



FOCUS ON PRIVACY

PRIVACY RIGHTS — WHERE DO THEY COME FROM?

Note: This article is adapted from an article on privacy rights written by Julie Kalish, Esq., of Norwich. The text of the full article — with legal citations and footnotes — can be found on the ACLU of Vermont's Web site, www.acluvt.org.

As technology advances, as the values of a consumer and information culture take firmer root, and as the globe shrinks and concerns over security increase, protected boundaries of privacy become more confusing and illusive.

At times, legal questions seem as if they might out-pace anyone's ability to apply constitutional standards and case law to new situations.

Most people are aware of the privacy controversies raised by government surveillance activities. But what of the more everyday questions raised by our increased use of the Internet?

Is a woman's privacy invaded if she's listed on an adult Web site as a "swinger?" Is such a posting more invasive than an identical note scrawled on a bathroom wall? Is privacy invaded when Google keeps track of the videos someone watches on YouTube?

If we want protection from these sorts of actions, where do we turn?

What is privacy, and what protections does it

enjoy?

The U.S. Supreme Court made its first concerted attempt to locate a source for the right to privacy in the 1965 case, *Griswold v. Connecticut*, which was about a woman's right to use contraceptives.

Nowhere does the U.S. Constitution explicitly mention a privacy right. But the prevailing opinion in the *Griswold* case stated that the Bill of Rights has "penumbras" surrounding its enumerated rights, within which reside un-enumerated rights that are "emanations from those guarantees that help give them life and substance."

Privacy, the justices said, is such an un-enumerated right. It can be seen in the "zones of privacy" created by the First, Third, Fourth, and Fifth Amendments, and it protects "the sanctity of a man's home and the privacies of life."



DNA

This spring the Vermont Supreme Court said even non-violent offenders can be forced to give DNA samples. The state has a "special need" to collect the information, the court said, trumping all privacy rights.

DATA AGGREGATION

Data aggregation is the combining of information from several sources to produce a new set of information. An example is "doctor detailing," in which pharmaceutical companies send sales people to specific doctors to convince them to prescribe brand-name rather than generic drugs. Prescription information comes from "pharmacy benefit managers"; it includes ID numbers of prescribing doctors. The aggregators obtain "keys" that match the numbers with doctors' names.

VERMONT CONSTITUTIONAL PROTECTIONS

Many point to the Vermont Constitution for stronger privacy protections than the U.S. Constitution provides.

It's usually Article 11, which addresses search and seizure protections, that jurists cite in privacy cases.

While a federal officer need not obtain a separate warrant to search a closed container in a vehicle, a Vermont officer must.

Similarly, while many U.S. citizens have no reasonable expectation of privacy in the trash they leave out for the garbage collector, Vermonters do have such an expectation if

they've put their trash into an opaque bag.

The Vermont Supreme Court opinions behind these cases speak of Vermont courts' "task ... 'to honor not merely the words, but the underlying purposes of constitutional guarantees' and 'to discover and protect the core values that gave life to Article 11.'"

Other Articles — 1, 3, 7, 10, 13, and 20 — contribute to Vermont's constitutional safeguards for privacy. Only Article 11, though, has a solid jurisprudential history of providing greater *privacy* protections than the federal constitution.

VERMONT STATUTORY PROTECTIONS

In addition to constitutional privacy protections, laws passed by the Legislature can also offer protection. And while there is no general Vermont "Privacy Statute," many laws have privacy provisions.

Protected as confidential are things ranging from agricultural data collection information to the names of people treated for HIV/AIDS. Many of the protections come within the state's Public Records Act; the protections are exemptions to the general rule that information the state gathers must be open.

There are some commonalities to the information Vermont legislators have, through the exemptions, deemed "private."

The Public Records Act itself acknowledges that "[a]ll people have a right to privacy in their personal and economic pursuits, which ought to be protected unless specific information is needed to review the action of a governmental officer." Generally, identification information such as date of birth and Social Security number is considered private. Also private are tax return information, health information, student records, the identity of

library users, and books the users check out.

Individuals under investigation, defendants, and convicted criminals also have privacy rights within Vermont law. These protections not only facilitate investigations and court procedures, but also protect individual reputations, the presumption of innocence, and, in the case of convicted offenders, the ideal that one's time can be served and completed.

Vermont has started to recognize the risks to privacy posed by advancing technology, but it's been a struggle to keep up with complex areas such as data aggregation.

One thing is very clear: Technology has made it difficult to remain anonymous. Criminal conviction records from 14 different courthouses around the state are now stored in one place and made available over the Web. Every prescription written in Vermont for a Category II, III, or IV drug is stored in Health Department computers. Grand list information about one's home is often on the Web.

Privacy created by anonymity is, in effect, disappearing.

PRIVACY TAKES CITIZENS TO PROTECT

Vermonters like to think of Vermont as a state that's different. This includes the way we think our privacy is protected. And indeed, Vermont has a judicial and legislative history of protecting privacy rights.

But that history is neither extensive nor unassailable. Vermont's constitutional protections may exceed those of the federal constitution, but only in the context of search and seizure. And even there, the protections may not be as extensive as one would hope.

Statutory privacy provisions vary from law to law (and from one legislative session to the

next) and can be tortuously illogical — an exemption to an exemption but only sometimes, as in the case of certain tax records.

Often the protections that do exist are because citizens, interest groups, and communities (such as the medical community) impressed upon legislators the importance of privacy measures.

Indeed, the lesson to be learned seems to be that privacy protections will only be as strong as citizens' ability to convince legislators that privacy deserves protection.

MEDICAL RECORDS

The confidentiality of medical records ranks high among individuals' anxieties over privacy, perhaps because they reveal vulnerabilities whose exposure could be exploited. Vermont's "Bill of Rights for Hospital Patients" protects confidentiality. Patients are routinely requested (or required, in the case of insurance coverage) to waive that right, however. And how records are used after that can be problematic.

TAX RECORDS

Tax records are generally private. But a fight continues over whether income-related data used to calculate property tax bills should remain confidential. Privacy of income data is important because that information is a target of data aggregators. The aggregators use it as an identity marker for marketing purposes.

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