Municipal Lawyer

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Privacy in the New Millenium

By Robert J. Freeman

Perhaps the most persistent and perplexing issue facing many, whether in or outside of government, involves the continuing tension between access to information and the protection of privacy. We face dilemmas relating to attempts to reach the proper balance between access and privacy every day when dealing with our governmental duties under the Freedom of Information Law (FOIL), and in addition, as consumers seeking to purchase goods or services at our local supermarkets or, now, online. It seems that hardly a day goes by without some new statement appearing in print on the subject.

While there is no constitutional or common law right to privacy in New York, many statutes protect privacy by exempting certain records from disclosure to the public, and there may be little need to enact more such provisions regarding government records. Moreover, in many instances, flexibility is crucial, for privacy may be more valuable in some contexts than in others. Further, some have suggested that as important as statutory privacy protection is the need to ensure that government guarantees internal security.

Is There a "Right to Privacy"?

We frequently read or hear about the "right to privacy." Nevertheless, there is no direct reference to privacy in either the United States or the New York State Constitutions. In most jurisdictions, there is a common law right to privacy, and some states have included a right to privacy in their constitutions. New York is unique due to the absence of any common law right to privacy; any right to privacy here is statutory.

In 1903, the New York State Legislature enacted §50 of the Civil Rights Law, the first "right to privacy" statute in the nation, in response to the use of a picture of a young girl on boxes of flour without her consent. In that instance, privacy was violated by means of the appropriation of a person's name or likeness for commercial purposes without that person's consent. Other than the statutory prohibition against the use of a person's name or likeness for commercial purposes without his or her consent, there is no "right to privacy" in New York.

Protection of Privacy by the Government in New York

The FOIL enables agencies, both state and local, to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The Personal Privacy Protection Law, which applies to state agencies only, provides the essence of fair information practices that have become widespread outside of the United States and adopted by the European Union. In addition, there are numerous privacy protection statutes that require that certain kinds of records be kept confidential, or which are, in the words of the Freedom of Information Law, "specifically exempted from disclosure by state or federal statute." Most often, those statutes protect against the disclosure of records that contain intimate details of peoples' lives. For instance, statutes that prohibit the government from disclosing records involving personal income tax, birth and death certificates, foster care, medical and mental health treatment, education records pertaining to students and numerous others.

Protection of Privacy is Not Absolute

In a column by William Safire in which he described privacy as "a political sleeper issue," he concluded by writing that:

"...excepting legitimate needs of law enforcement and public interest, control of information about an individual must rest with the person himself. When the required permission is asked, he or she can sell it or trade it – or tell the bank, the search engine and the Motor Vehicle Bureau to keep their mouths shut."

While Mr. Safire's contention may have general merit, in the context of the treatment of government records, some disclosures clearly involve a *permissible* rather than an *unwarranted* invasion of personal privacy, and persons named in records may have no choice or control over their disclosure. For instance, assessment records that include the names of owners of real property and the locations of the property have long been available; they were public prior to the enactment of the FOIL. Disclosure is necessary so that property owners can have the ability to ascertain whether the government is treating them fairly in terms of the assessed value of their property and the amount of tax they pay. Without having the ability to know of our neighbors' assessments, we lose the ability to ensure that government is acting fairly and equitably. Even though the information may be considered to be somewhat "personal," the Legislature determined years ago, intentionally or otherwise, that disclosure of the information was more important in terms of the assertion of certain rights than the need to protect privacy.

Motor vehicle records, while the subject of continuing controversy, should, in many instances, be public. If a person has committed a violation of law, such as speeding or driving while intoxicated, the public should clearly have the right to know, whether or not the subject of the record consents to disclosure.

In short, absolute statements or principles relating to privacy may not be sensibly applied in every context, and legislative bodies should be mindful of and sensitive to the multitude of *values* that may be pertinent to issues involving privacy.

Privacy as a *Value*

There are many aspects of our lives which relate to the manner in which we place a value on protecting our privacy, or on the other hand, consent to or even desire disclosure.

Surveillance Cameras

The Chair of a New York City Community Board in Manhattan sponsored a public forum in which the issue involved the use of surveillance cameras in Washington Square Park by the Police Department. According to *Government Technology* magazine:

"Cameras are popping up everywhere: toll plazas, bus stations, tunnels, traffic intersections, bridges, public parks, offices, apartment buildings and government offices. In some cases, they are installed by the local police department. In other cases, the cameras are a result of a partnership between community groups, the city and local law enforcement agencies."

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Inside...

Construction Claims, Labor Arbitration and Land Use to Highlight Fall Meeting

The Municipal Law Section of the New York State Bar Association will hold its Fall Meeting on September 28-30, 2001 at the Château Laurier, Ottawa, Ontario, Canada. The New York State Associations of School Attorneys and County Attorneys are cosponsoring this conference. Under New York's Mandatory Continuing Legal Education rules, the program has been approved for between 6 and 7 credit hours in practice management and/or areas of professional practice.

On Saturday morning, the Municipal Law Section will hold a joint program with the School Attorneys Association. The program will begin with "Litigation of Construction Clams: Planning for Change – Unforeseen Circumstances, Change Orders and Design Defects." Anthony J. Adams, Esq., Gates & Adams, P.C., Rochester will be the speaker.

The Saturday morning session will continue with a presentation on "Labor Arbitration" examining the process from the viewpoint of an advocate and an arbitrator. The speakers for this program are Jack D. Eisenberg, Esq. of Harter, Secrest & Emery, LLP, Rochester and Jacquelin F. Drucker, Esq., New York City. The Saturday morning program will conclude with a presentation by Linda S. Kingsley, Esq., Corporation Counsel of the City of Rochester on "How to Evaluate a Claim." This presentation will focus on what you need to look for when the claim arises, whether or not you are self-insured and whether you use outside or inside counsel.

On Saturday afternoon, the Municipal Law Section will be hosting a Corporate Counsel Roundtable Luncheon. Local government attorneys are invited to bring their problems, ideas and issues for an informal discussion over lunch. The New York State Association of School Attorneys will also be holding a luncheon on Saturday afternoon.

Highlighting Sunday morning's program will be a presentation from the Honourable James B. Chadwick, Superior Court Justice, Ottawa, Ontario. Justice Chadwick will provide a Canadian Federal Justice's perspective on Canada's judicial system and their current efforts in mediation. The Sunday program will also feature presentations on "Lead Paint" by Peter Danziger, Esq., O'Connell and Aronowitz,

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Privacy

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That article also indicates that "the use of surveillance cameras is quickly becoming one of the nation's most popular and economical ways of using technology to fight crime."

That was the focus of the forum, and although some described concerns regarding the use of the cameras and expressed the belief that their use represented an invasion of their privacy, the majority of those who spoke favored the use of the cameras due to a decrease in crime and a greater sense of safety. Whether crime actually decreased is questionable, for it was suggested that crimes that had been committed in the area of the park simply moved to surrounding areas. Nevertheless, the point is that many were more than willing to relinquish some elements of their privacy in return for an apparent reduction in crime.

Relinquishing Privacy for Personal Gain

In an article appearing in *Government Technology*, reference was made to an electronic commerce venture that offered free personal computers and Internet service "in exchange for a promise to share personal information and allow the company to monitor your travels on the Internet." Hammitt wrote that "[w]hen the company announced it would give away 10,000 Compaq PC's, more than 300,000 people visited the company's website that day, most of them filling out an application that required basic personal information." He added that the incident "shows just how little most of us value our privacy."

He then referred to a case in which a federal court "reasoned that people would probably be willing to give up their ironclad privacy protections under the Freedom of Information Act if they stood to benefit financially." The case involved a request for names and addresses of individuals with unclaimed bank accounts at two failed banks, and reversed "what, until now, has been a practical iron curtain against disclosing personal information." The court, in Hammitt's words, found that "privacy is one consideration in an economic negotiation and that courts should not be in the business of telling people that their privacy is worth more than money in their pockets."

Hammitt suggested that the apparent trend involves "the benefits an individual might reap from such a bargain," but that when the government would benefit by selling personal information, "the outrage over privacy invasion can quickly rise to deafening proportions." In conclusion, he wrote that "In the world of privacy, businesses are beginning to feel out just what that price is. So far, the only thing we know is that the price is reasonably cheap, but the benefit has to go to the individual, not to the government."

In short, while some of us might contend that disclosure of certain personal information is offensive and unwarranted in some contexts, we might choose to disclose the same information in others, depending on our perception of the benefit — the benefit in protecting our privacy as opposed to the possible gains that we may reap via disclosure.

Privacy in the Private Sector: An International Issue

Historically, Americans have demonstrated a desire to acquire more and more information, even or perhaps especially information about people, and the explosion of information technology has made it relatively easy to acquire information about individuals. Conversely, in other parts of the world, access to information is subordinate to the protection of personal privacy. In the nations comprising the European Union (EU), for example, privacy is considered a basic human right. Further, the EU has issued a "privacy directive" stating, in essence, that it will not do business with an entity that does not give effect to general principles that recognize what have become known as "fair information practices."

Numerous polls and surveys indicate that there is concern for privacy on the Internet, and that consumers in many instances refuse to do business via the Internet by means of "E-commerce" unless there is some sort of guarantee of privacy in relation to an online transaction. The issue from the point of view of many involves whether privacy guarantees should be required by statute, or whether the business community should confer privacy protection through what is generally characterized as self-regulation.

Recent studies indicate that despite exponential increases in the use of the Internet (from 17 million in North America in 1998 to more than 100 million by the end of 1999), more than 70 percent of online consumers have chosen at least once not to register at a website due to fears regarding their privacy. More than 80 percent of consumers have expressed the view that the use of a website should not give companies the right to resell information about them to third parties. Consumers are mistrustful, and more than a quarter of consumers provide false information online due to privacy concerns.

There is reason to believe, however, that the business community in the United States has recognized that the public's misgivings and fears about engaging in E-commerce represent a genuine threat to the continued growth of online purchasing. A study in 1998 by the Federal Trade Commission (FTC) indicated that only 14 percent of companies' websites warned consumers of how their personal information was being collected and used. At that time, FTC Chairman Robert Pitofsky admonished that he would urge Congress to enact privacy protections if the business community did not take steps to offer consumers information and choices regarding the use of personal information. Although many companies have responded by adopting privacy policies, earlier this year, he indicated that the FTC would recommend legislation that embodies what have become known as "fair information practices."

The basic elements of fair information practices include:

(1) notice/awareness — Web sites would be required to provide consumers notice of their information practices, *i.e.*, what information they collect and how they use it;

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Municipal Briefs

Attorney's Fees

Under the "American Rule," parties are required to bear their own legal fees and, absent explicit statutory authority, attorney's fees may not be awarded to a prevailing party. However, numerous federal statutes authorize courts to award fees and costs to a prevailing party (e.g. 42 U.S.C. §1988 authorizing attorney's fees in §1983 actions). Ruling 5-4, the United States Supreme Court now holds that in the context of these Congressionally enacted attorney's fees statutes, a "prevailing party" is limited to "one who has been awarded some relief by a court." Accordingly, the Court opines that the "catalyst" theory, previously embraced by numerous federal appeals courts, which allows an award of attorney's fees if the plaintiff's lawsuit brings about a voluntary change in the defendant's conduct without a formal judicial sanction, is not a permissible basis for an award of attorney's fees under these fee shifting statutes. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 121 S.Ct. 1835 (May 29, 2001).

Here, the plaintiff, an operator of care homes and a provider of assisted living to their residents, failed an inspection by the State Fire Marshall because some of the residents were incapable of "self-preservation" i.e. removing themselves from dangerous situations such as fire. After being ordered to close its resident care facilities, the plaintiff sued to invalidate the "self-preservation" requirement as violative of the Fair Housing Amendments Act of 1998 and the Americans with Disabilities Act of 1990. Enforcement of the closure orders was voluntarily stayed by the State, and, prior to judicial adjudication of the dispute, the West Virginia Legislature repealed the "self-preservation" requirement. On the State's motion, the District Court dismissed the case as moot.

Arguing that its lawsuit was the inducement for the State's repeal of the offending legislation, plaintiff moved for an award of attorney's fees. In an opinion by Chief Judge Rehnquist, the majority drew a sharp distinction between "enforceable judgments on the merits and court-ordered consent decrees [which] create the 'material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees'" and "a defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit [which], lacks the necessary judicial imprimatur on the change."

Ethics

The revolving door provision of Public Officers Law §73(8)(a)(ii) which imposes a lifetime prohibition on former State agency employees from rendering services relating to any matter which the former employee was directly concerned with and personally participated in while a State employee, extends to rendering compensated services that do not require the former employee to actually appear or practice before the agency. *McCulloch v. New York State Ethics Commission*, __ A.D.2d __ (3d Dept. 2001).

Here, petitioner, a senior planner for the Tug Hill Commission ("Commission") applied for a Federal community development block grant for the Town of Forestport. When the grant application was approved by the federal government, the petitioner administered the grant on behalf of the Commission until he resigned his State position. At the time of his resignation, the project funded by the grant had been 60% completed and $4,500 remained to pay for the completion of administrative matters. One month after his resignation, the Town hired the petitioner to administer the remainder of the grant and paid his private firm $4,500, the remaining grant money, for his services.

Cited by the State Ethics Commission for a violation of §73(8)(a)(ii) in connection with his work for Forestport, petitioner defended upon the grounds that he did not appear or practice before the Commission while administering the grant for the Town. A Hearing Officer found that petitioner had violated the statute and the State Ethics Commission confirmed that finding and imposed a $2,000 penalty. In the ensuing Article 78 proceeding, the Supreme Court annulled the Ethics Commission's determination, ruling that the petitioner did not violate the law because, after his resignation from State service, he did not appear or practice before the Commission or any other State agency while administering the grant for the Town. Reversing the lower court, the Appellate Division, after reviewing the plain language and legislative history behind the statute, declared that its construction of the statutory bar, as prohibiting a former employee from receiving compensation for any services in any matter in which he was personally involved during State service, carried out the "Legislature's predominant purpose for enacting the statute – to prevent former agency employees from attempting to further their own monetary interest, or the interests of other individuals and entities, by utilizing inside information obtained during State service or asserting undue influence on former colleagues who continue to be employed by the State."

Parkland

Responding to a certified question from the Second Circuit Court of Appeals, the New York Court of Appeals has held that approval of the State Legislature is required before a water treatment plant, a non-park use, may be constructed on New York City park property. *Friends of Van Cortlandt Park, Parks Council, Inc. v. City of New York*, 95 N.Y.2d 623 (2001).

Here, New York City proposed to construct a water treatment plant on the Mosholu Golf Course in Van Cortlandt Park. According to the Environmental Impact Statement prepared for the project, the construction was scheduled to last at least five years, during which time 28 acres of parkland, including the golf course and driving range, would be closed to the public.

Citing the well settled common law principle that "parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes," the Court rejected the City's arguments that legislative approval was not required because there would be no alienation of

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NYSBA Notes

James Coon Award

At its Annual Meeting in New York City in January, the Municipal Law Section of the New York State Bar Association honored Ms. Deborah Goldberger, a third year student at Pace University Law School by bestowing upon her its James A. Coon Memorial Writing Competition Award for her two-part article on Zoning Enforcement Law in New York State published in *Environmental Law in New York*.

The Section created this award to honor the memory of James Coon, a former member of the Executive Committee. At the time of his death, James Coon was the Deputy Counsel to the New York State Department of State. He was best known around the State as the ultimate resource on New York Planning and Zoning Law. He traveled the State providing free technical assistance to local government on land use law issues. Also, he authored a number of publications for the Department of State and for the New York Planning Federation. This award is given annually to recognize outstanding writing in the field of land use and zoning.

Section Officers

Also at its Annual Meeting, the Municipal Law Section selected a new slate of officers who will take office for two year terms commencing June 1, 2001. Linda S. Kingsley, Esq., Corporation Counsel of the City of Rochester will be the new Chair of the Section. Hon. Renee Forgensi Minarik, Judge of the Court of Claims, will be the First Vice Chair; Thomas Myers, Esq., Orrick, Herrington, Sutcliffe LLP, New York will be the Second Vice Chair; and Robert Koegel, Esq., Knauf, Craig, Koegel & Shaw LLP, Rochester will be the Secretary. The current chair, Edward J. O'Connor, Bouvier, O'Connor, Buffalo, New York will serve as the Section's Delegate to the House of Delegates. Lester D. Steinman, Esq., Director of the Municipal Law Resource Center of Pace University was designated as the Alternate Delegate to the House of Delegates.

At the same time, Executive Committee members Henry M. Hocherman, Esq., Howard Protter, Esq., A. Thomas Levin, Esq., and Anthony Rivizzigno, Esq., were reappointed for two-year terms beginning June 1, 2001. To fill a vacancy on the Executive Committee, the Section's Employment Law Committee Chair, Richard K. Zuckerman, Rains & Pogrebin, P.C., Mineola, New York was appointed for a one-year term.

Finally, the Section extends its congratulations to A. Thomas Levin, who was elected Secretary of the New York State Bar Association at the Association's January House of Delegates meeting.

Privacy

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(2) choice/consent — Web sites would be required to offer consumers choices as to how that information is used beyond the use for which the information was provided (*e.g.* ,to consummate a transaction);

(3) access/participation — Web sites would be required to offer consumers reasonable access to that information and an opportunity to correct inaccuracies; and

(4) security/integrity — Web sites would be required to take reasonable steps to protect the security and integrity of that information."

While the foregoing pertains only to online transactions, the guidelines could readily be adapted to most situations in which organizations, whether private or governmental, seek personal information from individuals.

What We Can Do to Guarantee Information Security, Privacy and Access

In 1984, FOIL was amended to enable agencies to withhold "computer access codes." The idea was that disclosure of a code could result in unauthorized access to information stored in a computer. That was a first step toward protecting government records and information maintained electronically, but it is now clearly insufficient to guarantee against the legal disclosure of records that could be used not only to obtain information, but also to alter or even destroy it.

Not long ago, a description of an agency's security procedures concerning the protection of its records would not, if disclosed, compromise the ability to guard against unauthorized access. Even if written procedures were available, without the first key to unlock the door to the room in which the records were stored, and more importantly, without the second key needed to unlock the filing cabinet, records could be protected with reasonable certainty. In contrast, today's disclosure of an agency's security procedures could result in devastating attacks and incursions on agencies' electronic information systems. The use of the key to unlock the door or filing cabinet, being physically present, is no longer necessary; an electronic attack can emanate from anywhere.

To ensure that the FOIL cannot be used to facilitate the unauthorized access to information stored electronically or to require the disclosure of security procedures that could damage an agency's information or information system, the existing exception regarding computer access codes should be replaced with a new provision that permits agencies to withhold records or portions thereof that "...would if disclosed facilitate unauthorized access to an agency's electronic information systems or clearly jeopardize or compromise information security."

Using Technology to Protect Privacy and Maximize Access

"One of the bedrock principles of electronic access is that format should not dictate the availability of information. In other words, if the information is available on paper, the fact that it is in electronic form should not be an obstacle to its availability" (*Government Technology*, November, 1997).

It is becoming increasingly critical to consider the design of information systems used by government in order to provide maximum access to records, while concurrently protecting against disclosure of deniable information, especially when disclosure would constitute an unwarranted invasion of personal privacy. As stated in the article: "The move to maintain and collect more government information in electronic form continues and it seems more likely that almost all records will at some time become electronic...[and] the real problems of balancing access and privacy will have to be faced and resolved in an electronic world."

Through the design of information systems that provide appropriate disclosure coupled with the protection of personal privacy, often an agency need only delete certain fields from a database. Once the fields containing protected information are deleted, the database becomes fully public. Clearly that course of action, accomplished in consideration of access and privacy, is far preferable to a denial of access or the hours expended by agency employees making deletions with magic markers so that disclosure requirements can be met while recognizing the need to protect privacy.

In conjunction with the foregoing, the following provision should be added to the FOIL:

"When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to foster maximum public access."

The proposal offered here would clearly enhance the capacity of the public to gain access to records or portions of records that it has the right to obtain while concurrently protecting personal privacy. Moreover, the proper design of electronic information systems would foster the government's ability to deal effectively with access, privacy and security.

Mr. Freeman is the Executive Director of the Committee on Open Government, Department of State, State of New York.

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Fall Meeting

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Albany; "LDC's, UDC's, and IDA's: "Alphabet Soup for Municipalities" by Edwin Kelley, Esq., Bond, Schoeneck & King, LLP, Syracuse; and "Constitutional Land Use Law" by Terry A. Rice, Esq., Rice & Amon, Suffern, New York.

The School Attorneys will also be conducting their own program on Sunday morning. Feature presentations include "Update on Important Recent Court Decisions Regarding the Use of School Facilities by Outside Religious Groups"; "Techniques and Limitations When Investigating Misconduct Involving Computers within the School Setting" and "Hot Topics in Education Law."

Social events planned throughout the weekend include a welcoming reception and dinner on Friday evening at the hotel, and a tour of the Parliament building and a Rideau Canal boat cruise reception/dinner on Saturday.

Officials instrumental in planning this conference include Municipal Law Section Chair Linda S. Kingsley, Esq. and School Attorneys President Eugene R. Barnosky, Esq. The program co-chairs for the Fall Meeting for the Municipal Law Section are Gregory J. Amoroso, Esq., Corporation Counsel for the City of Rome and the Hon. Renee Forgensi Minarik, Judge of the New York State Court of Claims. The program co-chairs from the School Attorneys Association are Mary M. Roach, Esq., Roemer, Wallens & Mineaux, LLP, Albany, Lawrence J. Tenenbaum, Esq., Jaspan, Schlesinger Hoffman, LLP, Garden City, and Wayne A. Vander Byl, Esq., Williamson, New York.

For reservations and further information, please contact the New York State Bar Association at (518) 463-3200.

Briefs

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parkland and, since the plant would be built underground and the park surfaces fully restored, the proposed use would not be inconsistent with park purposes. Citing its prior decision in *Williams v. Gallatin*, 229 N.Y. 248 (1920) as controlling precedent, the Court opined that legislative approval is required for any "substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored."