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The Reviews

Litigation Under the Federal Open Government Laws 2010. (Electronic Privacy Information Center, 2010). Reviewed December 2010.

Now in its 25th edition, this 700-plus page guide to federal open government laws had its origins with a publication started by the American Civil Liberties Union several decades ago. It has always been the premier one-volume guide to the Freedom on Information Act, Privacy Act of 1974, Government in the Sunshine Act, and the Federal Advisory Committee Act. Most of the book is devoted to the FOIA, but the other laws receive their share of attention. Now edited by Harry Hammitt (publisher of Access Reports, a bi-weekly newsletter about the FOIA) and others, the book is better than even and updated with the latest case law.

Within the FOIA community, the volume is often referred to as the Litigation Guide, and its sharp advice on strategies for bringing and managing FOIA lawsuits is especially valuable to anyone contemplating litigation. Read the book before you file suit and, maybe, before you file your request. However, anyone looking for a quick and insightful analysis of any federal open government laws will find what they need here. Whether you deal with FOIA or the Privacy Act once a year or all the time, you will find that this book belongs on your bookshelf.

Who Are You? Identification, Deception, and Surveillance in Early Modern Europe. Valentin Groebner (Zone Books, 2007). Reviewed December 2010.

I was blown away by the scholarship of this review of identification issues in the thirteenth through seventeenth centuries and by the relevance of the subject today. There's nothing new under the sun when it comes to identifying individuals. Hundreds of years ago, governments, law enforcement, banks, churches, and others all faced the same problems that we do today in determining who an individual is, but they didn't have fingerprints, photographs, or administrative states to issue credentials. They used the facilities that they had, however imperfect the processes and the technologies. Thus, Groebner describes the use of portraits, seals, coats of arms, badges, descriptions, registers, lists, and official signa to identify and authenticate an individual. In Italy, painters including Giottino, Botticelli, and Andrea del Sarto were commissioned to engrave images of bankrupts on the run, delinquents, and traitors for circulation. Talk about government support for the arts! In other places, portraits were painted on broadsheets and put on display. If that's not the FBI's top ten most wanted list, it's close enough for government work centuries ago. The author expressly tells us that the notion of the Middle Ages as a simpler period that did not suffer from problems of mistaken identities is just plain wrong.

The parallels to today are consistently striking. Are we who we are or are we who our papers say we are? Groebner focuses on identification (rather than identity), a process that involves more than one person, because the identification process is what is so important and so determinative. That is true now more than ever.

The book is highly readable, and the reader constantly trips over stunning and delightful facts and references. Who knew, for example, that there was a late Middle Ages legal treatise on brand names and corporate logos? Anyone struggling with identification or authentication issues today will enjoy this book. This isn't a place to look for solutions to current problems, just reassurance that we are certain to face the same concerns and conflicts about identity and identification no matter how the technology changes.

IN CONFIDENCE: When to Protect Secrecy and When to Require Disclosure. Ronald Goldfarb (Yale University Press 2009). Reviewed December 2010.

This volume mostly offers a mildly detailed review of the history, development, and application of evidential privileges. Many of these are familiar to the laymen, including the attorney-client privilege, doctor-patient privilege, priest-penitent privilege, and the spousal privilege. I found the book both mildly interesting and significantly frustrating. The reviews of the various privileges seem competent, and the material is presented in a way that may interest a general reader. I'm not sure who the intended audience is. The book has little to offer a litigator struggling with a privilege issue in court, nor did that appear to be the intent.

In the area I know best, the discussion of the health privacy – and especially the HIPAA health privacy rule – is too superficial given the importance of the federal rule today. The author dismisses informed consent for disclosure of health records as a "charade". That subject calls for much more discussion than a single sentence. I mostly agree with the comment, but there's a lot more that should have been said here. The absence of a more in depth review of the policy was disappointing.

The author tends to lay out the pressures and conflicts that gave rise to a privilege and that shaped its development and interpretation and then to suggest the need for balancing of interests in striking balances in the future. Frustratingly, however, most chapters end at this point without providing detailed guidance for how to do balancing today. The author walks away from the hard part.

In addition, Goldfarb writes too many important sentences in passive voice. The chapter on medical confidentiality ends with the comment that consciousness and enforcement standards must be raised. That's fine, but just who should be doing the work here? Is it a task for the courts, the legislatures, the doctors, the medical establishment, the police, the patients, or who? In the end, most chapters are rather the equivalent of NYT Sunday Magazine pieces on the various privileges and confidentiality interests, but without enough depth or policy prescriptions to satisfy anyone but the most casual reader.

SEARCHING EYES: Privacy, The State, and Disease Surveillance in America. Amy L. Fairchild, Ronald Bayer, James Colgrove (University of California Press, 2007). Reviewed December 2010.

This book is a history of public health surveillance in the United States, beginning with tuberculosis and syphilis and the moving on to occupational surveillance, cancer, birth defects, and AIDS. More recent activities covered include public health surveillance of obesity and diabetes. The history is interesting and relevant. The book pulls together in one framework many public health activities from the last one hundred years or so. This is an accomplishment, and the material has plenty of value.

But I have trouble with this book. It tends to treat privacy as the enemy of public health activities. I may be too sensitive here, but somehow I don't think that the authors really come to grips with the vast powers of public health agencies to lock up people, expose their secrets, or, in recent years, control the way that they receive health care. Public health people (like health researchers) too often act like what they do is so valuable that they don't want to be questioned or constrained. This is remarkably like other fields of endeavor (law enforcement, national security, and many other government activities) where the participants want nothing more than to be free to pursue their activities without limit or oversight. Trust us, they say, because we are serving a vital interest, and you should pay no attention to the consistent history of legal and other violations of rights. Tuskegee is far from the only example.

Somehow, privacy if often cited as the problem, as if it is not a concern worthy of attention. So in this book, there is a constant undercurrent implying that if people just didn't insist on so much privacy, then public health workers would be more successful at their jobs. The authors come from the public health community, and they have their thumbs on the rhetorical scale too much to suit my tastes. That last sentence may be a better formulation of my problems.

The chapter on syphilis is instructive. The privacy concerns here are obvious. So are the fears that the government will interfere too much in the relationship between physician and patient. Like almost everyone else, physicians don't like the government looking over their shoulder and telling them what to do. Patients have a different set of familiar objections to VD reporting. After discussing nearly an entire century's worth of effort to cajole, encourage, and require reporting of syphilis cases by physicians, the chapter's last paragraph says that a 1970 study found that only one in nine physicians reported cases of syphilis. If that's the best they can do after decades of activity and coercion, there's a fundamental problem here that can't be dismissed as too much privacy. There's a lot more going on in the debate over public health surveillance than privacy. There is much acknowledgement of these other issues, but I just not convinced that the authors have a sufficiently independent perspective to accept their assessments.

When we arrived in the AIDS era, one change was the presence of an open and active community of advocates for those at risk for AIDS and those with the disease itself. That's something that didn't exist in the same way for other sexually transmitted diseases. There was never a Syphilis Action Council, but public health nevertheless had plenty of difficulty getting the cooperation and support it wanted. The existence of an active and vocal AIDS "opposition" concerned about privacy and about other aspects of public health surveillance seriously affected the dynamic, and the authors cover those changes in appropriate detail. Public scrutiny of public health authority and proposed expansion is something that will not go away in the future.

In some ways, I think that parts of the public health world don't seem to understand the opponents and the nature of the opposition. And that opposition seems to be continuing and, maybe, growing. Very recent litigation over newborn screening is further evidence that the public does not accept that anything public health authorities want to do is automatically a Good Thing. The case made by newborn screening opponents strikes me as weak, but their concerns need to be acknowledged in some way. Creating databases on the health status of individuals today without their knowledge, without real consent, and perhaps without any time limit just isn't acceptable today, regardless of motivation. Those who pursue that kind of data compilation need greater public buy-in to their activities, need to do a better job educating data subjects, and need to deal fairly with those who do not want to participate for whatever reason. I disclose here that my wife is a practicing physician who treats patients identified by newborn screening.

I have other problems with the book as well. These are minor on the broad scale of things, but they may be telling. The book's discussion of the Privacy Act of 1974 is flawed. In chapter one following note 129, the text says that the Act left public health surveillance "untouched". That is really not fair. There is no special exception in the Privacy Act for public health (although there are special exceptions for law enforcement and for the Central Intelligence Agency). The Act applies to federal public health surveillance activities just like every other federal activity. What is true is that the relatively weak standards of the Act do not impose any serious substantive restrictions on public health surveillance activities, there are publication obligations, disclosure limits, and other fair information practices that all federal agencies, including public health agencies, must follow. The Act does not erect any real barriers to public health surveillance, but that is also true for many other federal investigatory activities unrelated to public health. Public health received no special treatment in the Act as originally passed.

The book's next sentence is also misleading. It states: Further, the act noted that agencies may take 'take [sic] any appropriate action otherwise prohibited' if "the public health or public safety may be adversely affected or significantly threatened. This sentence was not part of the original 1974 Privacy Act. It was added by the computer matching amendments in 1988. I was the House of Representatives staffer responsible for the 1988 amendments. The quoted provision relates to the part of the matching law that controls how the findings from a computer match can be used. The computer matching amendments provide that no one can be denied a benefit or be the subject of adverse action based on a computer match without verification of the match, notice, and an opportunity to contest the findings. The language – quoted in the book (and with an citation that shows that no lawyer reviewed it) – from 5 U.S.C. § 552a(p)(3) says essentially that, notwithstanding the computer matching due process requirements, action against an individual can be taken during the notice period if public health would be adversely affected. This is NOT a general public health exemption from the Privacy Act. It is not even an exemption from the verification, notice, or opportunity to contest requirements applicable to computer matching. It just allows a limited exception for a short period to one narrow provision of the Act, and that same exception applies to actions affecting public safety as well. It isn't even clear that public health agencies use computer matching at all or computer matching of the type regulated in the Act. The computer matching language does not support the point in the text that the Act left public health surveillance untouched.

Nearby, the citation in footnote 133 has an error. The note cites the 1977 report of the Privacy Protection Study Commission, identifies the authors as the HHS Assistant Secretary for Planning and Evaluation and the Secretary of HHS. The Privacy Protection Study Commission was an independent commission established by statute and not sponsored by HHS. This is a minor error. Taken together, these errors (and there are more) suggest a too casual review of privacy accompanies by an overzealous search for some express congressional blessing of public health in privacy legislation.

Regardless of my concerns, it is fair to say that the book raises many important and current issues that need more public debate. The history is a contribution to that debate, despite its shortcomings. The authors are surely entitled to their point of view, but so am I. If public health authorities don't have enough to do and continue to try to expand their empires into obesity, diabetes, and a host of other non-communicable diseases, they are likely to find that privacy is the least of the objections that they encounter.