None of Your Damn Business: Informational Privacy after *Nelson*

Peter J. Comerford, Esq.
Coia & Lepore, Ltd.

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How often has opposing counsel posed a question at a deposition or in an interrogatory and you just wanted to tell your client, "Don't answer that, it's none of his damn business."? My guess is, more often than you'd like. What can you do in those circumstances? Maybe more than you think.

Any matter, not privileged, relevant to the subject matter of the pending action, is discoverable, even if it would be inadmissible at trial.[1] Our Supreme Court has stated in no uncertain terms:

> The only instance, we repeat, the only instance in which an attorney is justified in instructing a deponent not to answer is when the question calls for information that is privileged.[2]

Thus, we must ask, what is privileged?[3] A recently-published guide to discovery practice in Rhode Island[4] finds over forty privileges recognized by statute and case law, ranging from reports of the inspector of apiaries[5] (who may, after all, have a bee in his bonnet) through confidential tax information.[6] Recently, however, the United States Supreme Court has decided a case, **National Aeronautics and Space Administration, et al v. Nelson, et al.**, that alludes to the existence of a constitutionally-derived right to informational privacy.[7] If such a right were to exist, it might give rise to a corresponding privilege against being compelled to divulge such information. For example, the right to instruct your client that the information sought is none of the other side's business. This article explores that issue.

The **Nelson** plaintiffs were employees of the California Institute of Technology (Cal Tech) working at the Jet Propulsion Laboratory, a research lab run jointly by Cal Tech and NASA.[8] All plaintiffs were designated as low risk based on their relative lack of access to national security or classified information or projects. Many of them were long time employees who had undergone background checks upon their hiring by Cal Tech. However, unlike civil service employees of the government, these contractors had never been forced to undergo a governmental investigation of their backgrounds.

Following 9/11, the federal government decided to impose the same requirements on contractors as had previously been applied to employees.[9] As a condition of keeping their jobs at Cal Tech, these employees were forced to sign waivers allowing access to landlords, references, acquaintances, and the like for open-ended inquiries about a broad range of topics. The intended use of this information was not specifically revealed, but the plaintiffs obtained a document, called a "suitability matrix," that purported to identify disqualifying factors regarding approval for clearance and came to believe the investigation was designed to delve into these factors.[10]

As set forth on a web site set up by the plaintiffs regarding this suit,[11] the government, as suggested by this matrix, would look at the following:

It mentions "carnal knowledge," "attitude," "sodomy," "keeping house of ill repute," "bestiality," "displaying of obscene material" as disqualifying factors. "Cohabitation, adultery, illegitimate children" could also be disqualifying.

The plaintiffs filed suit, seeking declaratory and injunctive relief on the basis that the probes violated their Fourth and Fifth Amendment rights, as well as violating their constitutional right to privacy. The district court denied the request and an appeal ensued to the Court of Appeals which reversed the lower court and enjoined the investigations pending a hearing on the merits.[12] The injunction was based entirely on a constitutional right to informational privacy previously recognized in the 9th Circuit and elsewhere. NASA moved for a re-hearing en banc, and the court denied that request, over a dissent.[13] The dissent highlighted the fragmented nature of the jurisprudence on the issue of a right to informational privacy. Judge Kozinski wrote:

> Is there a constitutional right to informational privacy? Thirty-two terms ago, the Supreme Court hinted that there might be and has never said another word about it. *See* **Whalen v. Roe**, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (alluding to "the individual interest in avoiding disclo-

sure of personal matters"), and **Nixon v. Administrator of General Services**, 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (quoting the above phrase from **Whalen**). With no Supreme Court guidance except this opaque fragment, the courts of appeals have been left to develop the contours of this free-floating privacy guarantee on their own. It's a bit like building a dinosaur from a jawbone or a skull fragment, and the result looks more like a turducken. We have a grab-bag of cases on specific issues, but no theory as to what this right (if it exists) is all about. The result in each case seems to turn more on instinct than on any overarching principle.[14]

To the extent that this dissent was viewed by Judge Kozinski as an invitation to the Supreme Court to review this doctrine,[15] and, upon review clarify it, that invitation has only been accepted in part. While the Supreme Court accepted the invitation to look at the case, there was not much clearing of the thicket. Here is the opening of Justice Alito's majority opinion:

> In two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy "interest in avoiding disclosure of personal matters." **Whalen v. Roe**, 429 U.S. 589, 599-600 (1977); **Nixon v. Administrator of General Services**, 433 U.S. 425, 457 (1977). Respondents in this case, federal contract employees at a Government laboratory, claim that two parts of a standard employment background investigation violate their rights under **Whalen** and **Nixon**. Respondents challenge a section of a form questionnaire that asks employees about treatment or counseling for recent illegal-drug use. They also object to certain open-ended questions on a form sent to employees' designated references.
>
> We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in **Whalen** and **Nixon**. We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case.[16]

The case goes on to hold that the safeguards against disclosure of the information thus gathered, and the reasonable need to gather such information, satisfy

World-Renowned Author and Psychiatrist Dr. Peter Kramer Featured at Annual Meeting Seminar

Dr. Peter Kramer will join Rhode Island Bar Association President Lise Iwon and the Bar's Lawyers Helping Lawyers Committee Chair Nicholas Long in a discussion about legal ethics and depression at the Bar Association's Annual Meeting. The seminar is on Thursday, June 16th, from 10:45 until 12:00, with 1.5 ethics CLE credits.

Lawyers suffer from depression at much higher rates than the general public. While depression obviously harms the individual lawyer who is suffering from it, the disease also produces considerable fallout, affecting partners, clients, and family members. Although depression is a medical condition like cancer, with physiological as well as emotional impacts, Dr. Kramer believes that both the medical profession and society as a whole often fail to take depression seriously and even romanticize it. As a result, he argues, millions of people are suffering unnecessarily. At the seminar, Dr. Kramer will discuss lawyers' ethical responsibilities to themselves, their clients regarding depression-related issues, and how to promote timely diagnosis and treatment of the disease.

A best-selling author of six books, many scientific papers, short fiction, essays, and a blog on *Psychology Today*, Dr. Kramer is also a practicing psychiatrist in Providence and a professor at Brown University Medical School. He was formerly the host of the public radio program *The Infinite Mind*. Perhaps his most celebrated book is *Against Depression*, about which the novelist Joyce Carol Oates wrote: "Peter Kramer is an analyst of exceptional sensitivity and insight. To read his prose on virtually any subject is to be provoked, enthralled, and illuminated."

O, The Oprah Magazine noted, "By turns poetic and academic, and always deeply felt, [Kramer's] book is a polemic against a society that accepts depression as a fact of life."

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the demands of any such right to informational privacy as *might* exist, and that judicial modesty argues against deciding the constitutional question needlessly.

That modesty was met with a rebuke, in the form of a strongly-worded concurrence by Justice Scalia, in which Justice Thomas joined, saying that the Court should have reached the question and answered it negatively. With a fitting (dis)regard to what had recently been derided as "empathy,"[17] Justice Scalia derides what he calls:

> [T]he farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts![18]

So, the most we can say is that the Court declined to declare unequivocally that such a right exists, and avoided eliminating the right definitively.[19] Several circuits have well-established lines of cases supporting the existence of a constitutional right of informational privacy.[20] The law in the First Circuit is less clear, as there are relatively few cases here that discuss such a right. It certainly seems clear that there is not the robust support for this concept as is found in some other parts of the country.

The First Circuit reviewed the field, in the context of a claim for qualified immunity in a § 1983 case, in **Borucki v. Ryan**,[21] where the court found there was no "clearly established" right to informational privacy such as would remove the cloak of qualified immunity. That decision, in turn, mentions an earlier decision by Judge Pettine[22] that alludes, in a footnote, to growing support for a right of informational privacy. Neither decision expressly finds such a right, nor do they foreclose its existence. The circuit court was somewhat stronger in **Vega-Rodriguez v. Puerto Rico Telephone Company**,[23] involving video, but not audio, surveillance of an open area of a workplace.

The employees sued, alleging, *inter alia*, a violation of their right to privacy. The district court dismissed the complaint, and the appeals court affirmed. While affirming the trial court, the appeals court nevertheless recognized the existence of a constitutional right of privacy, albeit a narrowly circumscribed one. The court distinguished between a privacy right as it relates to personal autonomy in making certain personal decisions, and another right relating to confidentiality of private matters. The court found that neither of these rights was implicated in video surveillance of public areas in a workplace. Importantly, though, the court's recognition of "ensuring the confidentiality of personal matters,"[24] citing **Whalen** and **Borucki**, was not in any way hedged as being hypothetical or assumed for the sake of judicial modesty. In fact, the First Circuit, in a later case, cited **Vega-Rodriguez** approvingly in support of a narrowly drawn right "prohibiting profligate disclosure of medical, financial, and other intimately personal data."[25]

The Rhode Island Supreme Court appears not to have directly addressed the existence of a constitutional right to informational privacy,[26] though there has been some law regarding Rhode Island's statutory right to privacy, as well as reference to a more general right of privacy.[27] The Court has explicitly held there is no tort-based common law right of privacy, and any such right needs to be created by the legislature.[28] The Court *has* recog

nized a privacy interest, in terms of discovery, in certain confidential information, particularly financial information.[29]

It is not axiomatic that a constitutional right (if indeed there is one here) must give rise to a correlative evidentiary privilege. The United States Supreme Court has held, for example, that the First Amendment right to a free press does not give rise to an evidentiary privilege that would shield discovery regarding editorial decision-making.[30] Of course, the difference here is that the informational privilege, if it exists, protects precisely the revelation of that which is sought to be uncovered, as compared with the editorial privilege, which would have protected pre-publication discussions about potential stories, a matter which is distinct from the right to freely publish stories about public figures. Thus, there is a strong argument for a finding of privilege for informational privacy should this issue be litigated here.

The point is that courts often, and rightly, focus on the right of the inquiring party to obtain information,[31] sometimes to the point of asking counsel for those who resist the inquiry what basis there is for withholding that which is being sought. This article contends there ought to be some consistent balancing of that right against a person's right not to disclose that which is private. Those rights are not surrendered simply through being a party to a lawsuit, and those rights are widely recognized as having a constitutional dimension.

Discovery is sometimes derided as a mere fishing expedition where counsel probes at will for, it sometimes seems, the mere pleasure of the chase (or sometimes, perhaps, hoping to gain advantage from the discomfit thus inflicted). The better view may be that discovery *ought to be a fishing expedition* in that a wronged party needs to thoroughly explore the adverse party's records and recollections to uncover evidence in support of the claim of wrong, as well as allowing one accused of such wrong latitude to assess the validity and severity of the claim. It might be better to say that courts, and skillful advocacy, require that you only drop your net where you have reason to think the fish are.[32]

ENDNOTES

1 *Super. R. Civ. P. 26(b)(1)*

2 *Kelvey v. Coughlin, 625 A.2d 775 (R.I. 1993)*

3 *In fact, Super. R. Civ. 30(d)(1) offers three occasions when counsel may instruct a witness not to answer: (a) to preserve a privilege; (b) to enforce a court-ordered limitation on evidence, or; (c) to present a motion for a protective order.*

4 *"A Practical Guide to Discovery & Depositions in Rhode Island" MCLE, Inc. 2010, § 9.3, p.9-9 to 9-11*

5 *R.I. Gen. Laws § 4-12-13*

6 *R.I. Gen. Laws § 44-11-21*

7 *National Aeronautics and Space Administration, et al v. Nelson, et al., 562 U.S. _____ (2011) decided January 19, 2011, (Alito, J.)*

8 *This recitation of facts is derived largely from the Ninth Circuit's opinion in Nelson v. National Aeronautics and Space Administration, et al, 530 F3d 865 (9th Cir. 2008). ("Nelson II")*

9 *2004 Homeland Security Presidential Directive #12*

10 *According to footnote 5 in the majority opinion, the Acting Solicitor General asserted at oral argument that the government would make no use of the suitability matrix in making contractor credentialing decisions.*

11 *http://hspd12jpl.org/*

12 *Nelson v. National Aeronautics and Space Administration, et al, 506 F3d 713 (9th Cir. 2007) ("Nelson I")*

13 *Nelson v. National Aeronautics and Space Administration, et al, 568 F3d 1028 (9TH Cir. 2009) ("Nelson III")*

14 *Nelson III at 1052*

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15 *Liptak, Adam, THE TURDUCKEN APPROACH TO PRIVACY LAW, The New York Times, December 8, 2009:*

> *The dissenter was Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, in San Francisco. He is a master of the dissent that might as well be a petition for Supreme Court review of the majority's decision. This one, protesting his court's refusal to rehear a case about the privacy rights of employees, said the law in that area had become a tangled thicket.*
>
> *"It's time to clear the brush," Judge Kozinski wrote. "We didn't undertake that chore today, but we'll have to sooner or later, unless" — nudge, nudge — "the Supreme Court should intervene."*

16 *Rescript at p.1*

17 *Recall the role "empathy" played in the recent confirmation hearings for Justice Sotomayor. See, e.g., Liptak, Adam, SOTOMAYOR GUIDES COURT'S LIBERAL WING,* The New York Times, *December 27, 2010:*

> *At her confirmation hearings last year, Sonia Sotomayor spent a lot of time assuring senators that empathy would play no part in her work on the Supreme Court.*
>
> *That was a sort of rebuke to President Obama, who had said that empathy was precisely the quality that separated legal technicians like Chief Justice John G. Roberts Jr. from great justices.*

18 *Concurrence at p. 4.*

19 *The concurrences would have explicitly said that there is no constitutional right to informational privacy, and Justice Thomas would have declared that there is no general right of privacy under the constitution. It is beyond our present topic but worth noting that it is the general right of privacy that forms the basis of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, (1973), which Justice Thomas says is a right that does not exist.*

20 *These are discussed at length in Nelson III, supra.*

21 *827 F.2d 836 (1st Cir. 1987)*

22 *Natwig v. Webster, 562 F.Supp. 225 (D.R.I. 1983)*

23 *110 F.3d 174 (1st Cir. 1997)*

24 *Id. at 183.*

25 *Dickinson v. Chitwood, 181 F.3d 79 (1st Cir. 1998)*

26 *R.I. Gen. Laws § 9-1-28.1*

27 *See, In re ADVISORY OPINION TO THE HOUSE OF REPRESENTATIVES BILL 85-H-7748., 519 A.2d 578 (R.I. 1987), holding that strict scrutiny must be applied to legislative enactments that limit or impinge "such implied constitutional guarantees as the right to privacy, Roe v. Wade, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147, 176-77 (1973)." Id. at 581.*

28 *Henry v. Cherry & Webb, 73 A. 97 (R.I. 1909). This is a fascinating decision, a thorough discussion of which is far beyond the scope of the present topic. The court examined the assertion that the right to privacy was derived from natural*

law, in a way that would supercede common law or constitutional enactment. The court held that there is no enforceable effect of "natural law" and traces Rhode Island legal authority all the way to the founding of our nation and beyond, to the British parliament. The court held:

> *Since, therefore, except when expressly limited, the General Assembly exercises all of the legislative powers of sovereignty possessed by the British parliament, which is all-powerful, and since acts of that body are tested merely by the principles of the Constitution, and never by standard of transcendent rights alleged to have been reserved by the individual when he entered into society, there is no room in our constitutional theory for any transcendent right or instinct of nature except as guaranteed by that Constitution. Id. at 104. [Emphasis supplied]*

The court goes on at length to distinguish between that which is required by morality and that which is imposed by law. Lest anyone think that this decision has become stale, it was cited approvingly in **Pontbriand v. Sundlun**, *699 A.2d 856 (R.I. 1997), in holding that a tort based privacy right is limited to that found in R.I. Gen. Laws § 9-1-28.1.*

29 *See, e.g.,* **Palmisano v. Toth**, *624 A.2d 314 (R.I. 1993), holding that plaintiffs seeking punitive damages are not entitled to discovery regarding the defendant's financial condition until after the court determines, as the result of an evidentiary hearing, that there is a prima facie case meriting the recovery of punitive damages.*

30 *Herbert v. Lando, 441 U.S. 153, 175 (1979): Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. United States v. Nixon, 418 U.S. 683 (1974). [Footnote omitted]*

31 *In Hickman v. Taylor, 329 U.S. 495, 501 (1947), Justice Murphy wrote:*

> *Thus, civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. [Footnote omitted].*

But see, Herbert v. Lando, supra, Powell, J. concurring:

> *At the 1946 Term, just a few years after adoption of the Federal Rules of Civil Procedure, this Court stated "that the deposition discovery rules are to be accorded a broad and liberal treatment." Hickman v. Taylor, 329 U.S. 495, 507 (1947). The bar and trial courts understandably responded affirmatively. As the years have passed, discovery techniques and tactics have become a highly developed litigation art — one not infrequently exploited to the disadvantage of justice. As the Court now recognizes, the situation has reached the point where there is serious "concern about undue and uncontrolled discovery." Ante at 176. In view of the evident attention given discovery by the District Judge in this case, it cannot be said that the process here was "uncontrolled." But it certainly was protracted, and undoubtedly was expensive for all concerned.*
>
> *Under present Rules, the initial inquiry in enforcement of any discovery request is one of relevance. Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights, a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflects concern for the important public interest in a free flow of news and commentary.*

441 U. S. at 179. [Footnotes omitted]

32 *"A Practical Guide to Discovery & Depositions in Rhode Island" MCLE, Inc. 2010, § 10.3.2, p.10-12.* ❖