ACCESS AND PRIVACY: REGULATING THE BALANCE

"Privacy" in the title of the legislation in Canada, the USA, Australia and Israel encourages more debate on the fundamentals of the legislation, how privacy and access should be balanced in a democratic society. In Europe, the basic focus of the laws is the rather more impersonal "data" or "data protection." Ontario and Quebec have laws which combine the two elements in the same statute. David Goldberg has again (PL&B May '89 p.23) written our report from Canada, covering Access 90, a conference held in Ottawa on April 23/24, organized by the Canadian Access and Privacy Association and Riley Information Services.

There was a consensus that an increasing public concern over privacy would attract a correspondingly increased amount of attention by policy makers. Professor Don Rowat, (Carleton University) said that there was a "serious problem of balancing" access and privacy but that Canadian legislators had been "wise" where they had put access and privacy in one law. A problem arose when an access request might reveal personal information held on government files, such as the salary of a government official.

Such questions at this conference were looked at from the point of view of the requester for access. But Privacy Laws & Business readers will also find the issues important from the perspective of being recipients of requests for data - and an insight into how the privacy agenda might be expected to develop in Europe.

Employees' access and privacy at work....and outside work

Ed Finn, (Public Relations Officer, Canadian Union of Public Employees) took a strong position regarding practices in the workplace which, he argued, compromised employee/individual privacy. Problems arise at both the pre-employment vetting stage and on-the-job monitoring.

The former can involve blood tests, urinalysis, X-rays, or, perhaps more futuristically, genetic screening. Finn was concerned that no one could reasonably refuse such tests, whose results might be used as a pretext for not hiring someone or for compiling secret lists which could be circulated to other potential employers. He called for the right to access medically screened tests (c.f. the UK Access to Medical Reports Act), compensation for wrongfully denying someone a job and independent verification of the potential employer's medical test results.

Job monitoring can involve constant surveillance enhanced by the use of technology such as call-logging, or the placing of cameras in washrooms. It can also involve facilitating worker-productivity reports derived automatically which can, for example, compute keystroke rates or spot-welding rates. "The consequence here," said Finn, "involves loss of dignity." A report from the Massachussetts Institute of Technology concluded that such surveillance is workplace spying, and also it actually reduces productivity.

Also mentioned was employee drug-testing which is justified by the excuse of public protection. This reason is not borne out by accident

investigations. The US Flight Attendants Association accuses the Department of Transportation of hypocrisy; it sanctions drug testing whilst not objecting to the work hours airlines demand of their personnel, thus endorsing cabin crew fatigue. A tragi-comic aspect of drug testing is that apparently, there is now a market in the US in "clean urine!"

Finn's position was that alcohol or drug abuse is an illness and should be treated accordingly. Much more scepticism is needed in relation to the "results" of tests. It was said that the Disease Control Centre in Atlanta cannot achieve even a 50% success rate in this area. "Impairment cannot be measured; and often no distinction is drawn by employers between "mere suspicion" and hard evidence that an employee is abusing drugs and, therefore, should be dismissed."

Finally, worker surveillance tends to be discriminatory (heavily biased "against" transport workers) and could be the thin edge of the wedge. Is an employee's behaviour only of interest to an employer in the workplace? And, if not, does that legitimate surveillance in the home or at recreational venues?

Privacy regulated more by technicians than by democratic legislative norms

A more wide-ranging critique of social processes that diminish the role and status of the individual as a moral person with a democratic function, was offered by Pierrot Peladeau, Legal Researcher, Informatics and Law Research Group (GRID) University of Quebec, Montreal.

Peladeau painted a picture of a "techno-society," governed by norms created bureaucratically by technicians rather than legislatively by citizens. Increasingly, such norms regulate the lives of individuals who are not even aware of their existence, far less involved in the process of their creation. These norms establish the private information networks which have proliferated during the last decade and which have replaced the feared large-scale centralised information databanks which spawned the first generation of data protection laws.

In Peladeau's scenario, private agencies, such as credit bureaux (e.g. Equifax which holds 12 million records), collect, store and sell information for consumer purposes, or collaborate with government agencies for supervisory purposes. For example, a person who applied for a job with a supermarket was refused employment after the prospective employer obtained a report that he was friendly with a suspected shoplifter.

There are two problems here:

1. The individual is excluded from the process of decision-making because it takes place in the bureaucratic and not the legislative realm.

2. These decisions are based on information which makes the individual like an object rather than a person and, therefore, may be simply inappropriate. Information from hospital expert systems or auto-banking, when applied indiscriminately, negates the moral uniqueness of each individual.

The results can lead to unintended social discrimination. For example:

* Private sector regulations are written so that a prerequisite for hiring a car is a credit card. This necessitates that individual X has a credit file. Indeed, self-help groups now exist to assist in obtaining or recovering a credit rating.

* In order to rent a video, it is necessary in some places to hand over a driving licence. Social regulations such as these impinge on the rights of individuals to participate fully in ordinary social life. These barriers are being created without any reference whatsoever to democratic debate.

Peladeau did not show much sympathy for or set much store by privacy laws. In general, these are "symbolic," satisfying an emotional demand that something be done about the problem; but they are easily circumvented. Anyway, such laws have no influence over the technological choice made by "private bureaucracies" such as banks. For example, their preferred technical solution to Electronic Funds Transfer Systems maximises the informational value of the personal data collected to the banks. Once again, the consumer/citizen is excluded from participating in deciding which information system might have been put in place that would have reflected maximally their interests too.

When is a record a "record" as defined by access legislation?

Harry Hammitt, (Publisher, Access Reports/FOI, Washington D.C.) drew on his US experience in a session entitled "Electronic Databases: The Implications for Access Laws." Hammitt dealt with the notion of an "electronic record," undefined in the US Freedom of Information Act, and not yet resolved despite three Supreme Court cases.

The problem comes when an access request involves creating a record by means of computer operations. US Government agencies argue that, if compiling the information involves the use of programming, then there is no obligation to supply the information because it involves more than simple access to a record. The question is now, should a "reasonableness" standard be applied to decide if a legal duty exists to supply the data to a requester?

Another argument is over whether software is a "record." Again the US Government argues that it is a tool, akin to, for example, a pencil. Hammitt said that during the '90s, software will come to be regarded as a record. A further point of dissension arises over the "choice of format" of the information given to the requester. The legal position seems to be that provided there is no quantitative difference in the amount of information offered, the choice lies with the agency giving the data.

Finally, Hammitt referred to the National Security Archive case on preservation of E-mail at the National Security Council. Does E-mail constitute a "record?" Or is E-mail equivalent to a phone-call or a memo?

Third party exemptions....Canadian bankers' code of practice

Penny Bonner, (Osler, Hoskin and Harcourt, Toronto) gave practical advice on third party exemptions to requests for information. This was in the context of competitive bids which protect that party's commercial confidentiality.*

Joanne de Laurentiis, (VP and Director of Public Affairs, Canadian Bankers Association) made a strong defence of bankers' respect for customer privacy which would be demonstrated in the forthcoming Code of Practice (PL&B August '88 p.22). It has been based largely on the OECD guidelines.

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* **Commercial Confidentiality and Government Information: Protecting/Releasing Third Party Data**

is the title of a conference on October 19th to be held in Ottawa, Ontario, Canada. The conference will deal with the question of whether sensitive business information is being released under Canada's access laws:

* The balancing test between releasing and protecting 3rd party information
* The rights of a corporation to attempt to prevent release of 3rd party information vs. the public interest
* Is information submited to government sufficiently protected?

Speakers include Paul Tetro, General Counsel, Office of Canada's Federal Information Commissioner; Alan Adler, Lawyer, Cohn and Marks, Washington D.C.; Penny Bonner, Osler, Hoskin and Harcourt, Toronto; and the Organizers: Donald G. Grant, Lawyer, Lang Michener Honeywell Wotherspoon, Ottawa; and Tom Riley, President, Riley Information Services Inc.

The fee is $300 and there is a special rate of $275 for those who pay by September 10th. For further information, or to register, contact:

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