

The Public's Records: Open Access vs. Personal Privacy

By

Gary E. Clayton¹

In September 1999, the 21st International Conference on Privacy and Personal Data Protection was held in Hong Kong SAR, China. Over 400 delegates from over 40 of the world's most industrialized nations attended the Data Commissioner's conference. They were there to discuss how to protect what they believe is the fundamental right of individuals to privacy. The Honorable Justice Michael Donald Kirby, Justice of the High Court of Australia gave the opening speech. Justice Kirby noted:

"A recent OECD document listed 92 ways in which, it is claimed, the lives of ordinary people will be changed by the technology over the next 30 years. Global culture, education, employment, production and even crime will be affected. Privacy, it is argued, will be harder to maintain. Not unconnected with this, interpersonal relationships of human beings may become increasingly unstable. National governments will have limited control over cyberspace and over the pace at which globalization of inter-connected human consciousness is occurring.

"Whereas in the past one of the chief protections for privacy law in the sheer cost of retrieving personal information (and the impermanency of the forms in which much information was stored) such practical safeguards largely disappear in the digital age. It is not always appreciated by users of the Web that without specific initiatives of their own part, their visits to websites can often be resurrected, presenting a comprehensive profile of their minds. That profile may illustrate the subjects in which they are interested: their inclinations, political, social, sexual and otherwise."

One of the most striking aspects of the conference was who was not there. Although Americans generate, process and store more personal information than most of the rest of the world, there were only six of us present. Most noticeable was the absence of an American "Data Commissioner" - a public official charged with the responsibility of regulating how government, private enterprise and individuals can collect, use and transmit personal information. These data commissioners are often referred to in the

¹ Gary E. Clayton is the President of Privacy Council, Inc., a Dallas-based consulting firm that specializes in global data use and privacy issues. Gary can be contacted at 8150 North Central Expressway, Suite 1901, Dallas, Texas 75206. Toll Free: 888.262.5913. Fax: 888.456.8764. E-mail: gclayton@privacycouncil.com.

U.S. Press as "Privacy Czars" because the commissioners are also charged with the protection of personal privacy.

What has this got to do with the issue of access to public records in the United States? In a word: everything. There is growing pressure on the United States to regulate how information on individuals can be gathered and used. This has coincided with the concern over the Internet's ability to allow easy, inexpensive and global access to public records. Today's technologies allow privacy citizens or corporations to search and collect information from a multitude of public records and databases. The development of powerful -and inexpensive -computers allows each of us to search and collect disparate pieces of data to "profile" individuals. In other countries, concerns over personal privacy have lead to the enactment of laws that limit the ability to use personal information. They have also lead to the implementation of laws that limit the public's rights to access information contained in public records.

Consider the following statement from a paper presented by Professor Raymond Wacks²

It is no longer controversial that in many jurisdictions, most conspicuously the United States, freedom of expression has significantly eroded, if not wholly destroyed, the right of privacy. Expansive notions of 'public interest', 'public domain', and dominant theories of free speech (premised on arguments as diverse as truth, democracy, rights, and self-government) ensure that privacy is inevitably trumped.

The right of privacy, enshrined in international declarations, conventions, and domestic bills of rights, fares poorly when confronted by the overarching right of free speech. Privacy invariably yields when "balanced" against this, and indeed other, rights. Why should this be so?"

Can Government Officials Be "Trusted" to Strike a Balance Between the Public Interest in the Free Flow of Information and the Privacy Rights of Individuals?

We are now in the midst of a "global epidemic of new privacy initiatives, all of which threaten to restrict every aspect..."³ of how our society gathers and disseminates information. Governments everywhere face the "irresistible" urge to regulate and manipulate how information may be disseminated, particularly by commercial and media interests, Most democratic societies give lip service to the

² Raymond Wacks, Professor of Law and Legal Theory, The University of Hong Kong, Hong Kong SAR, China, -Privacy Reconceived: Personal Information and Free Speech."

³ Jane Elizabeth Kir1ley, -Privacy and the New Media: A Question of Trust, Or Of Control?" presented at the 2111 International Conference on Privacy and Personal Data Protection." Ms .

importance of freedom of speech, however, they almost invariably qualify that right by making it subject to other rights such as respect for the rights of others, public order, and of course, privacy.

The issues are extremely complex. They require a thorough understanding of the value of public records and why accessibility must be balanced with legitimate privacy concerns. Yet most Americans - even those charged with the duty of maintaining our public records -do not fully understand the crucial role that the public record structure plays in our society. According to Professor Fred Gate:

"Open access to public records is a cornerstone of American democracy. Such access is central to electing and monitoring public officials, evaluating government operations, and protecting against secret government activities. Open access recognizes that citizens have a right to obtain data that their tax dollars have been spent to create or collect. . The value of this essential infrastructure, however, extends far beyond government. Its benefits are so numerous and diverse that they impact virtually every facet of American life, to the extent that we frequently take the benefits for granted."⁵

Access to public record information is crucial to America's success in the global market. In a Green Paper⁶ prepared by the European Union, the importance of access to our public records was noted as one of the reasons for America's booming capital markets and the low cost of obtaining credit in the US. Conversely, the lack of clear and consistent principles for access to such records in Europe was seen as a competitive disadvantage for Europeans. The Green Paper noted that in some cases, "this has lead to leading European companies investing in products based on US public sector information."⁷

Examples of the Essential Role of Open Public Records

There have been numerous efforts over the last two years to document the essential role that public records play in the U.S. Many of these efforts have been lead by the members of the Individual Reference Services Group ("IRSG").

The IRSG is comprised of the leading personal data companies in the United States, such as Lexis-

Kirtley is the Silha Professor of Media Ethics and Law, School of Journalism and Mass Communication, University of Minnesota.

⁴ Id.

⁵ Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access -A New Framework for Finding the Balance* (1999).

⁶ Green Paper on Public Sector Information located at the following URL: <http://www2.echo.lu/info2000/en/publicsector/>

⁷ Id.

Nexis, Trans Union, Equifax, Experian and others.⁸

"The Public Record: Information Privacy and Access" lists the following "essential roles" played by open public records:

1. Access to public record information provides an important foundation for U.S. capital markets, the most vibrant in the world. The ability to grant credit speedily and appropriately depends on ready access to information about consumers collected in part from the public record. As a result, even major financial decisions are often made in a matter of minutes or hours, instead of weeks or months, as in the case in most other countries. Finally, public records have helped democratize finance in America, meaning that many economic opportunities are based on what you have done and can do instead of who you are and who you know.
2. This country's open public record system significantly reduces the cost of credit because the information that credit decisions depend upon, drawn in part from the public record, is assembled routinely and efficiently, rather than being recreated for each credit decision. As a result, American consumers save \$100 billion a year because of the efficient and liquidity that information makes possible.
3. Journalists rely on the public record every day to gather information and inform the public about crimes, judicial decisions, legislative proposals, government fraud, waste, and abuse, and countless other issues.⁹
4. Law enforcement relies on public record information to prevent, detect, and solve crimes. In 1998, the FBI alone made more than 53,000 inquiries to commercial on-line databases to obtain a wide variety of "public source information." According to Director Louis Freeh, "Information from these inquiries assisted in the arrests of 393 fugitives wanted by the FBI, the identification of more than \$37 million in seizable assets, the locating of 1,966 individuals wanted by law enforcement, and the locating of 3,209 witnesses wanted for questioning."

⁸ Information on the IRSG can be found at <http://www.irsg.org>

⁹ The European Union's Green Paper reached a similar conclusion. Indeed, the "lack of transparency" (as it is called in Europe) of public records is seen as one of the main reasons for the wholesale resignation of the European Union Commission due to the fraud found to have been involved at the highest levels of government.

5. Public record information is used to locate missing family members, heirs to estates, pension fund beneficiaries, witnesses in criminal and civil matters, tax evaders, and parents who are delinquent in child support payments. The Association for children for Enforcement of Support reports that public record information provided through commercial vendors helped locate over 75 percent of the "deadbeat parents" they sought.
6. Open public records help identify victims of fraud or environmental hazards; save lives by locating owners of recalled automobiles and blood, organ, and bone marrow donors; and protect consumers from unlicensed professionals and sham businesses.
7. Businesses rely on public records to choose facility locations, clean up or avoid environmental hazards, schedule the manufacture of consumer durable goods, reduce costly inventory, and prepare economic forecasts.
8. Researchers use public information for thousands of studies each year concerning public health, traffic safety, environmental quality, crime, prisons, governance, and a vast array of other subjects.
9. Cable companies and public utilities also use motor vehicle records to verify information about new customers, thereby helping people who have yet to develop credit histories establish new service.
10. Our entire system of real property ownership and nearly all real estate transactions have long depended on public records. These records are used to confirm that the property exists, its location, and its defined boundaries. Buyers, lenders, title insurers, and others use these records to verify the title owner. Mortgages, many legal judgments, and other claims against real property cannot be collected without reference to public records.
11. Commercial users and resellers of public record data often update it, correct inaccuracies, and then provide the improved version back to the governmental record custodians. They also greatly reduce the volume of inquiries that could otherwise overwhelm a government agency by providing services, Internet sites, and other means to access public records.
12. More than two-thirds of U.S. consumers -132 million adults - take advantage of direct marketing opportunities each year. Public record information helps sellers accurately and efficiently identify consumers likely to be interested in a given product or service.

Importance of Data Privacy

In the Internet world, the problem for business is that consumers are just a "click" away from leaving. If a consumer does not like a site, she simply clicks on her computer and leaves the site. If a

consumer does not trust the site to maintain the privacy of personal information, "click" and she is gone. Or worse for the company, she simply provides false information to the site. Consumers must believe that their information is being used appropriately or they will not provide the information that companies need to make their businesses a success.

Such market forces do not apply to the public sector. Governments can force citizens to provide information. Individual citizens often have no realistic alternative but to comply and provide personal information. As a result, governments collect information on the intimate details of individuals' private lives. There is little public benefit for providing access to such information -in most circumstances. In such situations, the government appropriately should restrict access or require that identifying details be removed from the information before it is released.

But what is simple when seen generally is difficult to apply in certain circumstances. In such cases as the psychiatric records of the "Unabomber", access to the psychiatric evaluation of the defendant were made public because of the perceived "public interest" in knowing how and why the court system made its decision regarding the defendant's decisions on legal counsel. Such abstract benefits are often difficult to balance against individual privacy concerns. Each of us would shudder to think that our own psychiatric evaluations could be made public if there was a public outcry to see the records. Yet, when considered in light of the importance of the public faith in the judicial system, the court's decision to release the psychiatric records seems understandable.

It is often said that "balance is the key" when weighing privacy rights against the public rights to access public records. Yet, in many cases, finding the right "balance" is extremely difficult. And is it this very difficulty that makes most legislators unwilling or unable to pass legislation to find the appropriate balance.

Absent legal guidelines, the decisions to make public records available often falls on court officials and government record custodians. They have to make decisions in the real world. The decisions will not always be easy. And the solutions reached will not always be correct. Each of us must think clearly and precisely about the values served by access to public records and the need to protect legitimate privacy demands. Each of us must try to find ways of protecting sensitive personal information - without denying completely the public's access to information.

Perhaps the most difficult challenge for us all is to overcome our own biases and personal concerns. Court officials and record custodians frequently complain about providing public records to "commercial interests." Or they attempt to require businesses and citizens to access information in traditional ways. New technologies and the demand for convenience by citizens require new ways of thinking. The public demands of increased access to records via the Internet have been well documented

over the last two years. The public also demands lowering of costs and more efficient use of taxes. This often means providing access to records through the Internet or other modern technologies.

The tensions will continue to exist. The answers will only come with public debate, careful review and caution. From my own perspective, caution is the most important factor. Each of us must be cautious when advocating the limitations on free access to public records. Each of us must be cautious when voting for laws that purport to limit access to personal information. The reason: unintended consequences. Even the best thought out rules and regulations are likely to have unintended consequences, positive or negative. And the costs for these consequences will be borne by us all.

Conclusion

The international community will continue to exert pressure on the United States to limit access to personal information and to public records. There will be increasing attention paid to these issues as the next election year approaches. The impact of the privacy debate is already being seen in such legislation as the financial modernization efforts in the US Congress and the medical privacy regulations.

The easy answer is to limit the rights of the public to information. Passing new laws is perceived as another simple solution. In the privacy debate, however, the easy solution is almost always wrong.

Do not trust those that provide simple solutions to the complex issues involving access to personal information and public records. The public has paid for the information you are entrusted with and it belongs to the public -not the government. Access to our records is essential to our democracy and our future. Be cautious. And be wary of the recent efforts to dramatically reduce the public access to its records.

The Twelve Steps of Balancing Access and Information Privacy ¹

1. **Policymakers Should Identify and Evaluate Conflicting Interests** - Decisions regarding privacy and access inevitably affect and are affected by other important interests. It is therefore essential that any policymaking process identify and examine those interests carefully to determine how they are implicated by a proposed law or regulation and to what extent they can - and should - be accommodated.
2. **Privacy Solutions Must Respond Reasonably to Defined Problems** - Those privacy problems or harms used to justify restricting access to public records should be stated explicitly and should reflect reasonable expectations of privacy.
3. **Limits on Access to Protect Privacy Should be Effective and No More Restrictive Than Necessary** - The accommodation between access and privacy needs to be carefully crafted as possible without necessarily invading privacy. In no event should limits be imposed on access to, or use of, public information to protect privacy if those limits will not in fact be effective in solving identified problems. Moreover, the government should not impose broad limits on access to protect information privacy where effective, extra-legal mechanisms exist that permit a more sensitive and individualized balancing of access and privacy interests.
4. **Privacy Interests are Limited to Personally Identifiable Records** - Access to government records that do not identify individuals should not be restricted on the basis of protecting privacy. Anonymous and pseudonymous records pose no meaningful privacy threats.
5. **Enhancing State Revenue is Not a Privacy Problem** - The government should not use privacy claims as a pretense for raising revenue, enhancing the competitive position of state-published information products, or restricting access to information for other purposes.
6. **Public Information Policy Should Promote Robust Access** - Information policy should facilitate as much access as possible without harming privacy interests.

¹ Reprinted by permission from Fred H. Gate and Richard J. Varn, *The Public Record: Information Privacy and Access - A New Framework for Finding the Balance* (1999).

7. **There should Be No Secret Public Records** -The public should be able to easily discover the existence and the nature of public records and the extent to which data are accessible to persons outside of the government. In many cases, it may be desirable and appropriate for the government to inform citizens about who is using their public records and for what purposes. Obviously, access to records is not appropriate in all cases, but this principle recognizes that access serves broad and important purposes.
8. **Not Every Privacy/Access Issue Can be Balanced** -Despite the importance of balancing, it is not appropriate in every case. The courts have established that there are some instances where the societal interest in access is so great that it trumps all privacy concerns. Similarly, the privacy of some types of records is of such important to our society that it outweighs access interests. ,
9. **Systems For Accessing Public Record and, Where Appropriate, Controlling Their Use Should Not Be Burdensome** -The mechanisms for accessing the public records and for allowing individuals to protect the privacy of records concerning them should be easily accessible and no more burdensome than necessary.
10. **Information Policy Must Ensure the Security of the Public Record Structure** -The government must ensure that public records are protected from unauthorized access, corruption, and destruction.
11. **Education is Key** -An informed citizenry is essential to the balancing process for both the individual choices they may make and in understanding the costs, risks, and benefits of privacy and access solutions. Government -assisted by industry, not-for-profit organizations, and the academic community -has a duty to educate the public about privacy and access issues.
12. **The Process for Balancing Access and Information Privacy Should Be Sound** -Government should have a process for balancing access and information privacy that is informed, consistent, and trusted. This process should be in place before one evaluates any new access or privacy issues. The process should draw heavily on expertise and existing data, involve as many of the affected parties as possible, apply these principles faithfully, focus on real and effective solutions, and provide for the automatic termination and/or frequent re- examination of those solutions to ensure their effectiveness and precision in the face of fast-changing technologies.

Neither information privacy nor access is absolute. The goal of policymaking should be to create and apply rational privacy and access policies as efficiently and fairly as possible. There are times when society will reject a perceived intrusion that has great benefit and accept a substantial intrusion that has little benefit. The difficult challenge for policymakers is to pay attention to the concerns of constituents while at the same time seeking to educate them about the costs and benefits intended and possible unintended consequences of proposed regulations. This challenge is made all the harder and all the more necessary by the rapid evolution of information technologies and societal attitudes.

We must think clearly and precisely about the values served by access and privacy. We must consider the extent to which the public actually and reasonably expects that given information in the public record, will be or should be kept private. Finally, we must determine whether targeted and effective protections for privacy can be constructed without denying completely the public's access to information. The cost of doing any less is real, considerable, and will be borne by all of us.