Cline

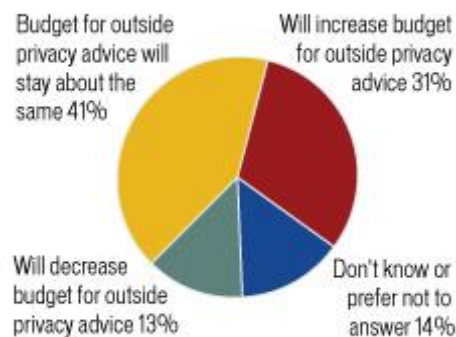
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Which are the best firms at helping organizations navigate the complexities of managing customer and employee information? That's the question I posed last month to over 2,000 people responsible for data protection. This was the third year asking this question (see "[The best privacy advisers in 2007](#)" and "[The best privacy consultancies](#)"), so we're now able to see some trend lines. I was surprised at the results.

Privacy budgets up

The most remarkable finding was that 31% of companies said they're planning to increase their 2009 budgets for outside privacy advice, despite the stock market implosion and U.S. recession that unfolded before the survey. Only 13% said they were decreasing their budgets.

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How can data protection officers survive the budget scalpels everyone else is facing? One possible answer makes sense: Boardroom executives perhaps no longer view data privacy and security as remote risks that can be put off for a better day. If these dollars are getting sheltered or even augmented, executives must now see privacy as a bottom-line objective with immediate impact on earnings.

Call my lawyer

A second noteworthy trend is the continued dominance of the legal profession at the top of the charts. Of the 684 votes in this category, 72% were cast for law firms, including the top eight vote-getters (see Table 1).

This is surprising to me, because of the healthy debate under way in the privacy profession about where privacy should sit in the organization. The side that is prevailing in this debate argues that privacy is much bigger to corporations and to society than legal compliance. But when it comes to whose privacy opinions CPOs seek most, it continues to be those who speak with the authority of the law.

Table 2: Top Privacy Law and Consulting Firms

The top three vote-getters remain unchanged from last year's poll, while law firms Morrison & Foerster, Kelley Drye and London-based Bird & Bird moved up a tier. In the table below, law firms are highlighted in pink, while consulting firms are highlighted in green and associations and collaboratives are highlighted in purple.

Firm	Voting Tier*
HUNTON & WILLIAMS ⁺	I
VENABLE ⁺⁺	II
BAKER & MCKENZIE ⁺⁺	II
MORRISON & FOERSTER ⁺	II
KELLEY DRYE ⁺⁺	II
BIRD & BIRD	II
FIELD FISHER WATERHOUSE	III
WILEY REIN ⁺⁺	III
REBECCA HEROLD & ASSOCIATES	III

<u>SAMET PRIVACY</u>	III
<u>FOLEY & LARDNER</u>	III
<u>IBM</u>	III
<u>COVINGTON & BURLING</u> ⁺	III
<u>DELOITTE</u>	III
<u>PRICEWATERHOUSECOOPERS</u>	III
<u>CORPORATE PRIVACY GROUP</u>	III
<u>ERNST & YOUNG</u>	III
<u>HOGAN & HARTSON</u> ⁺	III
<u>DLA PIPER</u> ⁺⁺	III
<u>PROSKAUER ROSE</u> ⁺⁺⁺	III
<u>SIDLEY AUSTIN</u> ⁺⁺	III
<u>LINKLATERS</u>	III
<u>PONEMON INSTITUTE</u>	III
<u>PRIVACY & INFORMATION MANAGEMENT SERVICES</u>	III
<u>WILMERHALE</u> ⁺	III
<u>BRISTOWS</u>	III
<u>DRINKER BIDDLE & REATH</u>	III
<u>INTERNATIONAL ASSOCIATION OF PRIVACY PROFESSIONALS</u>	III
<u>VORYS, SATER, SEYMOUR & PEASE</u>	III

* The firms are ranked in order of the number of votes received, but banded into three tiers to compensate for statistical margin of error. To enter Tier I, a firm needed more than 10% of the total votes, with Tier II requiring 3% to 10% and Tier III requiring 1% to 2%.

** For purposes of full disclosure, Minnesota Privacy Consultants, the author's firm, received the same number of votes as Foley & Lardner.

+ Indicates a firm that was ranked in the top Tier I of the 2008 Chambers and Partners survey of U.S. law-firm privacy and security practices. The Chambers results generally track these results.

++ Indicates a firm rated in Tier 2 by Chambers.
+++ Indicates a firm rated in Tier 3 by Chambers.

Last year, I took some heat for continuing to run an informal poll that was starting to influence purchasing decisions. So this year, I hired [Overbrook Research](#) to conduct a professional survey. Overbrook performs research for national political candidates, has been featured in *The Wall Street Journal* and has assisted a major network with its live 2008 election-night projections.

One of Overbrook's innovations was to allow CPOs to choose up to three firms as their top picks, muting the effect of any one firm's communications with its clients during the polling period.

Despite the change in methodology, the same three firms topped the charts this year as last. For the third year in a row, New York-based [Hunton & Williams](#) received the top number of votes. Washington-based [Venable](#) and Chicago-based [Baker & McKenzie](#) followed. New to the top six this year were New York-based [Morrison & Foerster](#), Washington-based [Kelley Drye](#) and London-based [Bird & Bird](#).

For its part, the appearance of Kelley Drye appears connected to the increasing number of privacy questions associated with new media and technologies, a stated strength of the firm.

"We work with many of the world's leading developers of new technology," said Reed Freeman, a partner in the firm's privacy and information security group, "and guide our clients on how those technologies are likely to be regulated in the future."

Niche consulting

A third surprise was who topped the consulting charts. We went back and re-examined the data on this one to detect any fundamental bias or flawed methodology. But out of 684 tallies, our pollster reported that the Big Four firms fared the same as niche consultants [Rebecca Herold & Associates](#) and [Corporate Privacy Group](#) (CPG) among companies earning more than \$1.6 billion per year, the current minimum to rank in the Fortune 1,000.

What could explain this turnabout? With CPG's permission, I asked three of its clients to explain their decision-making criteria.

"We needed to develop a privacy and information security course for our global employee base of over 80,000 people," said Alexis Goltra, managing privacy counsel at [Oracle](#).

"While performing diligence, we found that Richard [Purcell, head of CPG] was one of the leaders in the privacy world from a content perspective. And because CPG is a small firm," he added, "we knew that we could work closely with him to develop content that applied to Oracle's unique business and operations."

Kevin Turner, international director of emergency cardiovascular care at the American Heart Association, also pointed to the ability to know who would be working on his project. "I turned to Richard because he has an ability to build a positive consensus with decision-makers to understand the principles of proper data management and their impact on the long-term health of the organization."

Louis Branz, CPO at St. Louis-based Edward Jones, told me that cost was a deciding factor. "We have had very good experience working with lawyers like Becky Burr and non-lawyers like Richard Purcell."

Branz added, "We find that they're very willing team players who take the time to get to know us, track what's going on in the world and help us prepare practical solutions to our problems."

Enter Europe

When you have to make your living on privacy, you find out quickly who has money for it. Three years ago, the top answer was not corporations based in Canada, Latin America, Europe or Australia. While these regions preceded the U.S. in adopting comprehensive data-protection legislation and had enough budget to support a handful of local privacy practices, the number of corporate privacy executives and their budgetary authority always paled in comparison to their American counterparts.

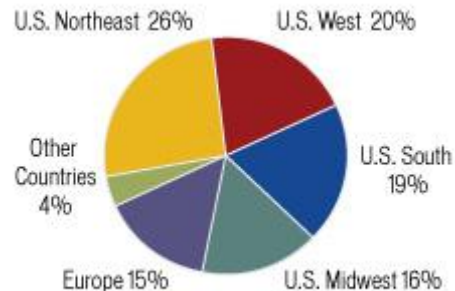
But this year was different. I noted a significant increase in the level of European participation in the survey, matching the total for the U.S. Midwest region. Of the Europeans, nearly all were votes by and for U.K.-based firms.

What could be driving this change? A simple explanation could be language and culture. The survey was executed in English, and non-Anglo CPOs could be hesitant about taking an American survey.

A second factor also could be at play. One need look no further than the heightened enforcement and budgetary powers of U.K. Information Commissioner Richard Thomas, who has been charged by the prime minister to put a stop to the spate of data breaches occurring in the U.K.

Diversification of the privacy-advice market

The headquarters of survey respondents were fairly evenly distributed among the four U.S. Census Bureau regions and Europe, with the combined area of Canada, Latin America and Asia-Pacific representing a new growth area.



"The stakes for privacy regulation in the U.K. are currently pretty high," said Eduardo Ustaran, a partner at London-based Field Fisher Waterhouse.

"As the Ministry of Justice acknowledges, the use of information underpins the government's ability to deliver benefits for the citizen," he added.

"However, this will only be achievable if people have confidence in the sharing and handling of personal data by both the public and private sectors."

Ruth Boardman, a partner at London-based Bird and Bird, echoed this sentiment. "In the U.K., we will soon see the level of fines available to our commissioner, which will focus compliance efforts," she said.

"The drive for more enforcement in the EU is not just a U.K. issue," she added. "For example, the Belgian Commission has also just announced a commitment to more pro-active enforcement."

As the APEC Privacy Framework gains traction and the Australian Privacy Commissioner gains more clout, watch for the same trend start to unfold down under.

Differentiators

Despite the changes in the economy and in our survey methodology, some results remained constant. When asked why they chose the firms they did, data protection leaders have reported the same answers three years running: They want the right answer, and they want it delivered in practical terms appropriate to their organization's market and culture.

Despite the slowing economy, privacy officers for a third year continue to appear willing to pay a premium for good and practical advice. Of the nine possible choices offered, "good value for the rates charged" has ranked dead last each time (see Table 2).

Table 2: What separates the leaders from the pack

In 2006, I asked CPOs to provide free-text answers to the question "Why did you choose the firm you did for Best Privacy Adviser?" In 2007, I allowed privacy leaders to choose multiple answers from a menu selection. This year, survey respondents could choose only one menu item. Despite the methodology changes, the order of answers remained relatively constant.

Differentiators	2008	2007	2006	Direction
Broad and deep expertise	1	1	1	<->
Practical advice	2	2	2	<->
They understand my business	3	5	6	//
Global staff and affiliates	4	6	5	//

Differentiators	2 008	2 007	2 006	Direction
Timely and thorough work	5	3	3	V V
Government connections	6	7	7	/
Interdisciplinary perspective	7	8	8	/
Accessible staff	8	4	4	V V V
Good value for the rates charged	9	9	9	<->

<-> indicates no change from the previous year
/ indicates movement one place up since 2007
V indicates movement one place down since 2007

Outlook

Looking ahead to 2009, what do the top firms see unfolding in the privacy marketplace? Several see an evolution of privacy regulations not letting up during an economic downturn.

Erin Egan, a partner at Washington-based Covington & Burling, expects that the new Congress and the [Obama](#) administration will more actively legislate and enforce consumer-privacy protection. "The increased use of 'border-free technologies and cloud computing " will also drive corporate privacy agendas, she added.

"The privacy landscape is becoming much more complex both domestically and internationally," echoed Mary Ellen Callahan, a partner at Washington-based Hogan & Hartson. Callahan points to new data-security regulations in Massachusetts and Nevada as barometers of future activity at the U.S. state level. She also sees an Obama administration potentially supporting federal privacy legislation covering all sectors. A "new data-breach notification scheme" in the EU is also a possibility, she added.

"I believe companies will be evaluating how legislative proposals in the new congress -- in areas including data security and online behavioral

advertising — would impact their businesses," opined Stu Ingis, a partner at Venable and second in votes for top individual expert (see Table 3).

Milo Cividanes, also a partner at Venable, similarly sees "potential new laws and regulations initiated by the Obama administration" as a key factor in 2009.

Ed McNicholas, a partner at Washington-based Sidley Austin, agreed. "In the coming era of more self-confident governmental oversight and enforcement, the increasing need to comply with regulatory mandates -- both foreign and domestic -- will drive companies to seek outside privacy advice, the recession notwithstanding."

Brian Hengesbaugh, a partner at Baker & McKenzie and No. 6 in top-expert votes, sees companies in 2009 still absorbing their pre-existing privacy obligations.

"At the same time," Hengesbaugh added, "more companies are going to be grappling with privacy in new contexts, such as global internal investigations, e-discovery and non-U.S. breach notification."

"Health privacy promises to re-emerge as a major topic of debate," said Mary Devlin Capizzi, a partner at Washington-based Drinker Biddle & Reath.

"We may also see more breach-notification requirements that apply to medical information, the extension of HIPAA-covered entity type requirements to vendors of personal health records, and statutory penalties for failure to comply with a HIPAA business-associate agreement," she added.

Several experts predict the drumbeat of security-breach notifications will affect new areas.

"There will continue to be an expansion of heightened data security and identity-theft prevention requirements to business entities not previously regulated in these areas," said Benita Kahn, a partner at Columbus, Ohio-

based Vorys Sater Seymour & Pease, "and to business functions not historically subject to rigorous security audits and controls."

"A main driver for engaging outside privacy advisers will include assistance in the selection and implementation of enabling technologies such as data-loss prevention, endpoint-security tools and access-governance applications," said Larry Ponemon, head of the [Ponemon Institute](#).

"We're seeing an evolution in the enterprise response to privacy and data protection," said Rena Mears, global and national service offering leader in Deloitte's security and privacy practice.

"Increasingly," she added, "companies are recognizing the need to manage and protect data as a global asset, and are adopting and implementing automated technology solutions to optimize opportunities and address these challenges."

Andrew Serwin, a partner at Milwaukee-based Foley & Lardner, said, "Growing concerns over information security, driven by the new information security laws that have passed, or will pass next year, as well as the Red Flag regulations, will be the top factor driving companies to seek outside privacy advice."

"There will continue to be an uptick in the number of regulatory investigations and enforcement actions" related to data breaches, added Sotto.

Several experts say developments in new technologies and business operations will continue to force privacy into project plans.

Purcell expects Web 2.0 technologies such as blogs, video uploads and social-networking sites to generate more privacy questions for businesses. "2009 will see the convergence of personal and proprietary information in ways that most businesses will find perplexing," he said.

Adam Nelson, senior managing consultant in IBM's Security & Privacy Services group, sees cross-border data transfer and data-related vendor management driving demand for 2009 projects across his clientele.

"Continued moves to globalize data management — and to tap into 'cloud' infrastructures — will drive an increased need to address compliance, risk management and supporting technology," he explained.

"We anticipate that a top driver for outside advice in 2009 will be related to cost-savings initiatives that impact privacy," said Ruth Hill Bro, a partner at Baker & McKenzie.

"Transactions such as renegotiating outsourcing arrangements, expanding offshoring activities, consolidating global databases and implementing global reductions in force would all require a plan for privacy," she added.

Table 3: Top individual experts

The following privacy professionals received the most tallies in response to the question, "Which person -- whether a lawyer, consultant or corporate privacy officer -- do you think is the top global expert on data privacy and protection?"

Expert	Votes
Lisa Sotto, Hunton & Williams/th>	35
Stu Ingis, Venable	25
Variants of "privacy is too complex to have a single top expert"	19
Chris Kuner, Hunton & Williams	15
Rebecca Herold, Rebecca Herold & Associates	14
Reed Freeman, Kelley Drye	13

Will companies facing declining earnings in 2009 end up scaling back their privacy agendas, after all? Many will try. But consumer, legislator and regulator demands for greater privacy protections are likely to drive the ultimate outcome.

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