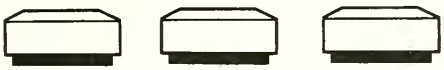
Confidentiality and access: legislative initiatives in the United States government.



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Introduction

Information specialists recognize the implications of our increased reliance upon automation. The conflicting demands for privacy protection and access clash repeatedly. But, this conflict will not be readily resolved. Recent initiatives in the United States government reflect the competing demands of enhancing privacy protection and broadening access to information. At the same time that the United States Senate has proposed restricting access under the Freedom of Information Act, we are seeing more computer matching programs than ever before. While the government implemented a strong Privacy Act, we failed to recognize the international implications of that effort.

Privacy legislation, Freedom of Information Act revisions, and hearings about transborder data flow and computer matching represent the key areas where privacy and access considerations are evident. Congressional concern about personal privacy has existed for several years; in 1974, the United States Congress passed the Privacy Act. The House of Representatives, through hearings in 1983, demonstrated its concern about the oversight of the Act. And during this past Congress (the 98th, 1983-1984), Representative Glenn English proposed the creation of a privacy protection commission to strengthen the implementation of the Act.

The Freedom of Information Act continues to generate interest and activity. In 1974, Congress substantially revised the Act. During the 98th Congress, the Senate passed the Freedom of Information Reform Act which significantly modifies several provisions of the 1974 Act. The House of Representatives held

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[1] The opinions expressed in this article are those of the author alone and do not reflect the official position of the National Archives and Records Service, nor of any other federal agency.

hearings on the proposed reforms but took no final action.

In recent years, the United States Congress has demonstrated its concern about the impact of automation on access and confidentiality through several hearings it has held. There have been a few different Congressional hearings concerning transborder data flow. And, in 1982, the Senate held hearings on the subject of computer matching.

Without question, the United States Congress is interested in privacy related issues, but it has yet to focus on access to and confidentiality of automated information. By highlighting and explaining congressional activity in the areas of privacy and confidentiality, it is the author's hope that the strengths and weaknesses of recent United States initiatives will become apparent.

Privacy Act

The Privacy Act of 1974 (5 USC 552a) represented the first attempt by the United States Congress to legislate general government-wide standards for the protection of individual privacy. But, the passage of this Act was not motivated by a concern about the implications of automation for privacy. It is more likely that Congress passed the Privacy Act in reaction to the Watergate episode which had heightened national concern about executive secrecy.

Congress recognized the need for access to personal information about individuals, and specified exceptions to the Privacy Act requirement that an individual must authorize access to personally identifiable records. These several exceptions indicate that Congress was aware of the need to provide access to information. It is less clear that they foresaw the need to take steps to ensure full privacy protection for individuals. The legislation did not designate a central authority for the adminstration and oversight of Privacy Act implementation. This has proven to be a significant shortcoming and has been the focus of recent congressional inquiries.

In 1982, a subcommittee on Government Information in the House of Representatives held hearings and issued a report entitled, "Who cares about privacy? Oversight of the Privacy Act of 1974 by the Office of Management and Budget and by the Congress". While the hearings focused on oversight, the subcommittee also heard from several people concerned about the international implications of the U.S. Privacy Act.

As an outgrowth of these hearings, Representative Glenn English, the chairman of the subcommittee, and an advocate of privacy protection, proposed the creation of a Privacy Protection Commission which would be a permanent and independent commission responsible for both domestic and international privacy issues. Representative English described the proposed commission as follows:

> Domestically, the Commission would be assigned an oversight role under the Privacy Act of 1974. The Commission would develop guidelines and model regulations, investigate compliance with the Act, and generally oversee agency Private Act activities. For international privacy issues, the Commission would assist U.S. companies doing business abroad to comply with foreign data protection laws, assist in the coordination of U.S. privacy policies with those of foreign nations, accept complaints and otherwise consult with foreign data protection agencies.[2]

While this legislation certainly would centralize Privacy Act oversight, it does not seem likely that any action on its creation will be taken in the near future. In the meantime, the courts offer the only recourse for private citizens who feel their privacy has been violated by the federal government.

As is probably apparent, the federal government offers only limited privacy protection. A few categories of non-governmental records are the subject of federal privacy laws; personally identifiable records gathered by credit bureaus and by colleges and universities are protected. State and local government records are, for the most part, excluded from coverage. It is important to note, though, that in the United States, each state develops its own privacy legislation for state and local records.

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[2]Congressional Record, August 2, 1983, H6344 daily edition.

Transborder flow

The proposal for the Privacy Protection Commission is the most recent legislative initiative which addresses the issue of transborder data flow. As is apparent from Representative English's statement, though, his legislation grows out of a concern for privacy. Many people in the United States contend that the major issue surrounding transborder data flow is one of economics, not privacy. Both the House of Representatives and the Senate addressed economic concerns during the past Congress. Each house received legislation to create an entity to oversee international telecommunications and information; the Senate bill proposed a White House office and the House bill proposed an interagency committee. The recent initiatives in the area of transborder data flow stem, in large measure, from a recognition that the United States government does not have an agency which focuses on the international exchange of information.

Several reasons make it unlikely that, in the near future, the United States Congress will pass legislation

to increase the government's role in transborder data flow. In the United States, there is a clear separation between the public and private sectors and, in addition, the first amendment to our Constitution explicitly limits the government's intrusion into the flow of information. Additionally, the United States government views international regulation of data as restrictive. A Senate report written in 1980 states:

> While other nations believe that a new regulatory framework may be necessary to ensure equitable opportunities and to protect all parties, the United States has been reluctant to advocate creation of legal structures which may prove restrictive in light of rapid technological developments and changing market dynamics.[3]

Until United States businesses are significantly hampered by transborder data flow, Congress probably will not act.

Computer matching

Computer matching programs present significant threats to personal privacy and yet they have proliferated in recent years, even though the Privacy Act seems to prohibit them. Computer matching is defined as the use of a computer to compare data in a Privacy Act system of records with other data for purposes of identifying individuals whose records appear in more than one set of records. Computer matching programs are intended to detect and curtail fraud or abuse in federal assistance, loan, or benefit programs.

The Inspector General Act of 1978 authorized the Inspectors General to request and obtain information from other federal agencies and state and local governments [4]. As a result, in 1979, the Office of Management and Budget issued guidelines for agencies acquiring computerized data files for use in computer matching programs. These guidelines, which were revised in 1982, require that

> ...the source agency should require the matching entity to agree in writing to certain conditions governing the use of the matching file.[5]

Some of these conditions may state that the matching file will remain the property of the source agency, that the file will be destroyed or returned at the end of the project, that the file will be used only for the purposes stated in the agreement, and the file will

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[3] "International Telecommunications and Information Policy: Selected Issues for the 1980's", Senate Report, 98-94, p.24

[4] P.L. 97-252, sections 6 (a) (3) and (b) (1).

[5] David A. Stockman, Memorandum for the Executive Departments and establishments, May 11, 1982; published in the Federal Register, May 19, 1982.

not be duplicated either within or outside the receiving agency. In addition, matching agencies are required to publish in the Federal Register a notice describing the matching programs and to provide a copy of this notice to the Congress and to the Office of Management and Budget. These procedures are designed to alleviate the potential abuse of personal privacy that is magnified by the increasing use of computers for the collection and maintenance of personal information.

Computer matching programs are becoming more widespread in government. In 1982, the President's Council on Integrity and Efficiency initiated the Long Term Computer Matching Project to encourage and facilitate computer matching. In July 1982, the project, which involves all Inspectors General, published its first newsletter and reported that the inspectors general of ten departments and agencies were engaged in computer matching efforts of sufficient significance to merit reporting. It is likely that the newsletter did not mention all the computer matching programs underway, and it is just as likely that new matching programs have been started since then. While computer matching remains a controversial practice, it seems to be gaining wider acceptance.

Interestingly, while computer matching has become more acceptable, statistical research has been severely curtailed since the passage in 1976 of the Tax Reform Act which places strict restrictions on the use of individual tax returns.

Freedom of Information Act

The Freedom of Information Act (FOIA) [6] affects privacy and access issues in a number of ways; some of them only tangentially. Recent congressional initiatives to reform the FOIA reflect a growing concern about access to government information. One revision prohibits foreign nationals from acquiring information under the Freedom of Information Act. Another proposal suggests charging a fair value fee for commercially valuable information. Yet another modification tightens access to informant information.[7] As mentioned earlier, the Senate passed these reforms but since the house of Representatives did not act, the bill expired and will have to be re-introduced during the next Congress. One change to the Freedom of Information Act did, however, become law this year; Central Intelligence Agency files on intelligence sources and methods have been exempted from the provisions of the FOIA.

The impact of various definitions on privacy and access

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[6] 5 USC 552
[7] S. 774, 98th Congress.

Certainly a major problem we face in the United States government is determining which materials are covered by which legislation. The multiple definitions of "record" complicate the protection of privacy in the U.S. government. Both the Federal Records Act and the Privacy Act contain different definitions of what constitutes record material. While the Freedom of Information Act does not contain an explicit definition of records, it uses phrases defined in each of the other two laws.

These multiple definitions of record present problems to those people concerned with privacy protection and access. It is difficult to properly protect information or to monitor compliance with privacy protection requirements if it is not clear what information is covered.

An additional complication is that these definitions apply only to the federal government. Each state is responsible for establishing its own definition of what constitutes a record. Therefore, to ensure full privacy protection, one would need to know the laws in every state in which records may be located.

Conclusion

Federal law plays a significant, albeit limited, role in the protection of privacy in the United States. Our increased reliance on automated information makes such protection more important than ever. The United States Congress is beginning to recognize the need to address the problems surrounding the confidentiality of automated information. And it is likely that, in the coming years, we will see a great deal of congressional activity in the area of privacy and access. But, we can also expect that such action will come only in reaction to particular problems. We are likely to see a series of discrete pieces of legislation, each designed to address a specific problem. It would be unduly optimistic to expect the United States Congress to develop a comprehensive and coherent policy concerning the increased use of automation for the collection of information.