

U.S. SUPREME COURT UPDATE



- ✦ *Elonis v. U.S.* ___ U.S. ___ (2015) – Terrorist threat made over social media, necessary standard of proof.
- ✦ *City of Los Angeles v. Patel* ___ U.S. ___ (2015) – Validity of city ordinance requiring records retention and law enforcement access on demand.

INITIAL QUESTIONS



- ✦ Do the positive benefits of new digital collection technologies outweigh the negative aspects:
 1. Privacy concerns, what are they and how should they be addressed?
 2. Data consolidation, retention, public disclosure, editing/redaction and related issues, what are they and how should they be addressed?
 3. What, if any, obligation should the private sector data accumulators have to hold data for the public sector?

THE COMMON DENOMINATOR



- ✦ “Metadata” according to the Oxford English Dictionary is “a set of data that describes and gives information about other data.”
- ✦ Not just the data Snowden and NSA were talking about.
- ✦ Body cameras, automated license plate readers, surveillance cameras, drones, personal computers and cell phones are all devices that can and do capture “data” that can become part of “metadata”.
- ✦ “Metadata” accumulation can permit the creation of a digital profile of an individual.

RIGHT OF PRIVACY



- ✦ Both Canada and the US have provided judicial and statutory rules regarding “the right to be let alone”.
- ✦ Neither country has a specific privacy provision in its Constitution.
- ✦ What is at issue is the “right to informational privacy” because “Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years...” [*Jones v. Tsige*, 2012 ONCA 32].

JUDICIAL SOURCES OF THE MODERN RIGHT OF PRIVACY



- ✦ Warren and Brandeis wrote an article for The Harvard Law Review in 1890.
- ✦ *Olmstead v. U.S.*, 277 U.S. 438 (1928), Brandeis wrote a dissent that planted a seed.
- ✦ *NAACP v. Alabama*, 357 U.S. 449 (1958), the first “implied constitutional right” case.
- ✦ *Griswold v. Connecticut*, 381 U.S. 479 (1965), the right of privacy became an “implied” personal Constitutional right.
- ✦ *Katz v. U.S.*, 389 U.S., 389 U.S. 347 (1967), the implied personal right was extended to data – informational privacy – collection.

MORE ABOUT THE SOURCES



- ✦ *Quon v. City of Ontario*, 560 U.S. 746 (2010), the Supreme Court assumed, but did not hold, the existence of a right of privacy in text messages.
- ✦ *U.S. v. Jones*, 565 U.S. 945 (2012), the Court confronted the right of privacy in the context of data accumulation.
- ✦ *Jones v. Tsige*, *supra* created the right to a civil common law “intrusion upon seclusion” action in Ontario.
- ✦ *Riley v. California*, 573 U.S. ____; 134 S. Ct. 2473 (2014), the Court extended *Jones* to a cell phone data.

STATUTORY RIGHTS OF PRIVACY: UNITED STATES



- ✦ There are several privacy statutes at the federal level in the US, perhaps the best known being the federal right of privacy statute. This federal statute deals with the protection of “personal identifying information” accumulated by the federal government.
- ✦ Some federal statutes address privacy involving private information handling. HIPPA is the most far reaching of these statutes because it has an express preemption clause.
- ✦ Preemption, however, does not eliminate state action.
- ✦ Each of the states has a privacy statute. Although the provisions and exemptions vary the general structure allows individuals to access the records pertaining to them and correct any errors.

STATUTORY RIGHTS OF PRIVACY: CANADA



- ✦ Canada has a federal privacy act which allows access to information held and correction of errors. The basic provisions of this law have been amended over the years by the Access To Information Act and the Freedom Of Information Act to reach its present form.
- ✦ Canada has been more aggressive in the area of regulation of the private sector through the Personal Information Protection and Electronic Documents Act. Three provinces – Quebec, British Columbia and Alberta – have provincial acts that have been found to be similar and, therefore, effective. Two provinces Ontario and New Brunswick have health information statutes which have been found to be similar and therefore effective.

DRONES AS A CASE STUDY



- ✦ Drones have sparked controversy because of the many ways they can be equipped to gather different types of data.
- ✦ There are many different views of appropriate and inappropriate uses of drones and the need to protect privacy – see the various legislative/regulatory reactions.
- ✦ Question: Is it better for state and local governments to wait for the judiciary to resolve the issues or to address them first?
- ✦ Question: Is it better for the private sector to wait for legislative and/or judicial action or to address the issues first?

PRACTICAL EXERCISE



✦ Divide into teams with the goal of addressing the following questions:

1. Are drones useful tools for government agencies? If so why and what agencies? Do the suggested policies for law enforcement agencies provide a useful outline which can be adapted to meet specific agency needs? If not, why not?

2. Are drones useful tools for private sector enterprises? Do private sector enterprises that use drones need to adopt written policies and procedures? Do the suggested policies for law enforcement agencies provide a useful outline which can be adapted to meet private sector needs? If not, why not?

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