



PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES

**THE FEDERAL REPUBLIC OF GERMANY,
SWEDEN, FRANCE, CANADA,
AND THE UNITED STATES**

BY DAVID H. FLAHERTY

Protecting Privacy in Surveillance Societies

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For Michael

Preface

Concern for the protection of personal privacy in the face of the massive surveillance capacities of governments and corporations is a leading issue in all Western industrialized societies. Individuals want to be left alone and to exercise some control over how information about them is used. Legislators have responded to widespread fears about the impact of computers on personal privacy by enacting protective laws. These measures seek to control the government's collection, use, and dissemination of personal information by means of codes of fair information practices. The issue is whether such data protection laws and the agencies created to implement them have been effective watchdogs in limiting governmental surveillance of the population and in promoting bureaucratic accountability in data use.

This book is a comparative examination of the passage, revision, and, especially, implementation of data protection laws at the national and state levels in five countries. The focus is an evaluation of the accomplishments in controlling surveillance by the officials charged with protecting certain aspects of personal privacy in the Federal Republic of Germany, Sweden, France, Canada, and the United States. Although data protectors in Sweden and France also regulate the private sector, the emphasis in the volume is on activities in the public sector. Since I am persuaded that data protection laws and agencies are necessary, I want them to be as effective as possible in achieving their objectives—hence this book.

The countries selected for treatment illustrate the leading approaches to data protection. Despite having the oldest national data protection law, Sweden is presented here as the prototype of the surveillance society. The West German state of Hesse has the oldest state law, and West Germany itself has had the most successful national system of data protection to date. As a federal political system, it offers valuable comparisons with North America. Canada has the most developed system of data protection in North America, because the United States does not have a single agency that concentrates on the oversight of data protection under its Privacy Act of 1974. France is of intrinsic interest because of its expansive 1978 law.

There is an important distinction between privacy protection and data protection. "Privacy" is a broad, all-encompassing concept that envelops a whole host of human concerns about various forms of intrusive behavior, including wiretapping, surreptitious physical surveillance, and mail interception. Individuals claim a right to privacy for an enormously wide range of issues

from the right to practice contraception or have an abortion to the right to keep bank records confidential. I am particularly concerned with "data protection," an aspect of privacy protection that is especially involved with control of the collection, use, and dissemination of personal information. Data protection is implemented to limit this type of surveillance by other persons and organizations and thus to preserve individual privacy. It is at present the most critical component of privacy protection, because of the ongoing automation of data bases.

References to "surveillance" in this volume primarily denote supervision, observation, or oversight of individual behavior through the use of personal data rather than through such mediums as a camera or a private detective. Electronic surveillance by computers is treated as the central problem of data protection, because it depends on the collection and linkage of personal information.

At one level this volume is a foreigner's perspective on data protection in various countries, written primarily for foreigners. Yet each case study sheds comparative light on data protection in other countries. Although there are problems of understanding the workings of data protection in any country, an effort was made to reach an appropriate level of comprehension of evolving systems that, in fact, tend to undergo periodic modification through statutory revision or changes in personnel and administrative practices. My research in the 1980s has been continuous in order to avoid superficial and erroneous impressions, although the final product necessarily reflects my own views on a relatively complex subject. The different data protection agencies had an opportunity to review and comment on what I had written about them, but I made all decisions on the final text.

This volume is consciously critical, because data protection agencies have not attracted meaningful scrutiny by independent observers. With few exceptions, the limited secondary literature on data protection adopts a celebratory tone or produces broad general overviews primarily listing national laws in a descriptive format. Data protectors themselves are occupied with the practical and political aspects of running their offices. As one of them wrote to me in 1988, they need to be reminded of how much remains to be done. One purpose of this volume is to explain the various systems of data protection in order to promote intelligent responses by them to usual and unusual problems. This goal is especially problematic given the myopic nationalism of some members of the data protection community.

In assessing particular agencies one becomes aware of the varying personalities at play and of some of the personal clashes that occur. My interest has been in the intellectual character of the debates over how to control surveillance, and there is clearly no intention, for example, to pick sides in internal agency disputes. I made my judgments after due consideration of varying opinions and facts. The process of interviewing as many different people as possible, inside and outside of government, promoted understanding of partic-

ular problems and issues, even though one never has the time or resources to do enough research.

The facts and general ideas developed in hundreds of interviews have greatly shaped the findings of this volume. Since a high percentage of my interviews have been with the staff who actually do the detailed work of data protection, the views analyzed in this volume reflect as closely as possible the reality of implementing data protection as opposed to elite managerial perceptions of what is or should be occurring. I have interviewed many of the professional staff members of data protection agencies on several occasions. They were always responsive to my questions about their current problems with implementation, thereby contributing enormously to the substance of this volume. Statements based on interviews are not attributed in the text itself, because I promised confidentiality to respondents.

Except for a few years' hiatus in France, I have enjoyed unrestricted access to data protection personnel in the various countries. I regret that I was unable to spend more time with the many members of the governing boards of the agencies in Sweden and France. In Sweden and West Germany, my linguistic deficiencies led me to depend on translations into English of documents prepared by government agencies or by colleagues and research assistants; fortunately, the vast majority of my interviews were in English.

Whenever possible, I have interviewed civil servants, lawyers, journalists, academic specialists, and civil libertarians outside the data protection agency. I have attended annual meetings of the data protection commissioners on various occasions, a large number of academic and professional meetings of privacy advocates, and staff meetings of the data protection agencies in France and West Germany. My research has also relied on a large number of published and unpublished sources, especially annual reports of federal and state data protection commissioners.

My approach to writing this book has been empirical and functional. I have sought to understand reality as opposed to the language of the relevant statutes. I have returned many times to each agency, so as to overcome the usual superficiality of tourist visits. I was in fact flattered when a West German respondent characterized me as "an international inspector of data protectors." (Less flattering was another inquiry in France as to whether I worked for the CIA.)

A word about my objectivity as a writer, since it is not possible to achieve strict neutrality in these matters and, at the same time, anyone in my position runs a significant risk of being co-opted. I have had only slight hesitation in asking sensitive questions at data protection agencies, because of my ultimate responsibility to readers. But I naturally sought to have cordial relations with the data protectors I was writing about, even though I have not always been successful. On one occasion, review of a draft case study led the head of an agency to order me to leave the premises. This necessitated fence-mending exercises with his successors and some subsequent restrictions on my access to

the staff for interviews. I am deeply grateful to those colleagues who eventually persuaded me that my career as a social scientist was not at an end. Fortunately as well, every other data protection agency proved most hospitable to the goals of public policy research. Yet I recognize the inherent conflict of trying to be constructively critical of privacy protection efforts, while dependent on data protectors as my prime sources.

Because of an introduction to Professor Alan F. Westin at Columbia University in September 1964, I have devoted a significant part of my academic career to the study of privacy issues. This book, and the accompanying volume, *Privacy and Data Protection: An International Bibliography* (London, U.K., and White Plains, N.Y., 1984), are based on a conviction that data protection should be subject to academic inquiry and objective criticism. I am also a privacy advocate, in the sense that I seek to raise the consciousness of governments and individuals to the human values and interests that are at stake when surveillance practices are uncontrolled. Creating, implementing, and improving privacy and data protection laws and practices is a matter of pressing public concern in the Western world. The major burden is being carried by dedicated and talented government officials in the several countries. In a spirit of constructive criticism, this volume seeks to assist in the process of regulating government information systems in the interests of preventing unnecessary intrusions into the lives of individuals. Although I recognize the risk that my critical comments about data protection may be misused by opponents of data protection in a particular country, I hope that the advantage of being a foreigner (except in Canada) permits me to claim some objectivity in addressing these matters.

January 1989
London, Canada

Acknowledgments

As a research project ends, one recognizes the enormous amount of assistance and support received from other institutions and individuals. I start with the essential financial support of the Ford Foundation, the Social Sciences and Humanities Research Council of Canada, and the Academic Development Fund of the University of Western Ontario. At Western, I have also had important intellectual and personal support from faculty and students of the History Department, the Faculty of Social Science, and the Faculty of Law. As always, I remain deeply indebted to the staff of the reference department of the D. B. Weldon Library at the University of Western Ontario, especially George Robinson, and to Marianne Welch of the Law Library. I would also like to acknowledge the support for publication received from the University of Western Ontario's J. B. Smallman Research Fund.

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I have had two outstanding student research assistants from the Faculty of Law. Terence J. Donohue worked with me from 1981 to 1983. His skills in the German language were of particular value, as were those of my colleague Erich Hahn. From 1983 to 1985 Peter Harte brought his excellent critical capacity to bear on my case studies.

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I have done research in at least ten countries in connection with this book and conducted literally hundreds of interviews. Since it is impossible to identify by name everyone that I have ever consulted, I have listed below the persons whose assistance was of the most value in each country. I regret that this impersonal listing cannot be supplemented by a running commentary on the stimulating exchanges and good times we have had together.

Because I have primarily studied specific institutions in each country, I have benefited most from the excellent cooperation of the successive heads of the several data protection agencies. It has been especially generous of the

leadership and professional staff of data protection offices to be willing to cooperate with an academic trying to understand how they do their work. I trust that my general admiration for their achievements is not lost from sight in the following pages.

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Finally, many events and activities helped to sharpen my thinking about data protection. I want to acknowledge the opportunity afforded me to write a draft of the conclusions to this volume, when I was a guest of the Rockefeller

Foundation as a resident scholar at the Villa Serbelloni in Bellagio, Italy, for a month in 1983. The opportunity to reflect on the directions of my research findings was invaluable.

The Rockefeller Foundation allowed me to organize a five-day conference in Bellagio in April 1984. Twenty-three specialists in data protection from nine countries gathered together for informative discussions. They offered valuable comments on my draft conclusions to the present volume. The Ford Foundation also furnished financial support for this conference.

In 1984 I prepared a report on foreign privacy and data protection laws and policies for the Office of Technology Assessment of the U.S. Congress. In addition to strengthening my judgment about the necessity of oversight mechanisms to make data protection effective, the drafting of the report permitted me to focus on certain specific applications of technology, such as computer matching and machine-readable identity cards. I have relied on this report at several points in this volume (David H. Flaherty, *Data Protection and Privacy: Comparative Policies*, A Report to the Government Information Technology Project, Office of Technology Assessment, U. S. Congress [U. S. Department of Commerce, National Technical Information Service, 1986, PB86-205689]). I was also a member in 1984-85 of the oversight panel for the Office of Technology Assessment's study of federal government information technology and civil liberties.

One of the problems of studying data protection is that it is a new aspect of public policy that does not fit neatly into any single academic discipline. The European Consortium for Political Research sponsored a week-long workshop on privacy and data protection in Barcelona in March 1985, primarily involving political scientists, lawyers, and sociologists from Western Europe. This was an instructive and helpful opportunity to discuss our respective interests in an academic context, and I am grateful to Charles Raab of the University of Edinburgh for inviting me to participate.

During the academic year 1985-86, I was a visiting scholar at the Stanford Law School, which allowed me an uninterrupted period of research and writing. I am deeply grateful to Dean John Hart Ely and his colleagues, especially Thomas F. McBride and Lawrence M. Friedman, for making this opportunity possible.

In 1985-87, I served as staff consultant to the Canadian House of Commons's Standing Committee on Justice and Solicitor General for its three-year review of the operation of Canada's Privacy Act and Access to Information Act. Since I drafted the privacy portions of the committee's report, I have at least tried to contain my enthusiasm for quoting it as an authoritative source.

In 1987 Marcel Pepin, then the director of the Quebec Commission d'Accès à l'Information, invited me to give the keynote address to the annual meeting in Quebec of privacy and data protection commissioners from twenty countries. This experience was truly seminal for me in refocusing my attention

on the theme of surveillance societies. I am grateful for discussions at a Statistics Sweden conference in June 1987 that helped me to shape my views about Sweden as a surveillance society.

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Abbreviations

ASAP	American Society of Access Professionals
BDSG	West German Federal Data Protection Act, 1977
BfD	Office of the Federal Data Protection Commissioner, West Germany
BKA	Federal Criminal Investigation Office, West Germany
BMI	Federal Ministry of the Interior, West Germany
CEIC	Employment and Immigration Canada
CFDT	Democratic Confederation of Labor, France
CGT	General Confederation of Labor, France
CIA	Central Intelligence Agency, United States
CIII	Center for Information and Initiatives on Computerization, France
CISI	Compagnie Internationale de Services en Informatique, France
CNIL	National Commission on Informatics and Freedoms, France
CPIC	Canadian Police Information Centre
CSIS	Canadian Security Intelligence Service
DALK	Parliamentary Commission on Revision of the Data Act, 1976–84, Sweden
DDASS	Agency for Health and Social Assistance, France
DHHS	Department of Health and Human Services, United States (formerly HEW)
DIB	Data Inspection Board, Sweden
DOMI	Data Processing Methods Division, Ministry of Health, France
DPC	Data Protection Commissioner, West Germany
ENA	National School of Administration, France
FBI	Federal Bureau of Investigation, United States
FDP	Free Democratic Party, West Germany
FOIA	Freedom of Information Act, United States
GAO	General Accounting Office, United States
HEW	Department of Health, Education, and Welfare, United States (now DHHS)

HUD	Department of Housing and Urban Development, United States
INSEE	National Institute of Statistics and Economic Studies, France
LMI	State Ministry of the Interior, West Germany
NIR	National Identification Register, France (formerly RNIPP)
NRW	North Rhine-Westphalia, West Germany
NTIA	National Telecommunications and Information Administration, United States
OECD	Organization for Economic Co-operation and Development, Paris
OIRA	Office of Information and Regulatory Affairs, OMB, United States
OMB	Office of Management and Budget, United States
OPM	Office of Personnel Management, United States
OTA	Office of Technology Assessment, United States Congress
PCIE	President's Council on Integrity and Efficiency, United States
PIN	Personal Identification Number
PMI	Agency for the Protection of Mothers and Children, France
RCMP	Royal Canadian Mounted Police, Canada
RNIPP	National Identification Register, France (now NIR)
SARB	Commission on the Vulnerability of Swedish Society
SCB	Statistics Sweden
SDECE	Service for External Documentation and Counterespionage, France
SIN	Social Insurance Number, Canada
SIRC	Security Intelligence Review Committee, Canada
SPAR	National Register of Names and Addresses, Sweden
SPD	Social Democratic Party, West Germany

Protecting Privacy in

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