Privacy Considerations and Public Access to Court Records

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Presented before the New York Commission on
Public Access to Court Records
June 12, 2003

When evaluating which court records should be available on the Internet, and how they should be accessed, we need to consider the issue of privacy, and in considering this question this Commission should assess what social expectations are, and what the realties are with respect to individuals' right to privacy.

Privacy in the United States is a paradox. People nearly universally believe it to be a fundamental right, yet we value it so lightly that we make our shopping habits available to the world for the equivalent of 50¢ off on a carton of orange juice. The "right to be let alone," as Warren and Brandeis[1] famously expressed it, may be inexorably intertwined with the right to enjoy life, but for the most part this is not a right that courts have been willing to recognize as existing in the common law. Indeed, it is somewhat remarkable that "The Right to Privacy," which has been called the most influential law review article ever written has had so little impact on any actual jurisprudence. Often cited, rarely followed, "The Right to Privacy is more an expression of wishful thinking than an articulation of any sort of binding legal principle.

New York was among the first to turn away litigants seeking a private right of action based in a common law right of privacy,[2] and little has changed since then. For example, last year, the Second Department held that banks may sell their customers' names, addresses, telephone numbers, account and loan numbers and other financial data to third parties without concern about the supposedly private nature of this information because the intrusion into the privacy of the individuals who sought to bring a class action seeking damages arising out of this activity was found to amount to no more than unwanted junk mail and telephone solicitations. The court held that this did not constitute an actual injury, stating: "Class members were merely offered products and services which they were free to decline."[3]

New York State drivers licenses bear a bar code containing information on name, age, license number, date of birth and expiration date. Bars and liquor stores routinely scan these bar codes, and there is nothing to prevent such vendor from preserving this data along with details about what and when the individual purchased.[4]

Lawyers practicing in this State have the choice of standing in lines that can stretch to the base of the steps at 60 Center Street, or obtaining a security card that makes

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[1] Warren and Brandeis, "The Right to Privacy" 4 Harvard L. Rev. 193 (1890).
[2] *Roberson v. Rochester Folding Box Co.*, 177 NY 538 (1902).
[3] *Smith v. Chase Manhattan Bank USA* __A.D.2d__ (2nd Dept. 2002).
[4] http://schram.net/articles/barcode.html

our names and dates of birth information available to anyone with a computer and modem, or access to the public library.

The tax assessor's information on your house, and even a photograph of it, may be on the Internet. It is public information, and it is posted in a number of places. In New York City, deed records contain the purchaser's social security number. Presently this information is protected merely by virtue of the fact that it is mildly inconvenient to go to where it is kept, but it is certainly not private. Federal bankruptcy records contain a wealth of personal information, essentially all of which is available on the Internet.

Life in the 21st Century may resemble life in 19th Century Boston as respects our expectations of anonymity, but as interesting as that may be sociologically, it does not mean much when held up to reality. Samuel Warren is said to have been motivated to explore the concept of the right to privacy out of pique over the newspaper coverage of his cousin's wedding[5]; today we are concerned about identity theft. In the end, the answer is always going to be the same and privacy experts generally acknowledge this: Nothing is private. Get used to it.

Balanced against this is the absolute right to open access to the courts. Open access to court proceedings is generally recognized as being important to preserving the integrity of the legal process, and in the public interest.[6] At the same time, the public's right to inspect and copy court records is neither absolute nor unrestricted.[7] Confidentiality agreements and sealed settlements are not favored by the law in New York,[8] but provision is made for protecting the disclosure of information under certain circumstances. CPLR § 3103 provides that the court may, on its own motion, or upon application of any party, make a protective order "denying, limiting, conditioning or regulating the use of any disclosure device," and specifically directs that such protective orders, "shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person...." Moreover, the statute further provides that, in the event any disclosure is improperly or irregularly obtained, prejudicing a substantial right of a party, the court may order the information suppressed.[9]

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[5]Turkington, Richard C., and Allen, Anita, *Privacy Law,* (West, 1999), 23. This may be a jurisprudential creation myth on a par with Abner Doubleday's invention of baseball, but both stories have some value: one has given us an attractive museum in Cooperstown; and the other has given us a number of attractive turns of phrase.

[6]NY Judiciary Law § 4.

[7]Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), *see, also, Aetna Casualty and Surety Company v. Certain Underwriters at Lloyd's, London,* 176 Misc.2d 598 (NY County, 1998)

[8]Uniform Rules for the New York State Trial Courts, 22 NYCRR § 216.1

[9]CPLR § 3103(c). In *Lipin v. Bender*[99]84 NY 2d 562 (1994). the Court of Appeals went even further, holding that dismissal of plaintiff's action was appropriate in a situation where plaintiff's counsel, upon coming across a pile of defendant's papers in the court room, picked them up, took them back to her office, copied them, then set up a settlement

In determining whether "good cause" has been established for sealing records, a court must balance the public interest in disclosure in a particular case against the benefits to be derived by the parties from confidentiality.[10] Courts may consider a number of factors in making this determination, and are generally quite willing to evaluate whether court records may be a source of business information which could harm a litigant's competitive standing,[11] or whether public access to court records may be detrimental to the best interests of an infant or an infant's family.[12] In addition, specific statutory protections of privacy include records maintained pursuant to the Mental Hygiene Law,[13] educational records, medical and records pertaining to HIV status. These examples are not by no means exhaustive, and, indeed, the categories of information and records that are statutorily protected as "private" are so extensive that many practitioners-- and I include myself among them-- often only learn of the confidential nature of a particular record when it is subpoenaed for trial and a motion to quash appears instead of the sought after materials..

Over the history of American law the courts have balanced privacy rights and the public's right to access court records This assessment is done by the courts on a case by case basis, when authorized by statute and regulation, and by the by the legislature, when it enacts specific statutes. Some may point to the ability to disseminate information over the Internet as a justification for changing our past and current practice. However, there is no threat here. The information that people want to get is out there and can be obtained one way or another. Given our long heald predilection for making information accessible (sunlight *is* the best disinfectant), there does not appear to be any justification for suddenly making data unavailable merely because it is now more accessible. When life centered around small towns, records were readily available to one's "entire world" simply by going to the local Clerk's Office. Now that our lives and influences have expanded beyond the once cozy boundaries of daily life, the scope of possible dissemination has increased. This is not new. The circle has simply expanded. Just as the belief is pervasive that there are greater privacy rights provided for under the law than there actually are, so to is the concern about the harm which might result if personal information becomes more accessible. There is no privacy. Get used to it.

The phrase "more accessible" may be misleading and it too should be evaluated with a skeptical eye. Notwithstanding the fact that an Internet search can reveal a great deal about an individual, anyone who has ever conducted an on-line search will agree that search queries can retrieve mountains of irrelevant data. Screening the results can

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conference in an attempt to exploit the improperly obtained information contained in the documents.

[10] *In re Estate of Hofmann*, 729 NYS2d 821 (NY Sur, 2001).

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[11] *Crain Communications v. Hughes,* 521 NYS2d 244 (1st Dept. 1987)

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[12] *See, e.g. Matter of Twentieth Century Fox Film Corp.,* 601 NYS2d 267 (1st Dept. 1993).

[13] Mental Hygiene Law § 33.13

become no less inconvenient than combing the Records Room of the courthouse. After all, too much information is almost worse than too little, if having too much means that time, effort, and energy must be spent sifting through mountains of data.

This is not to suggest that privacy is not something that is desirable, or that it is unattainable, but if there is going to be a fundamental change in the law of privacy, we should not try to make this happen by way of regulations which might diminish transparency and access to court records. This is approaching the problem the wrong way, and amounts to closing the barn door long after the horse has gotten away.

If identity theft is the concern, there are certainly other ways to address this, even in the current political climate. If the concern is merely that some things are more private than others, then it seems clear that the mechanisms necessary to protect recognized privacy concerns already exist, and work well. Although it is widely believed that the Internet somehow changed everything, in fact, that belief is already somewhat passé: it now appears that the Internet has changed very little. The experience of e-commerce has shown that we do not require new commercial codes to deal with cyberspace; new rules to deal with access to court records are likewise not necessary. Our legal system uses the public nature of its proceedings as a guarantee of fairness, and the its default presumption is, and should be towards transparency. Once a dispute has reached the point that the court system has been called upon to resolve it, the assumption is that the dispute is public information, if only to insure that the system operates fairly. We should work to preserve this, and I hope and recommend that this Commission draft its findings accordingly.

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Reporter, Kluwer Law International 1999; *Webvertising*, Kluwer Law International, 1999; *Contractual Indemnification in New York Labor Law*, New York State Bar Journal (July/Aug 1995); *Strategies for Successful Tort Claims Defense*, Pennsylvania State University 1993. He is a graduate of the State University of New York College at Geneseo and the University at Buffalo School of Law.