

DISCUSSION

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The papers presented here this afternoon contain a number of points that deserve to be underscored and also call forth some further observations on the subject matter they address.

Looked at from a policy-making perspective, the three agencies represented here today have exhibited an exemplary sensitivity to freedom of information and privacy issues. Although I was not directly involved in the discussions and events that led to the enactment of the 1974 Amendments to the Freedom of Information Act, I know that in drafting the Privacy Act of 1974, the Census Bureau, the Social Security Administration, and the Bureau of Labor Statistics were often held up as models of what was desirable for other agencies, and also of what was feasible.

The record of these three agencies in responding to competing demands for confidentiality and public disclosure of the vast amounts of data they assemble demonstrates clearly that well articulated, coherent policy translated into faithfully observed operating rules and procedures is the first and most important guarantee of responsible information management. Although you have heard a few alarms and an occasional cry of anguish this afternoon (panic without despair), you have also heard a celebration of integrity and professionalism, and so far as I can tell, well deserved satisfaction with accomplished tasks.

I do wish that we could banish forever from our discussions the phrase 'administrative burden'. I hear it frequently, and it troubles me, because I think it signals an unhealthy conception of what it means to be a 'public servant'--and a conception I hasten to say that is generally at odds with the descriptions of actual practice in service of the public interest that have been presented here today. But that is a minor matter and one that I suspect to disappear of its own accord once it becomes clear that the "burden" is in fact manageable, and that the long-term consequences of the new freedom of information and privacy requirements are overwhelmingly beneficial to everyone involved.

Indeed, if I were to take issue with anything that has been said today--and I understand that discussants are not permitted to sit down until they have taken issue with something--I would only point out that important tasks still lie ahead of us, and that we therefore must continue to move vigorously.

Many of these tasks have been mentioned or alluded to in the papers and presentations this afternoon.

For example, the Hagen-Clemence paper points out that failure to meet the goals of the Privacy Act of 1974 "will cause a further loss of public confidence." This is a telling observation which underscores the special obligation of the statistical agencies of government to continue to be strong advocates of information management policies that emphasize agency responsibility and, most important, agency accountability.

In practice, this means that while I agree with Tom Jabine that the Privacy Act's prohibition on the disclosure of identifiable records for statistical reporting and research purposes seems neither well-conceived nor logically worded, the key to straightening it out lies in developing acceptable threshold conditions for such disclosures rather than in simply removing the prohibition. Advance written assurance that a record will be used only for statistical research or reporting purposes is not an adequate safeguard against possible abuses. I think we can all agree on that. But what should the standards be and how and to whom should they be applied. For help in answering this question I look to the interested professional communities and hope that their help will be forthcoming.

A similar problem arises in the Labor Statistical case wherein, as you have heard, there are incentives at the State level to put to nonstatistical uses information ostensibly gathered only for statistical purposes. I think the solution BLS is now considering is not an unreasonable one, but I also wonder whether in the long run it might be better to make the effort required to obtain complete separation between the two types of uses. Again, expert guidance and innovative ways of thinking about the Federal-State relationship could be helpful.

All of the papers have at one time or another alluded to the question of access and disclosure safeguards for records about entities other than individuals. The drafters of the Privacy Act of 1974 explicitly rejected the idea that the Act's protections should be extended to anyone other than the individual citizen. However, it is apparent that the problems that prompted the enactment of the Privacy Act are not confined to government record-keeping about private individuals. For records about corporations and other types of institutional entities, I doubt that one would strike the same balance between

confidentiality and disclosure that has been struck for records about individuals. Yet structurally the problem appears similar and obviously needs to be looked into.

I have also noted Tom Jabine's report on recent changes in SSA's Regulation 1 and wonder if FAA v. Robertson, the recent Supreme Court case on the applicability of the (b)(3) exemption opportunity in the Freedom of Information Act to FAA records on the maintenance practices of commercial airlines, may turn out to be the catalyst that precipitates a thoroughgoing review of Federal agency confidentiality policy. In the Robertson case, the Court expanded the range of governmental records that can be withheld from the public on the grounds that they are confidential by statute. In effect, this means that in the future it may be quite difficult to argue that a given confidentiality statute is too vague to be used as the basis for rejecting an FoIA request, and the net result of that may well be piecemeal amendment of a wide range of confidentiality statutes in service of FoIA interests. Should that occur, there is a substantial danger that the distinction the Privacy Act makes between individuals and other types of entities will be lost and that the end result will be satisfactory to no one. Again, expert advice and strong policy guidance is needed.

Finally, I would like to draw your attention to some recent developments that should cause us to begin to ask whether the "privacy issue" and the "freedom of information issue" are not subparts of a broader set of information policy issues emerging in all the advanced, data-dependent societies. Tom Jabine mentioned the number of proposed bills and regulations that he is being asked to comment on, and would submit that of equal importance is the number of committees and commissions that have recently been created to examine and make recommendations on a whole gamut of information policy questions that have to do with the broad question of who shall have access to what for what purposes. These include--

The Privacy Protection Study Commission

The Electronic Funds Transfer Commission

The National Commission on CIA Activities
Within the United States

The Senate Select Committee to Study
Governmental Operations with Respect
to Intelligence Agencies

The House Select Committee on Intelligence

The National Commission on New Technological
Uses of Copyrighted Works

The National Commission for Review of
Federal and State Wiretapping Laws

The National Commission for the Protection
of Human Subjects of Biomedical and
Behavioral Research

The Federal Paperwork Commission

The National Commission on the Preservation
of Presidential Recordings and
Materials, and

The National Historical Publications and
Records Commission

Most of these bodies will be reporting during the next two years and their recommendations cannot help but have a profound impact on the way we have traditionally thought about information policy matters. Indeed I would submit, and this is the main point I want to leave with you-- I would submit that as a nation, as a society, and as a government, we have crossed a great divide in that the key question for the future is not the traditional one of how we prevent illegal or unauthorized access to information of all kinds, but rather what should be legal and what should be authorized.