

Mitchell's Musings 7-29-13: Need for Privacy is Transparent

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"It might seem strange for a journalist to raise questions about the availability of public information."

Los Angeles Times Business Columnist Michael Hiltzik¹

The quote above comes from an article about a plan by CalPERS – the huge state public pension plan in California – to publish the names of pensioners and the amount of their pensions on the web. CalPERS covers most state employees (except for those of the University of California) and many local government employees. The decision – now on hold after protests by pensioners – was made because under current court rulings, anyone could request the information from CalPERS and put it online. CalPERS decided that it would prefer to do the publishing rather than leave it to others.

Columnist Hiltzik notes that *"the position of the retiree advocacy groups fighting the CalPERS database is that it steps over the line in making public information just a tad too public. 'We're not against transparency,' says Donna Snodgrass, legislative director for the Retired Public Employees Assn. of California. 'But retirees' biggest concern is that this would give someone enough information to prey on elders.' In any case, the principle that recipients of public funds, like government employees, should expect to cede some privacy isn't consistently applied; no one has free access to the names of relief or Social Security enrollees, or to the medical records of Medicare enrollees."*

Hiltzik notes further that *"until recently, a kind of natural principle achieved the balance between publicity and privacy all by itself. It's known as 'privacy by obscurity.' It amounts to protecting privacy by leaving public information hard to find or hard to compile. 'I call obscurity pretty good privacy,' Woodrow Hartzog, a privacy expert affiliated with Stanford's Center for Internet and Society, told me. 'There are a lot of things that fall into the category of what we think is OK to be public because we feel nobody will find it.'*

In effect, back in the day, you could go to CalPERS headquarters, demand to see the pension amount of Lucy Jones, and be given it. But to compile a database of all pensioners, you would have to demand each individual pensioner record and make your own database. The same is true for payroll records of public agencies where nowadays similar issues of general disclosure arise. Newspapers routinely publish the wages and salaries of vast numbers of public employees on their websites – because they can and because current technology makes it easy.

As I have noted in earlier musings, however, newspaper publishing of large data sets - because they are available and technology makes it possible – never seems to extend to the employees of those newspapers or their retirees. In principle, a newspaper could publish its own payroll and pension records. A newspaper would have the information, of course, and the same technology used for public

¹ <http://www.latimes.com/business/la-fi-hiltzik-20130721,0,1949777.column>

employees could be applied to any other group of employees. But no newspapers do so. None would even consider doing it. Indeed, no private employers of any type would do it for all the obvious reasons.

There has been much complaining about N.S.A. snooping in phone and email records – although no one is quite sure exactly what has been snooped. Indeed, N.S.A. claims it doesn't have the ability to search its own emails.² But what has upset people is the invasion of privacy that may have occurred even though whatever the N.S.A. has done, it has not posted the results online. Somehow, that logic doesn't seem to apply to public employees. Indeed, the same LA Times that published the Hiltzik column put online the "value added" performance scores of local public school teachers (as did the New York Times) - because it could. I know of no newspaper or private employer, however, that publishes the performance appraisals of its own employees. Somehow, with public workers, the standards are completely different.

The rationale for invading the privacy of public workers is that they are on the public payroll and therefore disclosing pay or pensions will promote government efficiency and disclose waste. But if you take that argument to be the key reason for the difference between the public and private sectors, you must still ask whether the efficiency/waste issue could be handled without putting names on the figures for pay or pensions. Pay or pension by occupation or job title could be provided without tying the information to any particular individual. You, for example, could see what the wage was of a truck driver employed by the City of Whatevertown without knowing who that driver was.

Readers of this musing may regard the invasion of privacy of public workers as unjust but nonetheless feel that it is now the law and therefore there is no use raising the issue. But Hiltzik points to a 1989 U.S. Supreme Court decision involving the protection of privacy of an individual who arguably -as an organized crime figure - had less entitlement to such protection than your typical CalPERS pensioner.³ It's worth providing an excerpt from that Supreme Court decision:

"On the basis of information provided by local, state, and federal law enforcement agencies, the Federal Bureau of Investigation (FBI) compiles and maintains criminal identification records or 'rap sheets' on millions of persons, which contain descriptive information as well as a history of arrests, charges, convictions, and incarcerations. After the FBI denied Freedom of Information Act (FOIA) requests by respondents, a CBS news correspondent and the Reporters Committee for Freedom of the Press, they filed suit in the District Court seeking the rap sheet for one Charles Medico insofar as it contained 'matters of public record.' Since the Pennsylvania Crime Commission had identified Medico's family company as a legitimate business dominated by organized crime figures, and since the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman, respondents asserted that a record of financial crimes by Medico would potentially be a matter of public interest. Petitioner Department of Justice responded that it had no record of such crimes, but

² <http://www.nationofchange.org/nsa-says-it-can-t-search-its-own-emails-1374761950>

³ 489 U.S. 749, UNITED STATES DEPARTMENT OF JUSTICE ET AL. v. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL. <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=489&invol=749>

*refused to confirm or deny whether it had any information concerning nonfinancial crimes by Medico. The court granted summary judgment for the Department, holding, inter alia, that **the rap sheet was protected by Exemption 7(C) of the FOIA, which excludes from that statute's disclosure requirements records or information compiled for law enforcement purposes "to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."** The Court of Appeals reversed and remanded, holding, among other things, that district courts should limit themselves in this type of case to making the factual determination whether the subject's legitimate privacy interest in his rap sheet is outweighed by the public interest in disclosure because the original information appears on the public record.*

Held:

Disclosure of the contents of an FBI rap sheet to a third party 'could reasonably be expected to constitute an unwarranted invasion of ... personal privacy' within the meaning of Exemption 7(C) and therefore is prohibited by that Exemption...

(a) Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of 'personal privacy' interest that Congress intended the Exemption to protect.

(b) Whether disclosure of a private document is 'warranted' within the meaning of the Exemption turns upon the nature of the requested document and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties, rather than upon the particular purpose for which the document is requested or the identity of the requesting party. The statutory purpose is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

(c) In balancing the public interest in disclosure against the interest Congress intended Exemption 7(C) to protect, a categorical decision is appropriate and individual circumstances may be disregarded when a case fits into the genus in which the balance characteristically tips in one direction. ...Where, as here, the subject of a rap sheet is a private citizen and the information is in the Government's control as a compilation, rather than as a record of what the Government is up to, the privacy interest in maintaining the rap sheet's 'practical obscurity' is always at its apex while the FOIA-based public interest in disclosure is at its nadir."

Note that the decision makes the matter turn on whether disclosing the compilation tells you something about "what the Government is up to." In the case of pay and pensions in public agencies, making information public without specific names or other identifying information could arguably tell you "what the Government is up to" without invading individual privacy. When this decision was made in 1989, the internet was in an embryonic stage and most people had no access to it. Even so, the full decision makes explicit reference to privacy concerns raised by large-scale computer databases. But the kind of posting of wholesale employment records online proposed by CalPERS or done by various news sources

was not possible back then. Well over two decades have passed and it is time to revisit this issue in the light of modern technology.