

## Chapter 12

### The State Role in Privacy Protection

Naming the new nation the "United States of America" reflected the founders' commitment to the Federal Principle, the division of power between the States and the national government. From the beginning, each State was, and still is, a sovereign authority, with power to perform within its borders almost all of the activities, legislative, executive, and judicial, that the Federal government performs, except to represent itself in foreign affairs, burden interstate commerce, and provide for the national defense. It can, and does, tax its citizens, provide services, regulate commerce, license professions, and exercise police powers. Indeed, the national government was intended to be the government of limited, delegated powers, with the States exercising domestically, any of the powers one might expect a government to use. That was the theory, though in practice the pendulum has gradually swung so that the Federal government is now the forum where the great domestic policy issues, social as well as economic, are resolved. The States' role is still important, and shows signs of growing, but currently is the more limited one. The State still functions as a basic provider of government services, but in many cases is simply carrying out programs that originate at the national level and are funded, at least in part, by the Federal government. Even in the sectors it controls, for example, police protection, Federal statutory programs carried out by agencies like the Law Enforcement Assistance Administration (LEAA) are beginning to make inroads on its authority. The States are still the governmental vehicle for determining land use and allocation of most of the natural resources within their borders; though, once again, the Federal government has begun to take a prominent role in order to assure environmental quality and effect national resource policies. Population growth, urbanization, mobility, and economic integration have turned many of the social and economic problems that could once be managed at the local level into problems that require national attention. Thus, the Federal government, of necessity, now dominates many areas that were traditionally State preserves.

The role of State governments in protecting personal privacy is, however, still enormously important. The records a State government keeps about the individuals under its jurisdiction are often as extensive as those kept on the same individuals by the Federal government, and in some respects even more so. As a prelude to the following chapters which consider various aspects of the relationship between the individual and agencies of the Federal government, this chapter briefly summarizes how the Federal-

State relationship enters into the Commission's recommended program for protecting personal privacy. Four aspects of that relationship are important to the national policy the Commission proposes:

- How the Federal government constrains State activities;
- How States have tried to protect personal privacy;
- How State record-keeping practices affect personal privacy; and
- How the Commission's recommendations fit into the existing system for implementing national policy at the State level.

#### FEDERAL CONSTRAINTS ON STATE ACTIVITIES

The Federal government may restrict State action or take action itself affecting apparently intrastate activity on the basis of four Constitutional provisions: the commerce clause, the spending clause, the Fourteenth Amendment, and the welfare clause. The commerce clause enables the Federal government to regulate interstate commerce by precluding certain State regulation. In legislating under the commerce clause, however, the Congress sometimes explicitly leaves existing State regulation intact, or provides that States may also regulate, so long as State regulation does not conflict with existing Federal law. For example, Federal and State Fair Credit Reporting Acts and the existing banking system provide for dual regulatory structures in those areas. In fact, only in limited areas such as trademark and copyright law has the Federal government prohibited the States from acting. Congress has also used the commerce clause, alone or in conjunction with the Fourteenth Amendment, as its authority for enacting some laws that are basically social legislation, for example, the Equal Credit Opportunity Act, the Civil Rights Act of 1964, and the Equal Employment Opportunity Act.

The Fourteenth Amendment, mainly through its equal protection clause, enables the Congress to limit State regulation in areas of social policy, but it is the combination of the welfare and spending clauses that gives the Congress most of its power to affect social issues and limit State action that affects them. Federal programs predicated on the spending power can either restrict or require State action, or both. The Medicaid program, for example, requires the States to maintain certain records about individuals and restricts the disclosure of that information. The constraints of these programs are not mandatory on the States, as commerce clause and Fourteenth Amendment legislation is, but since they require State compliance as a condition of receiving Federal program funds, the effect may be about the same. They are, moreover, the only way that the Federal government can affect the internal management and functioning of a State government where there is no Fourteenth Amendment interest. While the Fourteenth Amendment enables the Federal government to forbid the States to discriminate improperly against individuals, or to deprive them of their Constitutional rights, neither the Fourteenth Amendment nor the commerce clause would seem to enable the Federal government to regulate State activities that are essential to the performance of *internal* governmental

functions, such as record keeping. As recently as 1976, the U.S. Supreme Court ruled in *National League of Cities v. Usery*<sup>1</sup> that the Federal government may not legislate in ways that "operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." The national government, in other words, may not use *coercion* to influence, for example, State government record-keeping practices, but the *National League of Cities* decision does not preclude the use of *inducements*, such as making certain record-keeping practices a condition of Federal funding.

#### STATE PROTECTIONS FOR PERSONAL PRIVACY

Within the strictures the Federal government imposes on public and private-sector record-keeping practices, some States have strengthened the federally prescribed protections. California, for example, includes in its State Constitution a specific protection for the "inalienable right" to personal privacy. The California guarantee goes beyond traditional limitations on government surveillance and government access to information to include protections for the records about individuals maintained by private and public entities. The California legislature has followed court interpretations of the State Constitutional provisions and, in specific areas of record keeping, has enacted statutes that prescribe procedures whereby an individual can exercise his right to participate in a record keeper's decision to disclose information about him.

In response to the invitation in the Federal Fair Credit Reporting Act, a number of States have passed their own credit-reporting laws, and some go considerably beyond the strictures of the Federal law, but there is little consistency among State laws to protect records maintained about individuals, in either the scope or the degree of protection provided, and few States give adequate minimal protection.<sup>2</sup>

The States have been active in privacy protection, and in many cases innovative, but neither they nor the Federal government have taken full advantage of each other's experimentation. Altogether, the Commission's inquiry into State record-keeping practices forces it to conclude that an individual today cannot rely on State government to protect his interests in the records and record-keeping practices of either State agencies or private entities.

This is not true, of course, of all States. Some of them approach the protection of the individual's interests in State records and record keeping in as comprehensive a way as has the Federal government. Seven States have enacted omnibus statutes similar to the Privacy Act of 1974 to regulate the collection, maintenance, use, and disclosure of State agency records. The Constitutions of four States provide a right to privacy that includes a record keeper's corresponding duty to keep certain records confidential. Several

<sup>1</sup> *National League of Cities v. Usery* 426 U.S. 833 (1976).

<sup>2</sup> An overview of State efforts and a comprehensive list of State legislation affecting the rights of individuals in records and record-keeping practices will be published separately as an appendix volume to this report.

States regulate the employment and personnel record-keeping practices of their State agencies. Almost every State has some kind of freedom of information or public records law opening State government records to public inspection. The States diverge widely, however, in their determinations of which records belong in the category of public records. Some exempt from disclosure specific categories of records, such as tax and adoption records; others exempt records that are required or permitted by any other statute to be withheld; and still others adopt the Federal standard and prohibit disclosure of information in government records if disclosure would constitute an unwarranted invasion of personal privacy. A few exempt any records if their disclosure would result in a denial of Federal funds, a provision that brings into focus the far-reaching effect of linking privacy protection requirements to the receipt of Federal funding.

Whatever a State may or may not elect to do about its own record-keeping practices, requirements to collect or protect information, or both, flow with Federal money and often supersede whatever State arrangements exist. On another level, the constraints thus placed on State activity frequently require private organizations to alter their record-keeping practices. The information collection criteria established by portions of the Medicaid program, for example, require State agencies to collect and retain information which they gather from private organizations, which, in turn, may very well have to keep certain records, or keep records in certain ways that they would not otherwise do.

#### STATE RECORD-KEEPING PRACTICES

The Commission looked at the State's role in protecting personal privacy from two perspectives: the State government as record keeper, and the State as regulator of the record-keeping practices of private organizations. In selecting State public-sector record-keeping relationships to examine, the Commission concentrated on areas in which the Federal government exercises substantial responsibility, and thus looked primarily at the State role as an implementor of national policy. As noted above, the Commission is also aware of the Constitutional limits on the power of the Federal government to regulate the activities of State government that are essential to the performance of internal governmental functions, such as record keeping. For these reasons, most of the recommended measures that directly effect State record-keeping practices can be implemented as a condition of Federal funding under various programs.

The Commission emphatically does not recommend wholesale application by the Federal government of the Privacy Act of 1974 to State and local government record keeping. The Commission believes that the States' creative work in devising privacy protections for the individual in his relationships with State government should continue. Indeed, the Commission believes that the fair information practice statutes or executive orders of the several States that have them constitute one good approach to resolving the privacy protection problems raised by a State's own record-keeping practices. The recommendations advanced in Chapter 9 of this report

regarding government access to records about individuals maintained by private organizations, the recommendations in Chapters 10 and 11, on education and on public assistance and social services record keeping, and the analysis of record-keeping practices and requirements associated with various aspects of the citizen-government relationship in Chapters 13 through 15, should help to guide the States in determining the type, degree, and mode of protections they will provide the individual in their own record-keeping operations.

Furthermore, while the Federal government has placed certain privacy protection requirements on States as a condition of receiving Federal funding, the cut-off of funds is an extreme and rarely effective enforcement technique. Hence, implementing such minimum protections by State law can have two advantages. A State can extend its requirements to the State agencies and organizations that do not receive Federal funds or benefits; and, it can use more flexible enforcement mechanisms and incentives for compliance than termination of Federal benefits. Depriving a State agency of Federal funds, for example, does not help an individual whose rights have been violated, and it harms other individuals. It is seldom an effective incentive for compliance since the sanction is so drastic that the threat of it lacks credibility, especially if the program is a large one where cutting off Federal funds would penalize a great many blameless individuals. By contrast, a State statute can create the alternative of allowing aggrieved individuals to seek redress and remedy against States in State courts, and can provide administrative or criminal sanctions for remiss State employees without disrupting the entire program.

### THE STATE ROLE IN A NATIONAL POLICY

In formulating its recommendations, the Commission has recognized and encouraged the existing role of the States in providing individuals with the ability to protect their own interests. In areas such as insurance and medical care, for example, the Commission suggests that the States retain their current power to regulate in conjunction with the creation or extension of a Federal role. Indeed, the significant increase in State regulatory efforts to protect the interests of the individual in records kept about him, noted above, has already led a number of States to try out innovative protections, particularly in their regulation of private-sector organizations. Of the four States that extend Constitutional privacy protections to records about individuals, all apply these same restrictions to their local governments, and two apply them to private organizations as well. Eleven States have gone beyond the protection required by the Federal Fair Credit Reporting Act and enacted Fair Credit Reporting statutes to legislate somewhat stricter requirements. A number of States restrict the disclosure of bank records and define the confidentiality an individual has a right to expect, a right not currently recognized in Federal law for either credit or depository relationships. A number of States have enacted statutes regulating the disclosure of medical records about individuals, many using their licensing

power to enforce this standard of confidentiality. A number of States recognize a patient's right of access to medical records about him.

The Commission takes no single position on the general role of State governments in regulating record-keeping practices. It suggests a role for State agencies in most of the areas it has examined, but always in the context of the current division of regulatory responsibility between the Federal government and the States. The recommended measures create no new authority to regulate the record keeping of organizations that are not now subject to State regulation, nor do they deprive a State of regulatory authority it now has.

Consider, for example, the recommendations regarding credit and depository institutions. The authority to regulate financial institutions is shared between Federal and State governments, and the Federal government has not preempted State regulation. Nonetheless, the recommended measures recognize the ability to preempt certain State regulation and therefore rely on Federal statutes and enforcement mechanisms. Yet, beyond setting basic protection requirements, the recommendations do not limit existing State authority. The States would remain free to provide additional legal protections for the interest of an individual in the records about him maintained by financial institutions.

Or consider the reverse. Regulation of insurance is traditionally the province of the States where the Federal government does not act. As Chapter 5 points out, however, the States have not provided adequate protection for the interests of the individual in the records insurers maintain about him. Thus, the Commission recommends Federal statutes to establish certain basic rights of access and correction, but these protections depend on the individual to assert the rights the Federal statutes would give him, and on State regulatory agencies as well as Federal agencies where the States do not act to provide oversight of insurance company compliance. The State role is defined in several recommendations. The Commission recommends that States amend their unfair trade practices acts, so that they can establish and enforce the recommended notification requirements. The Commission also recommends that State governmental mechanisms receive complaints regarding the propriety of information collected by insurance companies and bring them before policy-making bodies that have the authority to address them, or if the existing entity already has such authority, to consider such propriety questions itself.

In the record-keeping relationships that directly involve State agencies, the Commission recommends that protections for the individual be required as a condition for the receipt of Federal assistance. These areas are: public assistance and social services, education, research and statistical activities, and the confidentiality and use of Federal tax returns. In each of these areas, the extent to which the Commission's recommendations must be implemented thus will depend upon the degree to which the State's agencies participate in the relevant Federal programs. In two of these five areas, moreover—public assistance and social services, and the confidentiality of Federal income tax data—the Commission recommends that States be required to enact prescribed statutes establishing protections for personal

privacy. In both cases, the State agencies themselves are the primary recipients of either money or information from the Federal government, and also, most States have supervisory responsibility for much of the activity conducted by their county and city governments. In public assistance and social services, the Commission further recommends that each State enact a statute that would also apply to public assistance and social service programs in the State that do not receive Federal assistance, although it does not recommend or suggest that the enactment of a statute of that scope be a Federal requirement.

The medical-care area is something of a special case because the State's major role there is to reimburse Medicaid expenses. It is not usually a primary medical-care provider, nor is it involved in the flow of Federal assistance to individuals through the Medicare program where most of the direct Federal requirements on medical-care providers are imposed through the process of qualifying for Medicare participation. Nonetheless, the Commission still recommends that States enact their own statutes incorporating the protections for medical records recommended by the Commission so that individuals will not have to rely on the Federal government to enforce the rights the recommended measures would establish and so that the recommended rights and obligations can be extended to public and private medical-care providers who do not need to qualify for Medicare or Medicaid participation.

In research and statistical activities, Federal assistance usually flows directly to the performing institution through discretionary grants and contracts. The only State agencies that receive an appreciable amount of Federal funding for research and statistical activities are State universities. Chapter 15 presents guidelines for the protection of personal privacy which the Commission recommends as a basis for the research and statistical activities conducted by State agencies or with State assistance.

The Commission's major departure from the general policy of relying on the State to implement Federal requirements is in education. There the Commission does not recommend a State role. Several factors influenced this decision. First, Federal regulation of record-keeping practices under the Family Educational Rights and Privacy Act (FERPA) does not require an implementing State law, mainly because most Federal funds flow directly to local school districts or to universities. The recommended measures strengthen FERPA protections but do not alter that process. Second, the Federal law is comprehensive, and since almost every public and private educational institution currently receives Federal assistance, State law would not extend the law's coverage appreciably. Third, although there are State educational codes for public elementary and secondary schools, those schools have a strong tradition of local autonomy.

Nonetheless, nothing in current FERPA provisions or in the Commission's recommendations prevents a State from enacting its own legislation as long as the Federal requirements are met. Indeed, California, for one, has already done so, and the protections prescribed by California law are stricter than FERPA's. But while State law may be needed to provide civil remedies for individuals whose rights with respect to education records are violated,

the Commission prefers to stress local accountability in education as in the other areas. The recommended provisions of recourse to a Federal court which could enjoin the institution to respect the individual's FERPA rights should provide a vehicle for redress of grievances, if and when a governing board fails to see that an educational institution discharges its obligations to an individual.

It should be noted that in all of these areas, in addition to keeping the privacy protections required of State agencies to the minimum, most of the recommended measures leave the primary responsibility for enforcement with the States, seeking to strengthen the accountability of State agencies to their State legislatures and courts rather than making them more accountable to the Federal government. Concomitantly, the recommended measures restrict the Federal role to first reviewing and approving the required State law or policy, and then to receiving complaints about State enforcement efforts. Moreover, the Commission relies wherever possible on existing mechanisms to monitor performance: in medicine, the Joint Commission on Accreditation of Hospitals and State licensing agencies; in research and statistical activities, institutional review boards; in public assistance and social services, appropriate State agencies; and in education, elected boards and institutional governing boards.

In the matter of Federal sanctions, the Commission concluded that a Federal agency should have some alternative sanctions short of cutting off all Federal funds when a State or private agency is in violation. These alternatives might include withholding or asking for the return of a proportion of benefits, graduated according to the seriousness of the violation. In categorical grant programs a percentage of the total grant could be withdrawn as a penalty or withheld as security for specific performance of obligations. In reimbursement programs, monies could be withheld on a similar basis. To give the Federal agency graduated alternatives would make the threat of sanction credible, which in turn would increase the State's incentive to maintain compliance.

Finally, in a sixth area, employment and personnel, five of the Commission's recommendations specifically affect State employment and personnel record-keeping practices. These recommendations (*Recommendations (6), (7), (8), (9) and (10)* in Chapter 6), deal with the use of arrest records in employment. *Recommendations (6), (7) and (8)* invite State legislatures to restrict State use of arrest records in determining eligibility for employment and licensing. *Recommendation (9)* further expresses the Commission's deep mistrust of the use of arrest records in employment by recommending Federal financial assistance to States to help them devise means of limiting inappropriate arrest disclosures to employers by State and local law enforcement agencies, and to improve the accuracy and timeliness of arrest records.

As noted earlier, the Commission does not recommend that State governments be required to adopt a particular omnibus privacy protection statute to regulate their agencies' record keeping. The Privacy Act, however, recognizes that the Federal government owes the States assistance in developing appropriate legislation. In fact, the Privacy Act authorized the



Commission to provide technical assistance in the preparation and implementation of such legislation. The Commission sees a clear need for continued assistance of this kind, and includes suggestions to this effect in the chapters on medical records, education, and public assistance, and also in the implementation discussion in Chapter 1.

With respect to records maintained or regulated by State agencies, the Commission also makes two quite specific recommendations: (1) that States amend their penal codes to provide criminal penalties for getting information from a medical-care provider through deception or misrepresentation; and (2) that each State review all direct-mail marketing and solicitation uses made of State records about individuals. This is especially important when State agencies prepare mailing lists for the express purpose of publishing, selling, or exchanging them, as motor vehicle departments often do without apprising drivers and owners of registered vehicles that they do so. The Commission recommends that State agencies be directed to develop a procedure whereby an individual can notify the agency and, through the agency, any user of the record for direct mail marketing or solicitation that he does not want his name disclosed for such a purpose.

#### STATE AGENCY ACCESS TO THIRD-PARTY RECORDS

For many of the record-keeping relationships examined in this report, the Commission recommends constraining the voluntary disclosure of records about an individual by private-sector record keepers. Individually identifiable credit, depository, and insurance records may not be disclosed without the authority of the individual to whom they pertain or the presentation of valid compulsory legal process. This would include disclosures to State and local government agencies. There are exceptions, of course, where valid legal process is served on the record keeper or where the record keeper is subject to statutory reporting requirements. With respect to the use of Federal tax return information, the recommended measures also prohibit any disclosure by one State agency to another for nontax purposes. With respect to federally assisted research or statistical projects, no recorded information may be disclosed in individually identifiable form for any purpose other than a research or statistical purpose or the purpose of auditing a grant or contract.

To the extent that these restrictions affect State agencies, they place few specific limitations on State use of compulsory legal process or even on State reporting requirements. The limitations on Federal compulsory processes and Federal reporting statutes recommended in Chapter 9, however, provide a model for the States. Indeed, as noted at several points in that chapter, the broad public policy and specific recommendations it presents are equally applicable to State and local governments. The recommendations were not explicitly directed to the States because of the difficulties of dealing properly with fine, but often crucial, distinctions in the forms of compulsory legal process in 50 jurisdictions.