

Privacy Briefing Book

I. Contents:

A. Briefing Papers

Legal

Analogous acts, case law

Legislative history

Documents

Summary of types of documents we've seen

How many privacy redactions are there? How many are duplicates?

Policy decisions -- grid?

Given the clear and convincing evidence standard, who is responsible for demonstrating lack of need to keep the information secret?

Given that death of an individual is a factor triggering disclosure traditionally, who is to do the research for persons whose status is unknown?

II. Appendix:

Articles?

Laws?

Issues to cover:

FOIA

Ex 6

Ex 7(c)

Privacy Act

Medical records

Archivists (SAA) [ask Bill Joyce]; call Karma Beal (ALA/SAA)

NARA

Library of Congress

Legislative history

Effect of prior disclosure

Social Security numbers

Financial Records

Cases: Nixon v. GSA (plus any followons) ***

Computer Professionals for Social Responsibility v. U.S. Secret Service,
CA No. 93-0231-LFO (July 1, 1994).

Derivative use claims: *Dept of Justice v. Reporters Committee*, 489 US
749 (1989)

US Dept of State v. Ray 112 Sct 541 (1991)

*Painting Industry of Hawaii Market Recovery Fund v. Dept
of the Air Force* (9th Cir)

Arieff v. Dept of Navy, 712 F2d 1462 (DC Cir 1983)

Thott v. Dept of Interior

Urbigkit v. Dept of Interior

Conv. with Janlori:

re medical records: Kathleen Frawley, Am. Health Inf. Mgmt Assn.
736-2155

re privacy policy generally: David Flaherty, Privacy Comm'r, BritCol.
(privacy expert, lots of books, was professor,
thoughtful)

604-387-5629

Ask Peggy Irving: privacy issues

Check FOIA update

. Issues

A. Broad principles

1. Privacy is the right of an individual to be left alone, to live
a life free from unwarranted publicity. (AMLaw)

2. Tort law defines four types of invasion of privacy:

- a. intrusion upon the individual's seclusion or solitude
or into
his private affairs
- b. public disclosure of embarrassing private facts about
the
individual
- c. publicity that places the individual in a false light in
the
public eye
- d. appropriation, for another person's advantage of the

individuals name or likeness

3. Issue is usually couched in terms of what is an invasion of privacy, not what is privacy per se.

4. Generally (AML, p.40)
Medical records and psychiatric files are usually withheld

from

public access by privacy considerations.

Information developed or imparted during a client

relationship

are normally assumed to have a privacy element.

The right of privacy is a right of living individuals, and

normally

there is no privacy right for the dead.

Once information about an individual is in the public

domain, it

is open to subsequent users.

Personnel information, based in part on reassurances for employees that such data is restricted.

Normally released -- who works there, what jobs are

filled by

who, dates of employment, etc.

Normally withheld -- salary figures, unless there's a legal requirement to release.

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[Federal standards here are usually

more liberal than private
ones]

Background investigations, checks and reviews of
employees,

By their nature, investigations probe areas where an
individual might reasonably assert privacy rights.

Privacy rights include the individual who is the subject of
the investigation and the persons providing
information.

5. As reflected in standard deed or donation agreements, the
language widely used re privacy concerns restricts access to materials that
would "embarrass, damage, injure or harass" living individuals. (AML, 42)

6. Best privacy case law is FOIA law

7. There is no federal privacy statute, so institutions
generally use as
guidelines the libel laws. (AML 44) Legal definition
is "a
malicious publication, expressed in print or in
writing,
or by signs and pictures, tending either to blacken
the
memory of one who is dead or the reputation of one

who

is alive, and expose him to public hatred, contempt,

or

ridicule.

But, no such rights for dead people.

8. Other access conditions -- based on common sense tests, including: no privacy rights for the dead

if already public it can be released

necessity for restriction wanes over time

a person requesting info about

themselves

gets more than a third party

requesting

the information

B. Background

FOIA -- ACLU book

1. FOIA def (see below) requires a balancing of interests

"The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government information. S.Rep No. 813, 89th Cong. 1st sess. (1965) at 9. See also H.Rep No. 1497, 889th Cong. 2d Sess (1966) at 11.

Exemption is to protect "intimate" or "personal" details in files maintained primarily by VA, HHS, Selective Service, etc.

2. Use of terms personnel or medical files as Ex 6 descriptor is to set a standard as to what implicates privacy values.

3. Dept of State v. Washington Post, 456 US 595 (1982) set standard re types of info that triggers privacy. Took a broad focus. It is "the balancing of private against public interest, not the nature of the files" that governs the decision to release or withhold. 456 US at 599-600.

Similar files has included:

Reports of interviews of persons who unsuccessfully sought to immigrate to the US

Lists of names and home addresses of present government employees, private citizens (applications for permission to travel on a river, eligible to vote in a union election,)

Financial disclosure forms submitted to an agency by outside consultants

Union authorization cards

Inmate presentence reports

Info on VA home mortgage loans

4. *What's a clearly unwarranted invasion of personal privacy?*

Substantive test requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the 'FOIA' to open agency action to the light of public scrutiny. Rose, 425 US at 372.

Cases uniformly hold that "clearly unwarranted" "instructs the [decisionmaker] to tilt the balance in favor of disclosure" Getman 450 F2d 670, 674 (DC Cir 1971).

Privacy interest must be tangible and substantial -- exemptions "directed at threats to privacy interests more palpable than mere possibilities." Rose at 380 n.19.

Arieff -- it is the 'production' of the records, not the resultant speculation to which they may give rise, by which the invasion of privacy must be measured. 712 F2d at 1469.

5. *How do you determine the existence and degree of an invasion of privacy?*

Threshold issue for a cognizable privacy interest is that the material must usually be personal or intimate details of one's life, illustrated by Congress via files of VA, HHS, and Selective Service.

"Personal" is emphasized over "intimate", and tends to suggest that info is personal when it may cause harm to an individual. Dept of State v. Washington Post. 456 US at 600. Mere embarrassment is not enough to trigger withholding.

Derivative use question is hotly debated. In Ray, a majority said that the weight on the privacy side is greater when there is reason to believe that disclosure of personal information would put the individual in danger of retaliation or mistreatment. (Scalia says in a concurrence this is dicta, that the requirement is only to focus "solely on what the information reveals, not upon what it might lead to." 112 SCT at 550.

Privacy is limited to individuals, and doesn't extend to corporations.

Privacy lapse upon death(4.2.7)

Death or voluntary disclosure so diminishes any privacy interest as to amount of a waiver Diamond v. FBI, 532 Fsupp 216 (SDNY 1981)

Courts have seldom found that disclosure of medical records of a deceased person invades personal privacy Journal-Gazette Publishing Co. v. Dept of the Army, (NO. F-89-147)(ND Ind. Jan 8 1990)

Cognizable privacy interest after death extended to family members in limited situations (Challenger crash audio tapes, autopsy photos)

Types of records where privacy interests found, subject to removing identifying details or a strong interest in disclosure:

Property addresses, identities of lenders, loan amounts

Citizenship records if harm will result from release.

Interviews re unsuccessful asylum applicants

Names and positions of individuals providing info re Inspector General investigations.

Honor and ethics hearings

Arrest record of prosecution witness (released bec. of pubint)

Marital status of govt employees

Dod files with employment personal history and religious affil

employment records with evaluations

Ssns/birth dates

info re personal and family life of org crime figure, names of fbi agents and informants

records of or investigation into past criminal activities

prison records

records re employment applications

info re persons defaulting on student loans

payroll info, including job titles, hourly wages and salary, released due to public interest after removing names and addresses (News Group Boston inc. v. Natl RR passenger Corp, 799 F.Supp 1264)

(D Mass 1992)

Types of records where minimal or no privacy value found:

Names and addresses of unsuccessful applicants for research grants, names of researchers contracting with agencies

Data in the Biographic Register of State Dept ees (incl. date and place of birth, naturalization date, educ background, work experience, mil service appointment and promotin hisotry, post assisngments, awards, foreign languages)

Names of agency officers/staff

Employment history of consultants, fed ees

*Identity of sources lodging complaints to a commission
attendance reocrds of government officials*

disclosure of wages paid on a job (split decisions)

6. *What is the public's interest in disclosure?*

Generally, opening agency action to the light of public scrutiyny, permitteing the public to decide whether government action is proper, allowing public oversidght of govenremnt operations (4.3.1)

Under Reporters Committee, (FOIA) "unless the public wold learn somehting directly aobut he workings of the governmment, disclosure is not affected with the public interest" National assn of Retired People v. Horner, 879 F.2d at 879.

Strongest cases for public interest are where info serves to

inform the public about agency or official behaviour:

honors and ethics disciplinary proceedings sought to assess the workings of the military justice system

Info re shipments of prescription drugs to members of Congress by the Attending Physician to Congress

Employment histories and financial holdings of federal consultants

Info re money owed by us govt to taxpayers

Witness arrest record, where evidence of a deal bet prosecutor and witness

Personnel records of federal employees accused of taking bribes

Medical records of a deceased veteran to exwife who had killed her new husband and two children

Names of contributors to a Watergate related operation.

Congressional New Syndicate; Fund for Constitutional Govt v. NARA 656 F.2d 856, 865-066 (D.C. Cir 1981).

Names/addresses of servicemen who participated in an atmospheric nuclear weapons testing program

One helpful standard is to determine whether the requested material is needed to inform the public and if whether, even if released it still would not further that objective. *Minnis v. Dept of Agriculture*, 737 F.2d at 787; *Marzen f. HHS*, 825 F.2d 1148, 1153-54 (7th Cir. 1987) (despite substantial public interest and extensive public record in an adoption case, medical records were withheld because intimate details of an infant's deteriorating condition would not appreciably serve public debate and would certainly cause anguish to parents); *Challenger shuttle*

tape *New York Times v. NASA*, 782 F.Supp 628 (DDC 1991)

7. Other factors

Common law concept of the public figure in defamation law is employed to support disclosure.

A prior promise of confidentiality is sometimes relevant to the degree of invasion of personal privacy but is not determinative and cannot be used to frustrate an openness policy. *Washington Post v. HHS*, 690 F.2d 263

"It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, of themselves, override [FOIA]." *Ackerly v. Ley*, 420 F.2d 1336, 1339-40 n.3 (D.C. Cir. 1969)

A promise of confidentiality has "special significance" when it helped elicit "private matters" that the individual would not otherwise have exposed to the public and where the individual would be in danger of mistreatment absent anonymity." *Ray*

Expectation of disclosure in litigation can defeat privacy expectation.

Partial disclosure can weaken confidentiality. *Simpson v. Vance*, 648 F.2d at 16

8. Effect of prior disclosure

Prior public disclosure can defeat confidentiality.
Palmer v. Derwinski, (slip op, Ky 92) (prior press reports concerning gunman;'s relatives and listings in phone books tipped balance in favor or release of medical records disclosing relatives names and addresses)

Speculative publicity, as opposed to accurate disclosure of document contents, does not defeat privacy, nor does testimony re some personal facts waive privacy for others.

Fact something is on the public record somewhere may affect but doesn't necessarily defeat privacy expectations. Reproters committee

9. Home addresses - very different views -- not inherently and always a significant threat to privacy (Ray, Horner)

FOIA info -- DOJ

1. Is there a privacy interest
of what degree
2. Is there a public interest in disclosure
is it sufficient to override the privacy interest
3. Even if there is some overriding privacy interest, is there a way to segregate and release more information

Archives and Manuscript Law

1. FOIA Exemption 6: "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"

2. Early cases -- narrow construction to encompass only intimate

personal details

3. Dead individuals -- no privacy rights; question is whether info will violate privacy rights of surviving heirs or close associates, so issue is privacy right of living person based on info about a dead one

a. Need proof of death or passage of time such that its reasonable to assume death? (see cases AML 53, no)

b. What's an unwarranted invasion of personal privacy?

i. Per Dept of State v. Washington Post, 456 U.S. 595 (1982),

"information that applies to a particular individual" to

protect that person from "the injury and embarrassment

that can result from the unnecessary disclosure of personal

information."

ii. Privacy protection can include identifying information besides the name

iii. public information naming an individual (like news articles) does not require protection.

iv. once info is in the public domain it cant be withheld on privacy. Prior disclosure makes the most intimate details public

v. Historical interest overrides the glomal issue in archival records. (ALL)

vi. Balancing test

Privacy side is individuals ability to control dissemination of personal, intimate details of this life and the lives of members of his family. Regularly protected info includes marital status, birth legitimacy, medical condition, welfare status, family rights and reputation, religious affiliation. Info re federal service that's often withheld are home addresses, performance studies and award recommendations, complaints made against supervisors, medical and related details in employee claims, marital status, college grades, etc. Balancing test is a brake on absolute privacy, as is fact material is in government hands. (Id)

Public interest side is release of information must benefit the general public , for research purposes, not just general public curiosity

Areas in which public interest is assumed high is if requested information would inform the public about proven violations of the public trust (if

government wrongdoing). Professional and business dealings with the federal government (names of violators of laws). Amorphous issues in which the public has special interests and rights, like operation of the courts. Basic information about public employees, such as names, position titles, grades, salaries, duty stations.

Applying the test:

information about public figures -- privacy rights are eroded
Case law re suits against NARA for disclosure of information from records of Watergate prosecution (Fund for Constitutional Govt v. NARS,)

-- Public figures have a narrower orbit within which they can assert privacy rights than the average citizen. Not all privacy rights are forfeited. As a practical matter, much info about a public figure may already be disclosed by the person or via press reports. Determining the degree of public knowledge about a person reduces the scope of material whose release is potentially an invasion of privacy. (the same decision observes that the "degree of intrusion [from release of material] is indeed potentially augmented by the fact that the individual is a well known figure".)

Some state laws cover info like adoption records.

Many states have laws prohibiting release of records re for library circulation and for video rentals.

viii. Per AML, "[p]erhaps the single most important quality of information relating to an individual is that the claim of privacy is very slowly eroded over time. Unlike business information, which often

ages quickly, information about an individual has a privacy aura throughout his or her lifetime . . . Monsanto can develop a new herbicide, but it is not possible to build a new reputation so easily. Archivists must always be cautious when handling personal information about living individuals."
[p55]

C. Archival standards

1. NARA

a.

D. Social Security Numbers

1. See CDT paper (put in binder?)

2. Generally are withheld

Issue has come up repeatedly over the years, most recently in the context of the medical records debates raised by national health care.

3. Release is limited due to the very fact that it has become de facto a national identifier. (CDT at 6). Social security numbers are

the most frequently used identifiers already and act as the key to numerous public and private systems of records. (id at 7) Releasing them allows easy compilation of other records on an individual without providing a compensating increase in the public's knowledge about the events in question.

4. 1992 federal district court opinion (FOIA) affirmed the Social Security Administration's refusal to confirm or deny a person's Social Security number unless the individual has given written consent or is known to be dead. Rationale: disclosure was barred by personal privacy concerns. *Fidelity National Title Insurance Co. v. Dept of Health and Human Services, et al*, USDC CD Calif. No. CV CBM 2/13/92

5. Virginia drafted legislation re removing ssns from drivers licenses. Inherent inaccuracy concerns, computer matching concerns, little or no public interest in disclosure for living persons. In 1993, the 4th Circuit voided as unconstitutional Virginia's requirement that SSNs be recorded and made publicly available before voting. Virginia was ordered to stop releasing the Ssn. "The harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous." "Since the passage of the Privacy Act, an individual's concern over his Ssn's confidentiality and misuse has become significantly more compelling. . . "armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on the at person's checking account, obtain credit cards, or even obtain the person's paycheck."
Greidinger

6. Ohio Supreme Court rule that the privacy of Social Security Numbers can be guaranteed by the U.S. constitution. "[T]he high potential for fraud and victimization caused by the unchecked release of city employees SSNS outweighs the minimal information about governmental processes gained through the release of the SSNs. Release : "can allow an inquirer to discover the intimate personal details of each city employees' live, which are completely irrelevant to the operations of Government." cites Greidinger re danger of us as "a device which can quickly be used by the unscrupulous to acquire a tremendous amount of information about a person." State ex real. Beacon Journal Publishing Col v. City of Akron, et al, SCT Ohio, No. 93-2012, 10/26/94.

E. Psychiatric information

Many states have statutes barring disclosure.

F. Tax records

The seventh circuit rejected a bid by the Commodity Futures Trading Commission to subpoena tax records of persons suspected of making phony trades. "income tax records are highly sensitive documents.

That is why the [commission] cannot get them directly from the Internal Revenue Service." [also argues that "promiscuous" disclosure of tax records would prompt taxpayers to withhold or destroy information, destroying the self-reporting, self-assessing character of the income tax system.") In criminal investigations, federal prosecutors can obtain tax data about

targets of investigations from the IRS. (Check on citation in statute)

E. Current trends re release of privacy information

1. [NII]

2. Much current privacy advocacy centers around consumer privacy protections, protecting information available through computer means,

III. Types of privacy issues raised by documents in the collection

A. Security and Personnel files

1. HSCA requested files on CIA employees

Contents include -- fitness reports (or performance evaluations), medical evaluations and credit checks on individual CIA officers.

[see House judiciary hearing at 118]

CIA argues they are irrelevant to the question of who killed JFK, benefit to the public does not outweigh the clear privacy interest of the individuals in keeping the information confidential.

2. Information in documents on individuals that is derogatory and based on gossip or rumor. CIA makes similar privacy argument [118]

3. Dead persons -- in context of confidential informants, FBI

acknowledges that it will release the information. Same thing should apply in privacy situations. [house jud hrg 130]

B. Personal information

NARA policies

A. NARA's general restrictions track the FOIA

B.