

# THE ROLE OF DATA PROTECTION

in Safeguarding Sexual Orientation  
and Gender Identity Information

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**LGBT Tech** encourages the continued adoption and use of cutting-edge, new, and emerging technologies by providing information, education, and strategic outreach for LGBTQ+ communities. We are a national, nonpartisan group of LGBTQ+ organizations, academics, and technology organizations whose mission is to engage with critical technology and public policy leaders for strategic discussions at all levels. LGBT Tech empowers LGBTQ+ communities and individuals and ensures that media, telecommunications, and technology issues of specific concern to LGBTQ+ communities are addressed in public policy conversations.

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# EXECUTIVE SUMMARY

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In the United States, the LGBTQ+ community has endured a long history of outing, discrimination, hate, and social stigma that has caused immeasurable harm to LGBTQ+ individuals, including physical, emotional, and psychological impacts.<sup>1</sup> In 2022 alone more than 300 anti-LGBTQ+ bills have been introduced, including dozens of bills limiting, for instance, transgender kids' ability to play sports or general ability for LGBTQ+ individuals to access necessary and affirming mental and health care; several of those bills have passed. At the federal level, in May 2022, a draft U.S. Supreme Court decision was published that, if and when finalized, is set to overturn landmark decisions that were once grounded in the constitutional right to private life, namely *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Many believe this could signal the willingness of the Court to re-examine other milestone cases recognizing foundational rights of LGBTQ+ individuals, including *Lawrence v. Texas*, 539 U.S. 558 (2003) or *Obergefell v. Hodges*, 576 U.S. 644 (2015).

In the face of this, connected devices and services have evinced a great capacity to empower members of the LGBTQ+ community to find community, access services, and live more openly online and offline.<sup>2</sup> However, the sharp increase in availability and use of connected devices and services has also created new privacy risks for LGBTQ+ communities, as well as exacerbating existing risks. Technology makes it easier to recognize, identify, track, and target LGBTQ+ individuals. Even legally permissible or beneficial data processing for LGBTQ+ individuals can increase the risk of individual, community, or societal harms, in particular, harms associated with: (1) loss of opportunity; (2) economic loss; (3) social detriment; and (4) loss of liberty.

Although all individuals face privacy risks, we urge a heightened focus on those, like LGBTQ+ individuals, who can be most severely impacted. As Professor Scott Skinner-Thompson explains, “even assuming that privacy violations were evenly distributed across society (they are not), any such intrusion disproportionately impacts members of marginalized communities who are unable to

absorb the social costs that flow from a privacy violation or vindicate the privacy loss in courts.”<sup>3</sup>

Perhaps most relevant and integral to the LGBTQ+ community is the processing of information about sexual orientation and gender identity (“SOGI” information<sup>4</sup>) as well as other intimate personal data that may specifically be important to LGBTQ+ individuals for their personal development as well as the provision of social, mental, and physical health services. Processing this data is often necessary to provide products and services for LGBTQ+ users. Furthermore, diverse, representative datasets can be an important tool for ensuring equitable product improvements, addressing the digital divide, improving public health, empowering LGBTQ+ communities, and combating discrimination.

In this paper, LGBT Tech and FPF explore the history of privacy violations against LGBTQ+ individuals and the resulting consequences and regulatory responses. We then examine SOGI information specifically, providing definitions of SOGI and SOGI-adjacent information and the ways such information can be cataloged. We continue by identifying several use cases where SOGI information can be used and examine specific and general harms that may result from its use. Next, we briefly examine the current U.S. legal environment and identify important gaps in protection. Finally, we make some preliminary recommendations for steps that organizations and policymakers can take to work toward the safer and more equitable and dignified use of SOGI data with meaningful privacy safeguards. These recommendations, which should be seen as the beginning of a longer conversation that we use this opportunity to call for, include for actors to:

1. Recognize the unique sensitivity of SOGI information;
2. Inventory and categorize information to identify SOGI data;
3. Evaluate the protections for SOGI information with respect for context;
4. Support efforts to promote inclusion, representation, & equity and prevent discrimination; and
5. Support and encourage additional research.

# I. INTRODUCTION: THE IMPORTANCE OF PROTECTING SOGI INFORMATION

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In the United States, the understanding of a “right to privacy” has developed in part due to the societal recognition of a need to retain privacy for “intimate personal” decisions or lifestyles as well as an increased focus on “sexual privacy.”<sup>5</sup> LGBTQ+ relations have played a significant role in these developments.<sup>6</sup> For example, *Griswold v. Connecticut*, a fundamental privacy case, was decided on the sanctity of privacy in the “bedroom,” which was later expanded to protect same-sex relations in *Lawrence v. Texas*.<sup>7</sup> And, while legal notions of privacy today protect sexuality in many cases, in practice not all existing jurisprudence has led to practical or sufficient safeguards for the collection or use of SOGI data.<sup>8</sup>

An estimated 9 million American adults (3.5%) identify as lesbian, gay, or bisexual and an estimated 0.3% of adults are transgender. Additionally, reports of individuals that acknowledge that they have engaged in same-sex sexual behavior or acknowledge at least some same-sex sexual attraction are much higher.<sup>9</sup> However, while individuals within the United States population are becoming more likely to identify as LGBTQ+ and more accepting of same-sex attraction and behaviors, civil rights protections, including the right to privacy, are under attack and still lag when it comes to protecting LGBTQ+ individuals.<sup>10</sup>

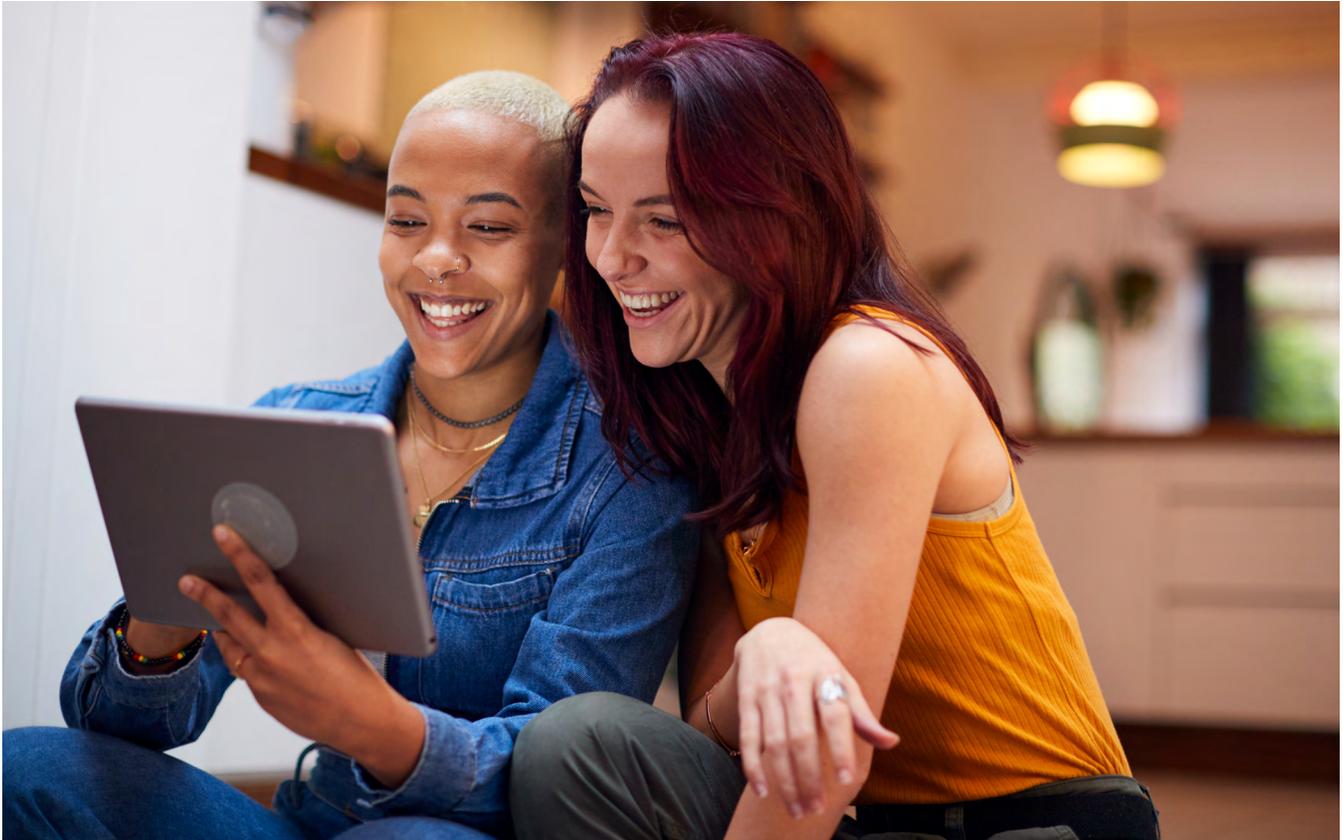
Technology has played an important role in LGBTQ+ communities. A recent study found that more than 80% of LGBT respondents utilized social media, compared to 58% of the general population.<sup>11</sup> A 2013 study found that youth who identified as LGBT spent a greater amount of time online than those who did not.<sup>12</sup> A higher percentage of LGBTQ+ individuals also have reported using online dating apps and having those connections result in a marriage or committed relationship.<sup>13</sup> Partly because of this, threats of misuse or abuse of technologies or technology services are particularly keen in LGBTQ+ communities.

There is currently no federal privacy law that comprehensively governs the privacy of personal data within the United States. Sectoral federal data protection laws do apply to certain categories of data such as health, financial, credit, and personal information collected from children. SOGI data is singled out for heightened protection in a number of recent federal legislative proposals, but, as of the time of publication, none of these efforts have yet made serious progress.<sup>14</sup> Instead, states have been filling the void. For instance, the California Consumer Privacy Act (CCPA), later amended by the [California Privacy Rights Act](#) (CPRA), introduced the first comprehensive (i.e., non-sectoral) state consumer privacy law, and provides limited protections in the form of individual rights to opt-out of the sale of personal information and to request that businesses limit certain uses of sensitive data, including information concerning sex life or sexual orientation.<sup>15</sup> The Virginia Consumer Data Protection Act, passed in 2021, requires affirmative consent for collection of sexual orientation data. Three other states, Colorado, Utah, and Connecticut, have since passed comprehensive privacy laws that also require affirmative consent to collect data related to sexual orientation and sex life (as well as other sensitive information), although they vary in the strength of other protections.<sup>16</sup> In the coming years, additional states are likely to consider new privacy laws that could create heightened protections for SOGI information.

Meanwhile, the U.S. Supreme Court has signaled that long-standing federal recognition of rights directly or indirectly concerning SOGI information may be at risk. Justice Alito’s leaked draft opinion in *Dobbs v. Jackson [Health Center]* has enough votes in its draft form to overturn *Roe v. Wade* and send abortion as an issue back to the states.<sup>17</sup> Even though the draft seeks to limit the ruling to the issue of abortion, its rationale could easily be used in future cases to dismantle the right to same-sex marriage enshrined in the Court’s *Obergefell* decision.<sup>18</sup>

## II. PRIVACY INVASIONS OF THE LGBTQ+ COMMUNITY, PAST TO PRESENT

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LGBTQ+ rights are, and have always been, inexorably linked with privacy.<sup>19</sup> This section explores some of the most significant privacy invasions impacting the LGBTQ+ community in U.S. history, from anti-sodomy laws to mandatory medical disclosures during the HIV/AIDS epidemic. We conclude with contemporary examples of harmful privacy invasions related to SOGI data.

As a preliminary issue, it's important to note that the policing of LGBTQ+ individuals and communities has disproportionately impacted those who are also members of other traditionally marginalized communities, including non-white communities or individuals from less privileged socioeconomic backgrounds.<sup>20</sup> As such, more research would be useful to examine the specific intersectional impacts of privacy invasions on LGBTQ+ communities across history.

### 1. Early America's Anti-Sodomy Laws and the Criminalization of Sexuality

In all American colonies the punishment for sodomy was death, a punishment that remained on the books in some states well into the 19th century. In the early 20th century, sodomy was still a felony in every state.<sup>21</sup> Anti-sodomy laws provided a basis for the violation of individuals' privacy as a means for the investigation, and frequently the incarceration, of individuals suspected of same-sex sexual behaviors.<sup>22</sup> While the long prison sentences associated with anti-sodomy laws have been diminished through state law changes and reduced discretionary application by police throughout the 20th century,<sup>23</sup> anti-sodomy and obscenity laws were — and still are — systematically utilized to oppress LGBTQ+ persons through

incarceration, disruption of employment, and public shaming. In addition, laws that prohibited or criminalized cross dressing (wearing clothes not typically associated with one's perceived sex) "...became a flexible tool for police to enforce normative gender on multiple gender identities, including masculine women and people identifying as transgender on gender non-conforming."<sup>24</sup>

Regulation of sexual behaviors and gender expression remains prevalent today. Although the U.S. Supreme Court in *Lawrence v. Texas* invalidated state anti-sodomy laws, those laws, and their progeny still remain on the books in many states.<sup>25</sup> For example, from 2011 to 2014, twelve men in East Baton Rouge Parish, Louisiana were separately arrested for "crimes against nature."<sup>26</sup> Similarly, the government continues to regularly mandate the revelation, or "outing," of information concerning people's sexuality, gender identity, and HIV status through legal regimes, including, for example, state laws requiring people to frequent bathrooms in accord with their sex assigned at birth, or mandatory disclosure laws to obtain government services, including government-issued identification.<sup>27</sup> In addition, federal policy involving such as issues as admission to the military (banning openly homosexual individuals from service), immigration laws and policies (sexually "degenerate" immigrants bans) and welfare policies (social security benefits) were used to systematically exclude LGBTQ+ individuals from federal benefits and subject them to second class citizen status.<sup>28</sup>

## 2. Police Raids and Entrapment in the Early to Mid-1900s

In the period preceding the Stonewall Riots (1900-1967),<sup>29</sup> it was common and expected that queer spaces would be regularly raided by police for such crimes as "inferring sexual perversion," "serving gay people," or failing to enforce blanket bans on LGBTQ+ customers.<sup>30</sup> Police would send young plainclothes officers into clubs to entrap gay men by leading them on and then arresting them, often on thin evidence. These officers would also arrest and charge other LGBTQ+ individuals for other so-called indiscretions, such as short hair on

women.<sup>31</sup> Many bars or performance venues that welcomed LGBTQ+ clientele would be shut down regularly, and the customers were often arrested, often merely for political expediency.<sup>32</sup>

These arrests did not tend to lead to lasting charges, and were not always intended to; rather the police were arresting individuals solely so they would be punished by having their names published in the following day's newspaper.<sup>33</sup> In this way, both the state and private businesses, especially newspapers, were active and enthusiastic participants in the outing of LGBTQ+ individuals.<sup>34</sup> Exposure as a homosexual, lesbian, or trans person—especially via an arrest—both jeopardized one's ties to friends and family and threatened existing jobs and access to employment.<sup>35</sup> At the time, lesbians were ostracized in the court of public opinion through crude stereotypes and fear mongering.<sup>36</sup> In addition, women who dressed as men (as well as men who dressed in women's garb) were subject to arrest and harrasment by police under antiquated and often unrelated anti-cross-dressing laws in effect at the time.<sup>37</sup>

For many, even today the stigma of attending LGBTQ+ events and frequenting LGBTQ+ spaces haunt members of LGBTQ+ communities. Older LGBTQ+ individuals are significantly less likely to view their sexual orientation as an important aspect of their identity, and a meaningful proportion say that their status is a negative aspect of their lives.<sup>38</sup> Additionally, there is a significant negative correlation between age and LGBTQ+ identification, suggesting that while there has been significant social progress, there are latent LGBTQ+ individuals choosing to forgo self-identification.<sup>39</sup>

## 3. The Lavender Scare and the Role of Employment Protection

In the period from 1940 to 1975, the U.S. federal government systematically purged the federal civil service workforce of LGBTQ+ individuals in what is known as the "Lavender Scare." During this time, President Eisenhower declared gay men and lesbians to be a threat to the security of the country and therefore unfit for government service.<sup>40</sup>

The resulting investigations led to more than ten thousand civil servants losing their jobs due to their sexual orientation.<sup>41</sup> This witch hunt made it largely impossible for federal employees to publicly identify as LGBTQ+.<sup>42</sup> In fact, the stigma was so strong that federal employees were fired simply for “guilt of association” because they had known someone who was accused of being LGBTQ+.<sup>43</sup>

The Lavender Scare also marked the beginning of an intense period of government surveillance of LGBTQ+ individuals and organizations spearheaded by the FBI and J. Edgar Hoover.<sup>44</sup> The majority of the FBI’s documents from the “Sex Deviates” program have been destroyed,<sup>45</sup> but those that remain demonstrate the extent of government spying.<sup>46</sup> The FBI recruited informants within early LGBTQ+ rights organizations, who would track and photograph other LGBTQ+ individuals, regularly outing them and using the photographs as evidence to get them removed from their federal jobs.<sup>47</sup>

Even today, members of LGBTQ+ communities may still find their employment threatened by being outed, often through the misuse of SOGI data, and in particular through data gathered on the internet. And, while the Supreme Court ruled in June 2020 that employers couldn’t fire employees on the grounds of sexual orientation or gender identity,<sup>48</sup> such terminations still occur.<sup>49</sup>

One of the most visible examples from the early internet is *McVeigh v. Cohen*,<sup>50</sup> a case involving the now-defunct “Don’t Ask, Don’t Tell” policy of the U.S. military.<sup>51</sup> In 1997, the military was tipped off that Mr. McVeigh, a decorated serviceman, was the likely owner of an AOL account that included a profile as “gay.” Due, at least in part, to a lack of clear corporate rules for data disclosure, an AOL staffer confirmed the information in the profile directly over the phone, leading to McVeigh’s termination after 18 years of service. Nor did the discontinuation of “don’t ask, don’t tell” end the discrimination of LGBTQ+ individuals in the military. During his term in office, President Trump issued a ban against transgender troops and limited the ability for transgender military personnel to receive medical treatment.<sup>52</sup> This ban was later repealed by President Biden in January 2021.<sup>53</sup>

## 4. The HIV/AIDS Epidemic and a Lack of Medical Privacy

A history of discrimination, disenfranchisement, and ignorance toward LGBTQ+ communities in the U.S. public health system has led to the inability of many LGBTQ+ individuals to seek and receive medical treatment, frequently due to a well-founded fear of denial of care, maltreatment, social stigma, or outing, which could lead to further economic or social consequences.<sup>54</sup>

An example of this is found in the early 1980s. At that time, most hospitals treated homosexuality as an illness, and care was laced with stigma.<sup>55</sup> This was the case when the Human Immunodeficiency Virus (HIV) and the associated Acquired Immunodeficiency Syndrome (AIDS) came into the American consciousness.

As it emerged, treatment of HIV/AIDS, initially called Gay Related Immuno-Deficiency Syndrome or “GRID,” was accompanied by a range of required disclosures. As a result of these disclosures, gay and bisexual men who sought treatment were often fired from their jobs, kicked out of housing, and even refused further treatment.<sup>56</sup> In addition, HIV-positive gay men in the 1980s were often denied health insurance, and often had to sell their life insurance benefits (often for pennies on the dollar out of desperation) to viatical companies to be able to afford food and medicine.<sup>57</sup>

The high rate of stigmatization led individuals to avoid testing or treatment. Many who did seek medical care would take efforts to withhold revealing their sexual orientation from their doctors, which would result in a lack of appropriate care. These issues were also compounded by existing racism and inequities—with HIV prevention programs reaching Black communities at a slower pace than programs aimed at white populations, despite HIV/AIDS impacting a higher proportion of the Black population than other races and ethnicities.<sup>58</sup>

Today, a lack of medical privacy and inadequate anti-discrimination protections continue to disproportionately impact the LGBTQ+ community. In 2020, a rule issued from the United States Department of Health and Human Services (“HHS”), interpreted provisions of the Affordable Care Act

(“ACA”) to, among other things, eliminate federal protections for LGBTQ+ individuals in accessing health insurance, particularly transgender individuals who are already mistreated and neglected through the denial of equal coverage and care.<sup>59</sup> As a result of litigation and advocacy efforts, this rule was rolled back in 2021, once again preventing discrimination of LGBTQ+ individuals.<sup>60</sup> However, critical parts of the 2020 rule remain, including a limit on the health care entities who were required to recognize these and other protections.<sup>61</sup>

## 5. Privacy of LGBTQ+ Children and Students

For some LGBTQ+ youth, the internet can be the only place they feel safe enough to express their sexuality, using it to meet peers, engage in civic activities, and search for medical and healthcare information. For transgender and non-binary individuals in particular, technology serves as an opportunity to find, create, and navigate communities with others who may be facing similar challenges.<sup>62</sup> The benefits that online access have yielded for the LGBTQ+ community are numerous, cannot be understated, and include fostering education and awareness, facilitating representation, and promoting safety. These benefits are particularly critical for LGBTQ+ individuals living in unsupportive homes or communities.

However, this era of connectivity has posed new and unique challenges as well. For example, individuals in smaller towns and remote communities suffer from limited access, including slower internet speed. This digital divide leads to an increased reliance on public internet networks, including those operated by libraries, schools, and private companies. These networks often have filters that frequently block content that serves or is targeted to LGBTQ+ individuals as well as other vulnerable communities.<sup>63</sup> These filters are often set at the local level by one or a handful of individuals using preset tools provided by companies.<sup>64</sup>

LGBTQ+ individuals and communities are disproportionately impacted by privacy violations online, and LGBTQ+ communities today still face significant barriers and prejudices from violence and discrimination to more unseen harms to dignity.<sup>65</sup> According to a 2021 report, 97% of

LGBTQ+ youth have seen content online that could be described as “homophobic/ biphobic/ transphobic,” and 40% have been targeted with abuse because of their sexual orientation or gender identity.<sup>66</sup> These violations can lead to privacy harms in the form of online outings and harassment. Outing online, particularly given the ability to scale messages in an online environment, can lead to widespread ostracization as well as physical violence, with more than 20% of hate crimes today based on perceived sexual orientation.<sup>67</sup> These issues are only compounded for LGBTQ+ youth online, who are five times more likely to be bullied than their peers. In a recent Yale study, over two-thirds of LGBTQ+ youths’ death records mentioned that they had been bullied.<sup>68</sup>

For children who are struggling with their sexuality or gender identity in an intolerant home, privacy risks are particularly acute. Technology products and services often provide the parent the tools or authority to access information that is generated on or by a child’s device, and in many cases are required to do so by law. This could lead to the outing of a young person, which may jeopardize their safety and security.<sup>69</sup>

## 6. The Rise of Algorithmic Harms and New Forms of Discrimination

As is the case with broader society, online services and other technologies play an important role for LGBTQ+ communities today. According to research undertaken in 2018 by LGBT Tech, 81% of LGBTQ+ youth have searched for health information online, as compared to just 46% of non-LGBTQ+ youth. Furthermore, 80% of LGBTQ+ respondents participate in a social networking site, such as Facebook or Twitter, compared to just 58% of the general public.<sup>70</sup> Algorithms play a key role in personalizing features, content and advertising on these services.

Algorithmic bias and unfairness may be difficult to identify and dismantle,<sup>71</sup> but algorithmic harms, particularly when done at scale, can cause substantial harm as algorithms are subtly embedded in our social and economic lives.<sup>72</sup> Rather than the traditional “public/private” distinction, LGBTQ+ individuals are acclimated to selective disclosure across work, home, family,

community, state, online platforms, and more to effectively protect themselves and their interests. The LGBTQ+ community's heightened use of the internet, coupled with historical injustices, and the fact that LGBTQ+ individuals can be discriminated against within their own home and by their own biological families, makes this community especially vulnerable.

Algorithms involved in online access to information, personalization, and content moderation have posed unique harms for LGBTQ+ individuals and communities.<sup>73</sup> For example algorithmic content moderation can change what LGBTQ+ content is seen on the internet, potentially limiting the exposure of individuals to certain information and the ability of LGBTQ+ individuals to fully take advantage of the options to share and monetize their own video content.<sup>74</sup> Conversely, it may lead to discriminatory or hateful content being promoted or amplified, increasing the number of individuals exposed to those messages, which may cause harm directly or indirectly through making hateful behavior seem acceptable or “mainstream.”<sup>75</sup> Facial recognition algorithms have been hypothesized up as a means to determine sexuality,<sup>76</sup> sparking opposition from groups that explained how reliance on those claims “could serve as weapon to harm both heterosexuals who are inaccurately outed, as well as gay and lesbian people who are in situations where coming out is dangerous.”<sup>77</sup>

Some technologies may be particular threats to certain LGBTQ+ communities, despite increasingly wide use in broader societal circles. For example, University of Washington researcher Os Keyes has demonstrated that automated gender recognition systems consistently operationalize gender in a trans-exclusive way, and consequently carry disproportionate risk for trans people subject to them.<sup>78</sup> For example, facial recognition tools used to verify identity have led to the outing and deplatforming of transgender individuals, particularly during or after transitioning.<sup>79</sup>

The potential for LGBTQ+ individuals to experience bias, unfairness, and discrimination may be amplified when automated decision-making tools use SOGI information to make decisions regarding an individu-

als' eligibility for housing, employment, financial opportunities, or other core services, especially without proper review and analysis. For example, a recent Housing and Urban Development (HUD) rule removed a requirement that entities perform disparate impact assessments in instances where housing eligibility is determined through automated processing.<sup>80</sup> While, at the time of publication, that particular rule is in the process of being reversed by the Biden Administration,<sup>81</sup> more attention needs to be paid to the potential ramifications around the use of algorithmic decision-making and algorithmic bias. Research in this area should also consider data points that could implicate SOGI data without revealing it directly, such as “gayborhood” ZIP codes in algorithms, used as clues to reveal an individual's sexuality.<sup>82</sup>

## 7. “Don't Say Gay” Efforts and the Continued Attacks on Sexuality

Legislation being proposed and enacted in state houses across the U.S., including “don't say gay” bills, have compounded these threats by providing even fewer pathways for LGBTQ+ youth to explore their sexuality and gender identity.<sup>83</sup> And this legislating has not happened in a vacuum,<sup>84</sup> but rather as a coordinated effort that encompasses more than 300 anti-LGBTQ+ bills and includes dozens of bills targeting transgender kids' ability to play sports or have access to necessary and affirming mental and health care.<sup>85</sup> At the time of this report, at least 20 states have introduced “Don't Say Gay” bills and 15 states have enacted anti-trans sports bans.<sup>86</sup> The cumulative effect of these bills is to stifle discussions of LGBTQ+ issues and individuals in schools and thus create a stigma around discussion of these issues. In fact, opponents of these laws, especially teachers, have been accused of “grooming” school children and enabling pedophilia for their efforts.<sup>87</sup> This is not a new line of attack for opponents of LGBTQ+ individuals and has been used consistently going back decades to deny LGBTQ+ individuals rights under the law.<sup>88</sup>

### III. SOGI AND SOGI-ADJACENT DATA: DEFINITIONS AND USES

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Today, SOGI data is collected and processed by a wide range of entities for a range of purposes. It does not solely implicate LGBTQ+ individuals, but it can uniquely impact those populations. SOGI data includes:

- › **Sexual orientation** — information about an individual’s romantic or sexual identity or disposition, including data around a person’s past, present or future romantic relationships and connections. Sexual orientation may or may not be fluid over time.
- › **Gender identity** — information which reveals an individual’s personal sense of one’s own gender. Gender identity can either correlate with or differ from a person’s assigned sex at birth. This differs from gender expression, which is how a person expresses their gender identity.

Not all information that is directly relevant to LGBTQ+ individuals is SOGI data. However, some SOGI-adjacent information can also allude to sexuality and be used to infer SOGI information. SOGI data does not necessarily include, for example, all information that pertains to an individual’s intimate desires, proclivities, purchases, past sexual history, or inferred future sexual behavior, though it may be directly implicated by this information. Such **sexual and intimate information** may sometimes reveal sexual orientation or gender identity, but not always.

SOGI data can be:

- › **Self-reported** — information can be directly collected from an individual with their knowledge and at their behest (for example, through self-categorization on a dating app);<sup>89</sup>
- › **Directly Inferred** — information can be directly inferred through an individual’s affirmative actions or behaviors; for example, signing up for a gay or lesbian-directed dating service, or joining a mailing list for a transgender resource center;

- › **Indirectly Inferred** — information can be indirectly inferred without an affirmative action on the part of an individual; for example, through the analysis of their shopping habits, web browsing history, or location history.

SOGI information that is either directly or indirectly inferred from activities may have high degrees of variance in accuracy and reliability. For instance, a person who requests additional information about LGBTQ+ topics may themselves be an LGBTQ+ individual, or may be an ally, researcher, policy-maker, or other interested individual.

Commercial entities collect, use, or can infer SOGI data for a wide range of business purposes, including advertising and marketing, social media, entertainment, directed health services,<sup>90</sup> community building, and advocacy.

The collection and use of data related to vulnerable populations can be an important step in addressing inequalities.<sup>91</sup> The potential utilities of using SOGI data can include:

- › **Providing Services, Product Improvement, and Personalization** — Using SOGI data to improve consumer recommendation models, improve existing services, and create new services and platforms that may benefit both the organization and the individual.<sup>92</sup>
- › **Addressing the Digital Divide** — The use and analysis of SOGI data may help identify and mitigate issues concerning the ‘digital divide,’<sup>93</sup> which disproportionately affects LGBTQ+ individuals, especially LGBTQ+ youth and seniors.<sup>94</sup> Data exclusion can slow down advocacy efforts for these groups, and it can be important to use SOGI data to identify gaps in service and resources in order to mitigate harm.
- › **Improving Public Health, Mental Health, and Medical Care & Empowering LGBTQ+ Communities** — Organizations and policymakers, as well as other stakeholders

including public health bodies, can use SOGI data to ensure that public health and medical services are provided in an equitable manner.<sup>95</sup> For example, SOGI information could be used to target medical resources to LGBTQ+ individuals and communities or track how illnesses might be disproportionately impacting specific communities.<sup>96</sup>

› **Combatting Discrimination** —

Organizations and policymakers can use SOGI data to ensure that discrimination is not influencing hiring practices or general organizational policies and activities. For example, once individuals are hired, SOGI data can be used to support LGBTQ+ workers by creating more inclusive workspaces, mitigating bias, fostering community, and supporting LGBTQ+ workers' upward mobility.

However, good intentions alone do not guarantee that the use of sensitive data for purported ethical or inclusion purposes will be well-received.

Professor Anna Lauren Hoffman explains that claiming that a use of sensitive data supports inclusion may “reinforce unequal relationships, and maintain data science and technology’s potential for violence.”<sup>97</sup> Efforts that purport to use sensitive data for social good should look to the affected communities to identify their priorities, to elevate their views, and to seek partnerships for collaboration.

Moreover, no matter the claimed benefit to the LGBTQ+ community, it is essential that users have meaningful protections for and transparent control over how their user data is collected and used by companies. As called for in the recent GLAAD Social Media Index Safety Report, “the sexuality or gender identity of an individual user is one of many pieces of private information. Users should be able to decide (in an easy, transparent way) whether they want to share personal information with platforms or not. Users should never experience micro-targeted ads or be subject to data-driven user-history algorithms unless they proactively opt-in to them.”<sup>98</sup>

## IV. SOGI DATA: RISKS AND HARMS

**S**OGI data can be used to provide services, advance research, and combat discrimination. However, these uses, not to mention the collection of this data as an initial matter, comes with inherent risk. Misuse of SOGI data can lead to differential treatment and harmful impacts.<sup>99</sup> For instance, while LGBTQ+ individuals may be exposed to services and products that are tailored to their needs through marketing, these benefits may be tempered by the risk of outing, whereby personalized advertisements to LGBTQ+ individuals can inadvertently broadcast their status.<sup>100</sup> Imagine a queer youth getting a LGBTQ+-related ad on their home computer, outing them to their parents or peers.

The case of *McVeigh v. Cohen*, described above, and the resulting damage to Mr. McVeigh's military career, further demonstrates not only the risks posed by the misuse of SOGI data by a private organization, but also the harms that may be inflicted upon an individual when SOGI data is inappropriately collected, managed, or exfiltrated.<sup>101</sup>

Today, policy discussions have highlighted legal and ethical issues raised by the use of sensitive data for hiring, policing, benefits determinations, marketing, and other purposes.<sup>102</sup> To facilitate these discussions, LGBT Tech and the Future of Privacy Forum (FPF) have herein attempted to identify, articulate, and categorize the types of harms that may result from the misuse of SOGI information in particular, as a sub-category of sensitive information that may pertain to an individual.<sup>103</sup>

The chart on the following page is borrowed from an FPF 2017 Report, and organizes harms into four broad categories: (1) loss of opportunity; (2) economic loss; (3) social detriment, and (4) loss of liberty.

This chart recognizes whether harm manifests for individuals or communities, and whether those harms are illegal or not. This chart does not attempt to quantify which harms pose greater or lesser risks to individuals or society. By identifying and categorizing harms,<sup>104</sup> the hope is to begin a process that will empower individuals and organiza-

tions to mitigate such harms. Many of the following harms could be addressed through laws and policies carefully crafted with the aim of limiting bias and discrimination.<sup>105</sup> As Os Keyes has pointed out, "given that the premise of many systems is one of classification, there are questions about whether the fluidity and malleability of identity can be adequately represented at all."<sup>106</sup> Thoughtful scholars of gender, postcolonial studies and critical race theory have extensively documented the long histories of colonialism, violence, and oppression that come with efforts to restrict something as flexible as the self to fixed and measurable forms. When considered in context, the potential harms of using SOGI data can include:

- **Employment Discrimination** — Forty-six percent of LGBTQ+ workers "reported experiencing unfair treatment at work, including being fired, not hired, or harassed because of their sexual orientation or gender identity at some point in their lives...nearly one-third (31.1%) of LGBT respondents reported that they experienced discrimination or harassment within the past five years."<sup>107</sup>
- **Loss of Liberty** — Internationally, 71 jurisdictions "criminalise private, consensual, same-sex sexual activity"<sup>108</sup> and 43 jurisdictions "criminalise private, consensual sexual activity between women. Even in jurisdictions that do not explicitly criminalise women, lesbians and bisexual women have been subjected to arrest or threat of arrest."<sup>109</sup> Countries like Chechnya and Russia have used anti-gay laws to harass, arrest and even torture LGBTQ+ individuals.<sup>110</sup>
- **Housing Discrimination** — Same sex couples experience significant levels of discrimination in rental housing, with heterosexual couples favored by sixteen percent.<sup>111</sup> The problem is even worse when an LGBTQ+ individual is also another marginalized identity (older adults, LGBTQ+ people with disabilities, and people of color).<sup>112</sup>

› **Healthcare Discrimination** — In a recent survey, 8% of LGBTQ+ individuals reported that a doctor or other health care provider refused to see them due to their sexual orientation, and similar percents reported refusal of care related to their actual or perceived sexual orientation, and used

harsh or abusive language when treating them.<sup>13</sup> This can be even more acute for transgender and gender non-confirming people. Nearly 1 in 5 survey respondents reported being refused care, 28% reported harassment, and nearly half reported significant lack of provider knowledge.<sup>14</sup>

**The Ways Privacy Harms May Manifest for LGBTQ+ Individuals and Communities**

Individual Harms		Collective / Societal Harms
Illegal	Unfair	
<b>Loss of Opportunity</b>		
<b>Employment Discrimination</b> E.g. Filtering job candidates by race or genetic/health information	E.g. Filtering candidates by work proximity leads to excluding minorities	<b>Differential Access to Job Opportunities</b>
<b>Insurance &amp; Social Benefit Discrimination</b> E.g. Higher termination rate for benefit eligibility by religious group	E.g. Increasing auto insurance prices for night-shift workers	<b>Differential Access to Insurance &amp; Benefits</b>
<b>Housing Discrimination</b> E.g. Landlord relies on search results suggesting criminal history by race	E.g. Matching algorithm less likely to provide suitable housing for minorities	<b>Differential Access to Housing</b>
<b>Education Discrimination</b> E.g. Denial of opportunity for a student in a certain ability category	E.g. Presenting only ads on for-profit colleges to low-income individuals	<b>Differential Access to Education</b>
<b>Economic Loss</b>		
<b>Credit Discrimination</b> E.g. Denying credit to all residents in specified neighborhoods ("redlining")	E.g. Not presenting certain credit offers to members of certain groups	<b>Differential Access to Credit</b>
<b>Differential Pricing of Goods and Services</b> E.g. Raising online prices based on membership in a protected class	E.g. Presenting product discounts based on "ethnic affinity"	<b>Differential Access to Goods and Services</b>
	<b>Narrowing of Choice</b> E.g. Presenting ads based solely on past "clicks"	<b>Narrowing of Choice for Groups</b>
<b>Social Detriment</b>		
	<b>Network Bubbles</b> E.g. Varied exposure to opportunity or evaluation based on "who you know"	<b>Filter Bubbles</b> E.g. Algorithms that promote only familiar news and information
	<b>Dignitary Harms</b> E.g. Emotional distress due to bias or a decision based on incorrect data	<b>Stereotype Reinforcement</b> E.g. Assumption that computed decisions are inherently unbiased
	<b>Constraints of Bias</b> E.g. Constrained conceptions of career prospects based on search results	<b>Confirmation Bias</b> E.g. All-male image search results for "CEO," all-female results for "teacher"
<b>Loss of Liberty</b>		
	<b>Constraints of Suspicion</b> E.g. Emotional, dignitary, and social impacts of increased surveillance	<b>Increased Surveillance</b> E.g. Use of "predictive policing" to police minority neighborhoods more
<b>Individual Incarceration</b> E.g. Use of "recidivism scores" to determine prison sentence length (legal status uncertain)		<b>Disproportionate Incarceration</b> E.g. Incarceration of groups at higher rates based on historic policing data

Chart originally published December 2017 at [fpf.org/blog](http://fpf.org/blog).

## V. THE CURRENT REGULATORY AND SELF-REGULATORY LANDSCAPE

In the United States today, no federal law comprehensively protects privacy or regulates the collection, use, and sharing of personal information, including SOGI data. Instead, the U.S. has sectoral privacy laws covering, for example, medical information, employment discrimination, and children’s privacy. In recent years, several bills have been proposed that would fill this gap, but no one proposal has gained sufficient momentum to make it through Congress.

*The rules that the United States federal government must follow are vastly more extensive than private industry. This paper did not seek to discuss those rules specific to the government but the authors of this paper do agree that further research, education and conversation should take place about the rules and regulations the government has to follow with regard to SOGI data.*

If and when a comprehensive privacy law is passed, it would likely place obligations on businesses and other organizations that process personal information, and give individuals certain rights when it comes to the collection and processing of their personal information. Many current federal privacy proposals designate some personal information — including all or part of SOGI data — as deserving of heightened protections.

Until then, federal sectoral laws create protections for sensitive or high-risk information in certain contexts, such as when collected by a medical or financial institution, while leaving similar information unprotected when collected or processed by unregulated entities. For example:

**Physical and Mental Health Records** — The U.S. Health Insurance Portability and Accountability Act (HIPAA) gives individuals rights over certain categories of protected health information when collected by certain covered entities, such as health care providers, pharmacies, or health insur-

ers. However, SOGI information, including when it constitutes sensitive health information, that is collected by organizations that fall outside of HIPAA’s definition of “covered entities,” meaning most mobile apps, dating services, or commercial websites, is not protected by HIPAA. In addition, the Americans with Disabilities Act directly protects against discrimination individuals with HIV, those perceived to have HIV, or associate with individuals who have HIV.<sup>115</sup>

**Education Records and Children’s Data** — The U.S. Family Educational Rights and Privacy Act (FERPA) provides for certain privacy and transparency rights in regard to student education records, with those rights being held by parents prior to the student turning 18, and by the students themselves thereafter. The U.S. Children’s Online Privacy Protection Act of 1998 (COPPA) is a federal law that requires regulated organizations in some circumstances to obtain verifiable parental consent before collecting data from children under the age of thirteen, though its protections end after the child reaches 13. In providing that the rights often fall to the parent and not the student or child, these laws may be a double-edged sword for LGBTQ+ youth who may reside in abusive or intolerant households. For instance, having to obtain parental consent for websites aimed at LGBTQ+ teens including safe sex resources or counseling and therapy resources may expose these teens to the exact danger they are trying to avoid.

**Financial Information** — Financial privacy laws regulate the manner in which financial institutions handle consumers’ non-public financial information. These include the Gramm-Leach-Bliley Act (GLBA), the Fair Credit Reporting Act (FCRA), the Fair and Accurate Credit Transactions Act (FACTA), the Bank Secrecy Act (BSA), and the Right to Financial Privacy Act (RFPA), among others. Such laws give consumers rights over their information and limit use and sharing of financial information in certain contexts. However, such protections are typically limited in the types of information and institutions that are covered. Because LGBTQ+ individuals or

couples often have specialized tax and estate planning needs that may often facilitate the provision of personal data to unregulated entities, gaps in protections may increase risk disproportionately in these communities.

## 1. Self-Regulatory Frameworks

Several self-regulatory frameworks include protections for sensitive information, when used for certain online advertising purposes.<sup>116</sup> For example, the Network Advertising Initiative (NAI), a U.S. non-profit organization that develops and enforces self-regulatory policies dedicated to responsible data collection and its use for digital advertising, has developed a Code of Conduct for their member companies. The NAI sets out a standard for the use of sensitive information, requiring its members seek opt-in consent for targeted advertising based on an individual's known or inferred sexual orientation.<sup>117</sup> In contrast, the Digital Advertising Alliance (DAA), a larger self-regulatory organization that is made up of a number of industry advertising trade groups, does not consider sexual orientation to be sensitive except in the context of health conditions derived from medical records.

## 2. U.S. State Frameworks

In addition to federal laws,<sup>118</sup> state laws, including criminal and civil laws, can impact the lives of LGBTQ+ individuals. Recently, states have focused on passing consumer privacy and data protection laws which are relevant to the protection of SOGI data. The California Consumer Privacy Act (CCPA), a leading state consumer privacy law,<sup>119</sup> does not include a definition of, or heightened protections for, sensitive data. However, in 2020 California voters adopted a ballot initiative, the California Privacy Rights Act (CPRA), that will create additional rights and protections. The CPRA will provide a new right to limit the use and disclosure of "sensitive personal information," including data pertaining to an individual's sex life or sexual orientation.<sup>120</sup> While the CPRA recognizes the sensitivity of most SOGI data, the CPRA's opt-out standard falls short of international regimes like the General Data Protection Regulation (GDPR), which in most cases prohibits the processing of "special category" personal data, including "data

concerning a natural person's sex life or sexual orientation," unless the covered entity has obtained an individual's explicit consent.<sup>121</sup> More recently passed state laws, including the Virginia Consumer Data Protection Act and the Colorado Privacy Act, will create an affirmative consent standard for collection of sexual orientation data.

## 3. International Regulations

Regulators around the world have started implementing comprehensive privacy laws that may have, and in many cases have already had, international impacts on the processing of data, including SOGI data. One major example is the European Union's General Data Protection Regulation (GDPR), an international standards-setting regulation of the processing of personal data. In complying with the provisions of the GDPR, many companies have made broader changes to their processing of data, effectively providing GDPR-protections to individuals around the world.<sup>122</sup> Europe is also trying to create new limitations. The Digital Services Act (DSA) — the final text of which was agreed at the political level by the EU's co-legislators in April 2022 — will ban the use of advertising based on special categories of data covered by Article 9 of the GDPR, including sexual orientation.<sup>123</sup>

In December 2021, Norwegian Data Protection Authority (Datatilsynet) issued a sanction against Grindr, the LGBTQ+-friendly dating app. One relevant issue in this matter was whether sharing the fact that an individual is using the Grindr app with third party advertisers amounts to processing a special category data so long as the third parties are not using the data to indicate specifically that a user is gay, but simply targeting users of a dating app. The Authority concluded that an entity needs to obtain consent to share these personal data and that Grindr's consents were not valid. Additionally, the Authority believes that the fact that someone is a Grindr user "strongly indicates that they belong to a sexual minority", and therefore this constitutes special category data that merit particular protection.<sup>124</sup>

## 4. Anti-Discrimination Laws

It's important to note that privacy laws rest against a backdrop of state and federal anti-discrimination laws, including Title VII of the U.S. Civil Rights Act of 1964.<sup>125</sup> These laws generally prohibit discrimination on the basis of one's immutable characteristics, including an individual's race, color, national origin, religion, sex, age, or disability. A series of recent court and administrative decisions make clear that sexual orientation and gender identity status fall under the protected class of "sex."<sup>126</sup> In policy if not practice, anti-discrimination protections generally cover:

- › **Individual discrimination** — discriminatory acts committed by individuals against individuals (for example, a business owner firing an individual on the basis of their sexuality) and;
- › **Structural discrimination** — discrimination arising from policies or procedures that disadvantage certain groups (for example, a organization-wide policy requiring certain gendered clothing, or disallowing features of gender expression).

However, gaps may exist in the application of certain civil rights protections in state laws when a service is offered only online. The Lawyers' Committee for Civil Rights reviewed the laws of all 50 states and documented which states' anti-discrimination statutes applies to Internet entities in interactions with their users, leaving open the potential of discrimination based on SOGI data in these jurisdictions.<sup>127</sup> The report found that generally online services are subject to some anti-discrimination laws in the majority of states, although there is a lack of clarity or uniformity for these laws. New York and California have the most explicit laws while six states do not have any public accomodation laws at all, online or offline.<sup>128</sup> This gap in state law means that SOGI data is not protected at a heightened level in these jurisdictions and misuse or discrimination of SOGI data by an online service may not be actionable under these laws.

## VI. RECOMMENDATIONS FOR ORGANIZATIONS

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The collection and use of information about an individual's sexual orientation and gender identity, as well as related information like that pertaining to sex life, carries inherent privacy risks and presents unique issues for LGBTQ+ individuals.<sup>129</sup> As this report lays out, while privacy is important across society, LGBTQ+ individuals and communities are particularly vulnerable when their information is collected and used, and may experience generalized and particular harm if that information is misused. Even when used to ostensibly benefit LGBTQ+ communities, the history of harm to LGBTQ+ individuals due to misuse of SOGI information has created a deep distrust that needs to be addressed.

For instance, during the COVID-19 pandemic, researchers have collected information pertaining to an individual's SOGI data when pulling together information about who the virus has most impacted — searching for disparate impacts to the illness and ways to mitigate ill-effects.<sup>130</sup> However, these efforts and others were, and continue to be, met by individuals within LGBTQ+ communities with skepticism and hesitancy, at least partially due to the distrust developed from previous abuses, including the events during the HIV/AIDS epidemic, described above.<sup>131</sup>

The U.S. legal and regulatory landscape currently does not adequately protect against improper uses of SOGI data. However, there are certain steps that organizations can take to ensure that they are only using SOGI data to benefit, and not to harm, LGBTQ+ individuals or communities.

Here we provide some preliminary recommendations for what organizations can do to start to address the unique privacy risks faced by LGBTQ+ individuals and communities. However, these initial steps should be seen as a starting point, and not a resolution of all of the areas of concern, many of which may be yet to be identified or fully understood. As such, we emphasize, as above, that this report is meant as the beginning to a longer conversation, and look forward to working with and supporting experts, industry leaders, policymakers, and impacted individuals on next steps.

### 1. Recognize the unique sensitivity of SOGI information

Given its revelatory nature, SOGI data, or data about a person or group's sexual orientation and/or gender identity, or information related thereto, should be treated with heightened sensitivity. While this information may be used at times for the benefit of LGBTQ+ individuals or communities, it also creates new risks for misuse or abuse.

Organizations should apply regulatory safeguards robustly and approach SOGI information with appropriate care and respect for its contextual sensitivity. Organizations should consider providing heightened safeguards for this data, specifically by requiring consent for its collection and use and considering limitations before data can be shared with third parties, particularly if it will make that data publicly accessible in a way that could increase the risk of outing.

The best practice may be to avoid collection of SOGI information when it is unnecessary and, especially, when it is not used for the benefit of LGBTQ+ communities or individuals. When it is collected, organizations should enact policies and processes to protect data against misuse and abuse, ensure it cannot be accessed or compelled by actors who would use it in ways that would harm LGBTQ+ individuals, and build appropriate oversight and accountability mechanisms.<sup>132</sup>

### 2. Inventory and categorize information to identify SOGI data

Organizations should establish processes to inventory and classify the data they hold—as well as institute privacy/data protection and/or human rights impact assessments in situations where the use of data may increase risks to LGBTQ+ individuals. Information that an organization believes to be sensitive should be protected in an appropriate manner, and retained only as long as necessary.

When it comes to SOGI data in particular, organizations should undertake extra precautions to avoid misuse and prevent harm to individuals, including deleting the information when no longer needed and providing users with easily accessible privacy controls. In certain cases, any personal data held by an organization may be considered sensitive.<sup>133</sup> In those circumstances, organizations should take additional precautions to ensure they are consistently operating in a privacy and security-centric manner.

### 3. Evaluate the protections for SOGI information with respect for context

Collection and use of SOGI information regarding individuals is often legally required, necessary for effective anti-discrimination efforts, commercially valuable, and available in public records. However, that information, when either provided or inferred, may cause a wide range of harm to individuals or communities in certain contexts. For example, revealing gender identity information in online fora or games can subject certain participants to heightened risks of harassment, discrimination, or hate.<sup>134</sup>

To effectively protect LGBTQ+ individuals and those who would be impacted by the release of their intimate data, organizations should specifically acknowledge the complexities inherent in data pertaining to an individual's sexual orientation and gender identity. Organizations should implement appropriate security and privacy safeguards to protect any SOGI data in proportion to the sensitivity of the underlying data and noting that sensitivity should be considered both individually and in the context of the community. In determining the appropriate privacy protections for SOGI data, organizations should also consider the complex history between LGBTQ+ persons, governments, and corporations. An individual's SOGI data can reveal intimate details about them. Furthermore, the misuse of this data can perpetuate existing bias, encode discrimination, and create lasting harm to individuals and communities.

Organizations should also consider de-identification mechanisms when appropriate. It is often appropriate to limit the collection, use, or sharing of

SOGI information. For example, organizations should be skeptical of proposals to share gender identity data that was revealed in a sensitive context with third parties who intend to use the data in a more public context.

### 4. Support efforts to promote inclusion, representation, and equity and prevent discrimination

SOGI data is often crucial to programs that seek to bridge the digital divide, improve public health, enhance clinical treatment, empower LGBTQ+ communities, and combat discrimination. This information is particularly valuable when individuals explicitly provide SOGI data to physicians, researchers, companies, or government agencies. However, organizations should affirm that this information will not be used, even in cases where it is intended to benefit LGBTQ+ individuals or communities, without the support of those communities themselves. Organizations should listen to these individuals and communities directly before making decisions related to what is in their best interest, or they will risk creating situations where they unwittingly exacerbate risk or cause harm.

Organizations should consider circumstances in which risk assessments or restrictions on high-risk profiling can bolster SOGI privacy protections while ensuring availability of data for key programs. Risk assessments, for example, those required under the GDPR when an entity begins a project that is likely to involve "a high risk" to individuals, can be used to both identify and mitigate risk.<sup>135</sup> Restrictions on profiling can limit automated decision-making that produces legal or similarly significant harms, for example creating algorithmic processes that lead to loss of employment, inequitable access to housing, or incarceration.

### 5. Support and encourage additional research

It is necessary for organizations to actively invest in research to better understand specific impacts data collection and use have on marginalized and vulnerable communities, including LGBTQ+ communities. Societal understanding of the benefits

and risks of processing SOGI data would be greatly enhanced by further research. In particular, additional research could shed light on: (1) the specific harms posed to the LGBTQ+ community through the misuse of SOGI and SOGI-adjacent data; (2) how existing laws and self-regulatory efforts define and limit the collection and use of sensitive data, including SOGI data; and (3) how existing regimes promote or hamper efforts to ensure equity for LGBTQ+ individuals and communities. This research should be done in collaboration with existing efforts. Organizations should encourage further research in this arena, partnering with existing

experts, and particularly focusing on SOGI and SOGI-adjacent information.

Organizations can encourage research into these arenas by directly and indirectly funding and creating or issuing targeted grants or awards of financial support to groups or experts operating in this space; supporting research exemptions in federal & state privacy laws to promote meritorious research regarding the impact of the use of SOGI data, subject to robust ethical review, and, when relevant, creating appropriate data sharing programs to facilitate that research.

## VII. SPECIFIC CONSIDERATIONS FOR POLICYMAKERS

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**M**any of the recommendations above may be relevant for policymakers and those considering crafting laws or regulations governing the processing of data. It would be prudent to be familiar with best practices regarding the treatment of SOGI information and the community-specific risks of collecting and using data in discussing and drafting rules. When considering work in this area, policymakers should consult proactively with individuals and experts from within the LGBTQ+ community in an ongoing manner to ensure that they are fully understanding the threats and risks faced.

Policymakers crafting new rules should include the protection of SOGI data as a subset of sensitive information when appropriate in regard to the context of use. Implementing strong anti-discrimination provisions that place obligations on organizations to mitigate risks and provide redress for harms can protect LGBTQ+ dignity and ensure that violations are adequately addressed. Anti-discrimination provisions might be appropriately included in privacy

laws, new anti-discrimination laws, or as part of updates to existing rules and statutes.

Contemporary laws, regulations, and executive orders often recognize that some personal information should be subject to heightened privacy and security safeguards that are appropriate for the context in which the information is collected, used, and shared. However, explicit protection for SOGI data has been inconsistent, though courts and policymakers are updating these regimes to recognize broader categories of sensitive information, including some SOGI data, and organizations are increasingly applying heightened safeguards to SOGI and SOGI-adjacent data in the absence of legal requirements.

As with private organizations, policymakers should support and encourage further research and investment to fully understand both the short- and long-term risks associated with the processing of data on traditionally marginalized communities like the LGBTQ+ community.

# CONCLUSION

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LGBTQ+ individuals and communities have been some of the earliest adopters of technology; as a result, they are also some of the earliest beneficiaries of the benefits of new and emerging technologies. They are also apt to experience earlier and more severe harms. Lessons learned from the past about privacy and LGBTQ+ history can, and should, continue to shape conversations about data privacy today.

While other categories of data, like financial and health information, have long been construed as sensitive given the risks that improper use and storage of that data poses, data pertaining to an individual's sexual orientation and gender identity has often not benefited from those same protections. More work needs to go into assessing issues around bias and risk, in order to mitigate, or even avoid, individual and collective harms.

- 1 While we offer some thoughts on European regulatory models and impacts, this report is focused on the history and current environment around LGBTQ+ individuals and communities and the use of SOGI information in a U.S.-context. We encourage additional work and research from a global perspective, where the risk is higher and the potential harms are potentially much more severe.
- 2 See *Welcome to LGBTQ+ at Williams*, THE DAVIS CENTER, <https://lgbt.williams.edu/resources/terms/> for a list of common terms used within LGBTQ+ communities that was created by Eli R. Green and Erica Peterson of the LGBT Resource Center at the University of California, Riverside in 2003-2004 and revised using resources from the following organizations: University of California, Riverside; MIT; University of California, Berkeley; George Washington University; California State University, San Marco; University of California, San Diego; Bowling Green State University; The Asexuality Visibility and Education Network (AVEN), and Wikipedia. The list was updated in August 2015 with the assistance of members of the Consortium of Higher Education LGBT Resource Professionals. The list includes commonly used terms within this document and the LGBTQ+ community. No taxonomy of LGBTQ+ terms is exhaustive, and terminology in this area is evolving. Each person who uses any of these terms does so in a unique way (especially terms that are used in the context of an identity label). If you do not understand the context in which a person is using one of these terms, it is always appropriate to ask. These terms were primarily developed in the context of academia, not courts or legislatures. FPF and LGBT Tech did not author the list. We are grateful to the individuals and institutions and members of LGBTQ+ communities who are working to elucidate the evolving societal understanding of human sexuality and gender.
- 3 See, e.g., Scott Skinner-Thompson, *Privacy at the Margins*, TEACHPRIVACY (Feb. 24, 2021), <https://teachprivacy.com/privacy-at-the-margins-an-interview-with-scott-skinner-thompson-on-privacy-and-marginalized-groups/>.
- 4 While research data sets may reference SOGIE data, inclusive of gender *expression* information, this paper intentionally focuses on SOGI data singularly due to the significance of such data to information privacy.
- 5 Citron, D. K., *The Roots of Sexual Privacy: Warren and Brandeis & the Privacy of Intimate Life*, THE COLUM. J. OF L. & THE ARTS, Apr. 2019, at 383, 385, <https://doi.org/10.7916/jla.v43i3.1999> (When Warren & Brandeis in 1890 called for a “right to be let alone” in private affairs, they were talking about invasive spying on family life and the publication of people’s sexual relations. One of the relevant matters was that Warren’s brother was effeminate and believed to have been gay, news of which would risk the Warren family’s social status); See also Charles E. Colman, *About Ned*, HARV. L. REV. F. 128, 135 (2015-2016) (Charles E. Colman documents the evidence of Warren’s brother’s homosexuality).
- 6 Danielle Keats Citron, *Sexual Privacy*, 128 YALE L. J. 1870 (2019).
- 7 *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); see Scott Skinner-Thompson, *Privacy’s Double Standards*, WASH. L. REV. (2018) <https://scholar.law.colorado.edu/articles/1218/> & Anita Allen, *Privacy Torts: Unreliable Remedies for LGBTQ+ Plaintiffs*, FACULTY SCHOLARSHIP AT PENN L., Oct. 2010, at 101 [https://scholarship.law.upenn.edu/faculty\\_scholarship/335/](https://scholarship.law.upenn.edu/faculty_scholarship/335/).
- 8 Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744 (1989); see also, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (this article is considered the first publication in the United States to advocate a right to privacy).
- 9 See Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INST. (Apr. 2011), <https://williamsinstitute.law.ucla.edu/publications/how-many-people-lgbt/>.
- 10 See for example, a lack of LGBTQ+ protections in housing. *Fair and Equal Housing Act*, HRC (Oct. 8, 2021), <https://www.hrc.org/resources/fair-and-equal-housing-act> (“currently there is no federal law that consistently protects LGBTQ+ individuals from housing discrimination”).
- 11 *Technology Plays a Vital Role in the LGBT Community*, LGBT Tech (May 5, 2015), <https://www.lgbtttech.org/post/2015/05/05/technology-plays-a-vital-role-in-the-lgbt-community>.
- 12 See Out Online: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth on the Internet, GLSEN (2013), [https://www.glsen.org/sites/default/files/2020-01/Out\\_Online\\_Full\\_Report\\_2013.pdf](https://www.glsen.org/sites/default/files/2020-01/Out_Online_Full_Report_2013.pdf).
- 13 *The Virtues and Downsides of Online Dating*, PEW Research Center (Feb. 6, 2020) <https://www.pewresearch.org/internet/2020/02/06/the-virtues-and-downsides-of-online-dating/>.
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