

HP-gate

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The American Heritage Dictionary defines **pretexting** as the act of pretending to be someone who you are not, by telling an untruth, or creating deception. The practice of pretexting typically involves tricking a business into disclosing personal information of a customer, with the scammer pretending to be the customer. This issue has been at the heart of the recent scandal at **Hewlett-Packard**, which has sent the corporate pundits mouthing strong words for the Fortune 500 company, calling its behaviour disgraceful and stating that it even puts the Watergate scandal to shame, '*gate-ing*' it as they always do a scandal in true American un-innovative style, as *HP-gate*. With digital technology aiding such improper activities and thus threatening to unsettle the conviction of shareholders, we have attempted to update our readers on the incident and its consequences.

How to get blown up by stepping on your own landmine

We do not mean to gibe HP for the mess its management has got the Company into, but to be gated thus, requires substantial shaking of the public trust and confidence. How did this happen? The incident cindered from the online site of CNET, a television cum internet media company that carried a story on HP strategy that could have only been leaked by an HP Director. A furious Patricia Dunn, the HP Board Chairwoman, resolved to identify the perpetrator of this deed and hired investigators, who in turn impersonated HP directors and CNET reporters and obtained the personal phone records of both from their respective telephone companies. But was this too rushed and impulsive a decision by Dunn, a scheme that won the war but lost the battle? No doubt the spying did unveil the disloyal director, but it also left in its wake a disastrous outcome, with Perkins, the Silicon Valley venture capitalist and one of the HP directors, resigning in protest of the ethical trespass, and being irked into making the moral breach public. To top it, the 'leaker' director George Keyworth II, apologised and stated, "I would have told you all about this. Why didn't you just ask?"

Perhaps, exasperated from the ongoing trickling of confidential company information to the media going back to CEO Carly Fiorina's tumultuous tenure that ended in early 2005, and wanting to rule it with an iron hand in order to once and for all plug the leaking faucet, Dunn took the extraordinary step of authorising a team of independent electronic-security experts to spy on the January 2006 communications of the other 10 directors - not the records of calls (or e-mails) from HP itself, but the records of phone calls made from **personal accounts**. That meant calls from the directors' home and their private cell phones.

That Dunn acted without informing the rest of the board was a worse infringement than the original culprit's and unleashed a round of boardroom fury. The leaker resigned from the board recently and investigation by state, federal and congressional authorities was launched. Dunn's transgression is far worse than the disloyal director's. The principled way would have been for Dunn to confront the board directly, ask the leaker to make himself known, and then given him the boot. Instead, the Chairwoman took matters in her own hand and turned a domestic quarrel into unlawful public combat, risking the Company's reputation by impelling the incident into the category of a possible criminal case. Voted by Forbes as the 17th most powerful woman in 2005, Patricia Dunn, in a matter of few months, made a disgraceful exit, giving in her resignation in September 2006. In a recent outcome, California's attorney general announced indictments against HP's ousted Chairwoman and its former ethics lawyer, for their roles in the snowballing boardroom espionage scandal. Three private detectives involved in the Silicon Valley icon's alleged spying operations were also indicted. The indictment sends a strong message to Corporate America, which is still reeling from the Enron episode that remains creviced with regulatory and ethical cracks.

Perkins, who resigned on the fateful day when Dunn called a meeting of the Board, where she revealed the surveillance tactics used and pointed to the source of the leak, chaired the HP board's Nominating and Governance Committee and had not been informed by Dunn of the surveillance, even though, as he stated, she had told him for

months that she was attempting to discover the source of the leak. Clearly an act of cozenage for the Chairman of HP Governance, it caused him to resign in protest.

When a director quits

Any time a director resigns from a U.S. public corporation, federal law requires the company to disclose it to the SEC, in what is called an 8-K filing. If the director resigned for reasons related to a “disagreement” with the company about “operations, policies or practices,” that, too, is now required. HP reported Perkins’s resignation to the SEC four days after it happened (back in May 2006) but gave no reason for the resignation, instead including only a press release thanking Perkins for his years of service. In early August, Perkins, represented by his own non-HP lawyer, formally asked the SEC to force HP to publicly file his written explanation for resigning. According to a source, the Company objected on the grounds that when Perkins resigned at the May board meeting he did not indicate why. Perkins says his reasons for resigning were obvious and he stated them at the meeting. In his words, “probable unlawful conduct, improper board procedures, and breakdowns in corporate governance” were the reasons for his final bowing out of the boardroom.

Digital conspiracy

The entire episode raises questions about corporate inspection in a digital era. In today’s innovative age, audio and visual surveillance capabilities progress further everyday at a regular pace, in their competence to collect and analyse data, with the web aiding the allocation of that data in a smooth and effective manner. But what are the ethical limits within which such operations should be carried out? Companies are a collection of people, including the shareholders, the workers and the management, and to keep a firm operational, its poll bearers need to be nourished with a certain amount of trust. The HP scandal brings to the fore a very important issue - how far should a company go to obtain information it seeks, for competitive gain or better management?

The HP case specifically also spotlights on the debatable procedures used by security consultants to obtain personal information. HP acknowledged in an internal e-mail sent from its outside counsel to Perkins that it got the paper trail it needed to link the director-leaker to CNET through a controversial practice called ‘pretexting’. Pretexting is heavily marketed on the Web.

The rogue technique

The ‘pretexting’ practice, according to the Federal Trade Commission (FTC), involves using ‘false pretences’ to get another individual’s personal non-public information: telephone records, bank and credit-card account numbers, Social Security number and the like. Typically, for example, in case of a phone company, pretexters call up and falsely represent themselves as the customer; since companies rarely require passwords, a pretexter may need no more than a home address, account number and heartfelt plea to get the details of an account. According to the FTC’s website, pretexters sell the information to individuals who can range from otherwise legitimate private investigators, financial lenders, potential litigants and suspicious spouses to those who might attempt to steal assets or fraudulently obtain credit. Hewlett Packard’s use of pretexting also brings up potential charges of criminal fraud, violations of consumer protection laws, issues of deception, and the use of spyware.

What the law says

Pretexting, the FTC site states, ‘is against the law’. The FTC and several state attorney generals have brought enforcement actions against pretexters for allegedly violating federal and state laws on fraud, misrepresentation and unfair competition. Legal experts vary in their views on the extent to which pretexting is a violation of criminal law. The *Gramm-Leach-Bliley Act of 1999* prohibits a range of fraudulent activity related to financial records, but its applicability to phone records is unclear. Experts agree that pretexting is often used to accomplish identity theft—to borrow money or buy merchandise - that clearly is criminal. But the pretexting itself may be harder to prosecute. Civil liability would seem to be much more a risk for pretexters, as they obviously engage in an invasion of privacy, achieved through misrepresentation.

Perkins vs. Dunn

The materials before the SEC indicate that Dunn's consultants used pretexting for her investigation. Sonsini, HP's outside counsel, acknowledged that Dunn's security consultants obtained information regarding phone calls made and received by the cell or home numbers of directors and that it was done through a third party that made pretext calls to phone service providers.

In the documents before the SEC, Perkins also protested that he was not allowed to review and approve the initial 8-K filing about his May resignation, which he said is required under SEC rules. And he requested that the HP board appoint a special committee to examine the legality and propriety of Dunn's investigation. "I resigned solely to protest the questionable ethics and the dubious legality of the chair's methods," Perkins wrote, berating Dunn.

Not a one-off

In a case in 2003, a man contacted internet-based *Docusearch.com* and purchased various services from the online company, including his ex-girlfriend's address, social security number, employer information including employer's address, which *Docusearch* got by pretexting her. Then the man located his ex-girlfriend, found and killed her, before killing himself. The court found that the pretexting was a deceptive trade practice.

In another case, *Source One* advertised that it would conduct "asset searches" for a fee. Lots of lawyers used the company's services to find out whether the people they were suing (or about to sue) had any assets worthy of attachment, which otherwise would have been an impossible task, as financial records are secret. But the asset search by *Source One* was carried on through the use of deception and trickery, including impersonation of account holders.

In March 2006 recently, the California Attorney General filed a US\$ 10 million-plus lawsuit against *Data Trace USA*, contending that the firm unlawfully obtained and sold wireless customers' confidential monthly call records via pretexting.

The half full glass

The loss of trust on account of the sad episode at HP represents the half-empty glass viewpoint; however, in a way, the glass does seem to be half full. As California Attorney General has stated that while it does appear that "illegal" means were used, but what has emerged from this is the fact that although California has strict laws to cover some of these illegal methods of obtaining phone records, there is not a national or federal law in place to cover these important personal privacy issues. In fact, even 'pretexting' is not necessarily illegal in California and the whole issue of pretexting and any other means used to illegally obtain private phone records would now enter the national debate, and most likely, finally push major legislation, already in the US Congress, forward, after years of being stalled. And as the world emulates the American giant, perhaps such legislations would come to pass in other countries too.

Already, in the wake of the HP scandal, California Governor, Schwarzenegger has, this month beginning, signed a bill (Senate Bill 202) that forbids the practice in the state and would go into effect starting January 1, 2007. The law specifies that the written consent of the original caller is needed to release the records to any other individual or agency. Fraudulent attempts to obtain the records would be punishable by fines or a jail term.

What is interesting is that despite intense media coverage, investors continue to show faith in the company. As of October 12, the price of the Company's stock actually increased from US\$ 36.5 to US\$ 38.4 per share, above that of pre-scandal levels, at a six-year high! Perhaps it is the reputation that the Company has built over the years that has reflected in the belief of the investment community, with the scandal having little to no impact on the Company's financial results.

At the risk of hearing an outburst from the ethical pundits, at least the HP scandal, if not all such incidents, was a result of a well-meaning individual trying to get the job done. On the more crucial angle, it is obviously irresponsible to topple the whole cart in order to pick out one rotten apple. Pretexting is very clearly a reckless exercise that not just breaks down public trust, but also causes damage to both, the spy and the party being watched through the keyhole. In the case of Hewlett Packard, it would have been prudent for the Management to take responsibility for the mole among them, and taken it as a sign that perhaps someone had a problem big enough to divulge confidential company information to an outside party. If the issue had been recognised and addressed accordingly, HP's reputation would have been left intact and so would have the public faith in it.

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