Freedom of Information and Privacy: The Civil Libertarian's Dilemma

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As I UNDERSTAND my assignment from Edwin A. Thompson, I am to present some of the conflicts between competing constitutional rights and freedom of information and privacy, which raise ethical problems for practicing archivists who must deal with both issues. I hope my comments will create a framework for you specialists to explore further in terms of your expertise.

The emphasis on ethics, from a civil liberties perspective, must focus not only on personal judgments as to when or how access and privacy are to be protected, but also on what *rights* individuals have within our constitutional constellation. For constitutional rights are inextricably connected to ethical concerns. Rights represent, in the codified form of our laws, the dignity and worth of the individual reflected in constitutional guarantees, and rights provide standards of conduct which govern the relationship between government and the citizen.

The problems of access and privacy are not restricted to the arena of government. The same question of how to safeguard these values arises often in the relationship between private individuals and institutions, primarily the press. But, since the major difficulties arise when government and the citizen collide, our focus naturally is on the governmental sector.

In probing the civil libertarian's dilemma, one immediately recognizes that the conflict is not simply that of competing *rights* but also of competing *needs,* both for individuals and for society at large. Freedom of information, as this audience knows so well, is the essence of free and democratic government. Unless the citizenry is fully informed, the whole democratic experiment in self-government fails no matter what the social, political, or economic issue may be. Wise and effective participation in the affairs of government, through the election process and communication with legislators and the media, is weakened if the flow of information is limited or blocked. The

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diversity of thought and opinion, assured by the First Amendment, cannot spread throughout the nation if government denies access to information about government operations. Whether information is obtained by the press in furtherance of its informing function, or the private individual in pursuing a personal interest, the need for access rooted in our long-standing constitutional guarantees and historical tradition is paramount. Indeed, this need is so essential under our system of government that one should start with the assumption that access has an open door and the burden for closing that door rests on those who wish to reduce the flow of information.

The need for protection of privacy is equally compelling and finds support also in constitutional guarantees. As Attorney General Edward Levi has recently said, the First and Fourth Amendments mark off measures of confidentiality. The First Amendment's guarantee of freedom of expression shields the confidentiality of a person's thoughts and beliefs. The Fourth Amendment protects the "right of the people to be secure in their persons, homes, papers and effects against unreasonable searches and seizures" and is an ethical expression of the importance of individual privacy and a recognition that basic elements of individuality would be lost if all aspects of a person's life were exposed to public view. In the words of Attorney General Levi: "Indiscriminate exposure to the world impairs irreparably the freedom and spontaneity of human thought and behavior and places both the person and property of the individual in jeopardy."[1]

The list of privacy needs—or values—can be easily expanded. Public scrutiny of private organizations, such as disclosure of membership lists, could effectively destroy an organization involved in controversial matters. What would have happened to the NAACP in the 1950s and 60s, when the civil rights movement was the target of open hostility, if the Supreme Court had not turned back the efforts of southern states to obtain the NAACP's organizational roster? Can the press perform its function if the names of confidential informants, the source of much sensitive information, were publicly disclosed? Jury deliberations, judicial conferences, aspects of law enforcement, conduct of foreign policy, even true examples of national security, all point to the fact that there is value to society in the protection of privacy.

Today's deep public concern with how the vast power of government can interfere with the lives of citizens and take away their liberty, a natural product of Watergate, has created a tendency to see the conflict of access and privacy as a fresh phenomenon, a new problem area which now demands a solution—if possible. But we make a mistake, I suggest, if in our search for solutions we train our sights simply on current abuses. The conflict is much more deep-seated. For years we have worried over questions put to citizens by the decennial census, inquiring into a person's racial or ethnic background—an obvious

[1] Attorney-General Levi, address to the Association of the Bar of the City of New York, April 28, 1975.

component of public information which conflicts with the sensitivity of minorities so accustomed to being singled out for discriminatory reference. Legislative and administrative bodies have been properly criticized for decision making in executive sessions, behind-closed-doors sessions which deny citizens a look at how *their* government operates; but absolute openness would intrude on many delicate matters requiring privacy, such as collective bargaining negotiations or private personnel problems of government employees. The list of long-existing conflicts could be enlarged; my purpose in noting these illustrations is to suggest that easy panaceas do not exist and hard thought is necessary to seek out resolutions to the conflict.

Are resolutions possible? Before tackling what appears to be an insurmountable problem of defining those situations in which one constitutional right should take precedence over another, we ought first to look at what the legislatures and the courts are saying about this seemingly unresolvable conflict.

Given the deep-seated nature of the problem, it is surprising to note that Congress was motivated to act only as relatively recently as 1966, when it adopted the Freedom of Information Act. The result of prodding by the press, a few citizens organizations like ACLU, and some congressmen, the law was written to implement the meaning of the First Amendment—that there is not only the right to *express* ideas and information but also the right to *receive* ideas and information. The law provides that records of federal government agencies shall be made available to the public and outlines the procedures by which private citizens may share these records. Time does not permit, nor does this special audience require, a categorization of the kinds of information the FOIA makes available. For the purpose of our discussion, however, it is important to list the categories exempt from the protections of the FOIA. These exemptions are the battlefield on which the struggle for access and privacy is being fought.

The FOIA exempts from public disclosure nine categories of information. These are:

1. Records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and which are "in fact properly classified pursuant to such Executive order." This refers to "classified" information—records formally and properly designated "Confidential," "Secret," or "Top Secret" under the terms and procedures of the presidential order establishing the classification system, and implementing directives.

2. Matters concerning "internal personnel rules and practices" that do not affect the public. This exemption has sometimes been construed by the courts to apply also to disclosure of internal rules and practices when disclosures would prevent the agency from efficiently carrying out its duties, such as instructions for negotiations on land acquisition or for the conduct of unannounced inspection of a regulated industry to determine compliance with federal regulations.

3. Matters exempted from disclosure by statute. Sometimes the

statute that establishes an agency will specify that certain information handled by that agency may not be disclosed.

4. Trade secrets and commercial or financial information that have been given to the agency and that are privileged or confidential. For example, sales statistics given to an agency in confidence by a corporation executive would be exempted from public disclosure.

5. Inter-agency or intra-agency communications, such as memoranda showing how individual decision-makers within an agency feel about various policy alternatives. This category is not meant to exempt from disclosure factual material circulated within an agency.

6. Personnel and medical files, and similar files which could not be disclosed without a "clearly unwarranted invasion" of someone's privacy.

7. Investigatory records compiled for law enforcement purposes (such as files compiled by the FBI in a criminal investigation)—but only if the production of such records would (a) interfere with law enforcement, (b) deprive a person of a fair trial, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source and, in criminal and lawful national security intelligence investigations, confidential information furnished only by such a source, (e) disclose investigative techniques, or (f) endanger the life or safety of law enforcement personnel.

8. Reports prepared by or for an agency responsible for the regulation or supervision of financial institutions, such as reports prepared by the Securities and Exchange Commission concerning the New York Stock Exchange.

9. "Geological and geophysical information and data, including maps, concerning wells." This refers to reports based on explorations by private gas and oil companies.

Despite the eight-year existence of the FOIA, few test cases have reached the Supreme Court for definitive decision; however, these Supreme Court decisions have shed light on how the FOIA withstands constitutional challenge. In the 1973 *Environmental Protection Agency* v. *Mink* case the Court said that the public's access to governmental records could not operate unless certain kinds of information in the broad range of national security could remain confidential.

This was the only interpretive decision of the Supreme Court until a few weeks ago when in cases involving the Sears, Roebuck Company and the Grumman Aircraft Corporation the court gave an interpretation of the fifth exemption. The court held that, on narrow grounds, disclosure of an agency's files with respect to underlying documentation could be kept secret, and the court made reference to the need for the confidentiality of advisory communications within government agencies.

An important case litigated by the ACLU is now on the court docket involving further interpretation of the sixth and the second exemptions. The case involves The New York Law Review and its efforts

seeking access to the records of the U.S. Air Force Academy relating to its disciplinary system, for use in connection with the law review's study of the academy's honor-code system. Eventually the Supreme Court will have to rule whether, when an agency has the final word in determining if, under exemption 6, disclosure would cause a clearly unwarranted invasion of privacy, the material in question can be submitted to a court for an *in camera* review as to deletion of personal identification references. And moreover, whether or not, when a substantial public interest exists in obtaining documents, the rule barring release of materials pertaining to internal agency personnel rules and practices takes precedence.

There are new cases winding their way through the labyrinth of administrative and local court proceedings, cases that hold special interest to libraries and historians. These cases concern the release of government file material to scholars studying particular historical periods—in this instance the Alger Hiss and Rosenberg perjury and espionage cases of the 50s.

The decisions of the Supreme Court that I have mentioned deal with demands for governmental information and the court's construction of the First Amendment need. But the Supreme Court has provided other guidelines when it was argued that the need for privacy deserved first attention. The integrity of the individual was stressed in the 1965 *Griswold* case upholding the right of marital privacy in obtaining contraceptive devices. The 1967 *Katz* decision voiding a warrantless wiretap of phone booths stated that an individual's privacy could be invaded only if the government showed a reasonable purpose for the invasion. All of these decisions provide some help in trying to establish the line where access or privacy interests should prevail. But new social developments have created new problem areas.

Largely the result of the technological revolution in systems for storing, retrieving, and disseminating information, there is a growing consciousness about how easily privacy can be invaded. The computer age has educated people to realize how instantaneously and widely the minute details of a person's life can be circulated. With the government's power to amass data, often necessary to deal with complicated problems of today's society, there is justifiable concern over the wrongs to individuals that can flow from misuse of government information. So new legislation aimed at preserving the privacy of persons against the maw of government computers has been adopted.

The Privacy Act of 1974 is really a system of fair information practice, a set of standards to which personal data record systems, and especially automated systems, must adhere. Specifically, no personal data record system can be kept secret; people can discover information about themselves in the system and how such data is being used; information gathered for one purpose cannot be used for another without the individual's consent; individuals can correct or amend information in their records; agencies creating or using the data are responsible for its reliability and its use. Although the problem here is

not so much the conflict between competing *needs* of access and privacy, how the routine collection of information can adversely affect an individual's privacy, it is mentioned here to show the broad dimensions of the information-privacy problem.

A checklist of legislation and court decisions provides vital background for defining the scope of competing needs between access and privacy. However, it is the everyday struggle to preserve civil liberties that broadens our understanding of how this conflict generates tension between competing rights and needs. The following represents the ACLU's experience in evaluating the conflict. Four major areas stand out:

1. The general assertion by government of the need for keeping information secret, an assertion demonstrated by efforts to classify data with labels of "secret" or "top secret" when release of the information is presumed to affect gravely the national welfare. The tight vise of "national security," placed over so much information in recent decades, exemplifies this category and points up the harm done by a government covering up mistakes and abuses of its power. The final twist of this vise is the demand for a prior restraint on publication, as in the Pentagon Papers case.

2. The issue of governmental investigation before the matter becomes public by virtue of a criminal prosecution. Here the conflict is joined because of the obvious governmental need to collect information secretly before the law enforcement process reaches its final stage—public indictment—and the public interest guaranteeing a defendant a fair trial by making sure that the defendant has access to information necessary for his defense.

3. Information assembled in the form of internal memoranda for advisory purposes, the thorny field of executive privilege which was so thoroughly explored in the Watergate affair. Obviously, any executive needs advice from trusted counselors and others so that decisions can be made intelligently, on the basis of full information and frank advice. Such advice could not be given if private conversations are to be the subject of open congressional investigation and media reporting. The converse argument, of course, concerns the need of the Congress, as the public's representative, to know how laws are being enforced, and the need of litigants who have suffered injury for evidence to prove their cases. The dilemma might be resolved by drawing a firm line between allowing an advisory (privacy) privilege for recommendations, advice, and suggestions passed on for consideration in the formulation of governmental policy on the one hand, *and* facts concerning what has been done on the other.

4. Information for which nondisclosure is claimed under the exemptions to the FOIA, and especially where the government claims to be protecting the "privacy" of third parties. This argument is becoming more and more a part of the government's position in sensitive cases. An example is the requests by scholars for information in government files about the Hiss and Rosenberg cases, requests

rejected because of an expressed concern for individuals named in the files. This recognition of privacy by government may be genuine or, as some critics have observed, may be a ruse employed by government to preserve secrecy, now that the courts and public opinion are rejecting the dragnet definitions of national security employed since the end of World War II. And the government's claim is further weakened when third parties, such as Alger Hiss, eschew their own claims to privacy and want the material released for the purpose of historical study.

Above are some of the horns of the civil libertarian's dilemma. An answer to the questions is still demanded. Is there a solution to the conflict? Unless one takes the absolutist position of simply choosing one right over the other (and there are reporters and attorneys who regard the public's right to know as paramount), the answer is that each individual case provides the context for judging on which constitutional side the best argument falls. But even if one accepts the wisdom of a case-by-case approach, there are certain guidelines which can help determine which path to follow:

1. Because access to information is so vital, we cannot tolerate any form of prior restraint other than those very rare instances in which disclosure would directly and adversely affect the nation or the rights of citizens. For example, the publication of technical details of military operations or weaponry might be justly restrained. The efforts of government in recent years to restrain the press and thus deny information to the public seems to make clear the wisdom of a no-prior-restraint policy.

2. In the same vein we must maintain a vigilant watch over criteria offered by the government for keeping information secret. The incantation of the magic phrase "national security," which so abused the public's need to know what their government was doing, illustrates the problem.

3. Release by the government of specific kinds of information and records which directly intrude on the privacy of the individual should not be tolerated. Examples are details of medical records of individual persons treated in public hospitals, personnel employment files of public employees, and information prejudicial to a defendant in advance of trial. Here the right of individual privacy takes precedence over access to information. In keeping with the spirit and letter of the Privacy Act of 1974, we must carefully check with the individual concerned to obtain consent before information that government has amassed is disclosed. This has particular application to persons held in such public institutions as mental hospitals and prisons, where true, informed consent may be difficult to obtain.

4. The deletion of names and other identifying information from files made public seems a sensible arrangement, provided all other factual information and opinion are retained. This is an effort to accommodate both access and privacy needs, yet may not satisfy pro-

ponents of both sides. In following their traditional demand for authenticity, the press may believe that names and addresses are crucial to their story; and the individual may feel that even deletion of names and direct identifying information is not sufficient protection. As the argument goes in a celebrated case now back in the New York courts involving a psychiatrist's book on one of his patients, the deletion of identifying matter still leaves enough information to expose the patient to those within his particular occupation who know him.

5. Materials treating social and political issues have obvious First Amendment value and must be treated differently from materials of a commercial nature, where profit is the motive. Examples are the efforts of a commercial wine hobby group to obtain from the IRS the names of people whose income tax expenses include wine purchases so that their business might be solicited for a grow-wine-in-the-home promotion; or the sale of state motor-vehicle registration lists to private companies hawking auto services. The value of preserving personal privacy in such cases is far greater than the value of refusing to disclose to the press the names of private peanut growers who receive the largest Department of Agriculture subsidies.

6. The proximity of the person in question to the historic or other public event is a standard for judging the protection of privacy. For example, witnesses and other central figures in the Hiss and Rosenberg cases do not have the same degree of privacy with respect to the cases as do unauthorized third parties. Similarly one must question the time relationship of the information to the issue being studied. Is it necessary to release data on an individual's participation in an event thirty years ago when the target of the disclosure is a current event? Conversely, is it necessary to give the same degree of protection to information about a person's involvement in an historic event as it is to his involvement in a current event?

7. The individual who is willing to talk about the case or have his role exposed—the Alger Hiss example—obviously waives his right to privacy.

8. The application of the one test which represents a fundamental ethical concern for civil libertarians, the standard of fairness. Would release of the information, as in the case of raw, unevaluated data in an FBI file, irreparably injure the individual, either in his ability to obtain a fair trial or to repair damage to his reputation?

I do not know whether this exploration of both the constitutional rights of freedom of information and of privacy, and how they might be meshed, fits into the particular operational concerns of archivists. Dealing as I do with the ACLU's own archives at the Princeton University Library, I see the civil libertarian and the archivist sharing parallel concerns. I believe that neither has the perfect answer, but the search, as this meeting today shows, has started. And that is important. For the search may provide the solution.