

# THE HISTORY, ACHIEVEMENT AND FUTURE OF THE 1980 OECD GUIDELINES ON PRIVACY

**ORGANISATION FOR ECONOMIC CO-OPERATION AND  
DEVELOPMENT**

**DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY**

**COMMITTEE FOR INFORMATION, COMPUTER AND  
COMMUNICATIONS POLICY**

**WORKING PARTY ON INFORMATION SECURITY AND  
PRIVACY**

**PARIS, 10 MARCH 2010.**

**Round Table on the 30<sup>th</sup> Anniversary of the OECD Guidelines  
on Privacy**

The Hon. Michael Kirby AC CMG

**ORGANISATION FOR ECONOMIC CO-OPERATION AND  
DEVELOPMENT**

**DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INDUSTRY**

**COMMITTEE FOR INFORMATION, COMPUTER AND  
COMMUNICATIONS POLICY**

**WORKING PARTY ON INFORMATION SECURITY AND PRIVACY**

**PARIS, 10 MARCH 2010.**

**Round Table on the 30<sup>th</sup> Anniversary of the OECD Guidelines on  
Privacy**

**THE HISTORY, ACHIEVEMENT AND FUTURE  
OF THE 1980 OECD GUIDELINES ON PRIVACY**

The Hon. Michael Kirby  
(Australia)

As the chairman of the OECD expert group on trans-border data flows and the protection of privacy (1978-80), I am proud to be invited to return to this Roundtable which is aimed at giving contemporary participants in the OECD an opportunity to reflect on the achievements of the Guidelines on Privacy (“the Guidelines”), developed by the expert group. They were adopted by the Council of the OECD and recommended to OECD member countries in 1980.

One normally thinks of the OECD as a body of sober economists, statisticians and technologists. One does not normally expect such people to be dripping with human rights sentiments. Yet the OECD Guidelines have proved to be one of the more effective international statements of recent times in affording protections for the basic human

right of privacy, as that right has come to be understood in the context of contemporary information technology.

One does not normally expect economists, statisticians and technologists to be sentimental about their institutional history. Yet it is a commonplace that those who forget their history are bound to repeat its mistakes. This Roundtable is therefore welcome. I am pleased to be here with the chair of the ICCP Committee (Mr. Jørgen Andersen) and the Director of DSTI (Mr. Andrew Wyckoff). Back in 1980, I knew their predecessors who, in the case of ICCP, included Mr. Johan Martin-Löff, also a distinguished telecommunications expert from Scandinavia.

This meeting room in the new OECD Conference Centre is more salubrious than the dungeons in which the OECD expert group convened in 1978-80. My concern about such beautiful surroundings is that one might never want to leave them. That was certainly not true of our dungeons. Yet, although some things have changed, the footsteps still automatically take one back to the OECD building complex. In 1980, there were no double metal barriers around the compound. Security was comparatively light. Still, the intellectual environment was just as intense as it is today. The commonalities of the participating nations meant that many irrelevant disputes were avoided. Meetings started on time. Productivity and efficiency were our watchwords.

In those far-off days, I learned, as every pupil at the Ecole Nationale d'Administration does, the merits of the Cartesian division of every problem into three parts. So it is that I have divided my words today. I will recount some of the history of the expert group. I will describe some of the achievements of the Guidelines. And I will offer some reflections

on the future, as these may be of assistance to participants still working within the OECD on information, computer and communications policy.

## I. HISTORY

The way the OECD became involved in the project to draft guidelines on the protection of privacy in the context of trans-border data flows (TBDF) was described by me yesterday in remarks to the WPISP, chaired by my Australian colleague (Mr. Keith Besgrove)<sup>1</sup>.

I can offer one added ingredient to the explanation there given for the emergence of the expert group. It is to be found in the initial title of the group. This addressed its attention to “trans-border data *barriers* and the protection of privacy”. It was “barriers” that afforded the initial focus of the work of the expert group and of the perceived interest of the OECD. Then, as now, this was an organisation concerned with economic efficiency and with the generally free sharing of information essential to the proper operation of democratic governance and free market economies. It was the potential of TBDF to occasion restrictions, regulations and even treaties within the global community of free markets and for these to impose “barriers” on the free flow of data that attracted the interest of the OECD. Specifically they enlivened its mission to contribute to (and defend) free flows deemed suitable to market information economies.

Put bluntly, the OECD concern was that the response of European nations (and European regional institutions) to the challenges of TBDF for privacy might potentially erect legal and economic barriers against

---

<sup>1</sup> M.D. Kirby, “The OECD Privacy Guidelines @ 30”. Remarks to WPISP, unpublished, OECD, Paris, 9 March 2010.

which it was essential to provide effective exceptions. Given the different perspectives, especially on each side of the Atlantic, the resolution of this quandary lay not in the direction of an international treaty, but in the adoption of general principles. If those principles were introduced into domestic law, it was hoped that they would contribute to the reduction of “barriers” that would otherwise result in inefficiencies and obstacles to the attainment of OECD institutional objectives.

At the heart of the disagreement that led to the establishment of the OECD expert group lay different approaches to the regulation of data flows so as to provide protection for privacy. For European member countries, impairment of personal privacy was not a theoretical danger. It was one deeply remembered from the misuse of personal data by security and military officials during the Second World War, still comparatively recent in memory in 1978.

The suspicion that several non-European countries had was that the European treaty approach to protecting privacy was heavy-handed with bureaucracy; potentially expensive to implement; insufficiently sensitive to the values of TBDF; and (even possibly) motivated by economic protectionism so as to strengthen the European technology of informatics behind legally established data protection walls. The suspicion of Europeans was that non-European member states would insist on a “toothless tiger”. They would give the appearance of agreement; but without any real or practical effectiveness.

Before and during the work of the expert group, numerous seminars and conferences were held in Paris and elsewhere concerned with aspects of the problems that led to the creation of the group. One of these was a

large conference in Paris attended by the then President of the French Republic (Mr. Valéry Giscard d'Estaing). In the course of that conference, to which I contributed, the powerful feeling that lay behind the European response to the dangers to privacy was brought home to me in a vivid way. During an interval for public participation, an audience member leapt to his feet. I knew that his contribution would be unusual. His appearance was arresting. He had a long beard and his eyes gleamed as he spoke:

'Why, Mr. President, did so many refugees and Jews in France survive during the War? Why did so few resistance fighters and Jews survive in The Netherlands?', he said. 'It happened because, in the 1930s, The Netherlands government, with typical efficiency, had devised an identity card with a metal bar installed through the photograph. This was then the latest in secure technology. In France, we had an ordinary photograph, pasted on cardboard. It was easily imitated. Upon that difference hung the lives of thousands of good people. In France, they survived. In The Netherlands they perished. Efficiency is not everything. A free society defends other values. Personal control over data is one such value.'

It was a powerful intervention. It made a good point. Not to laud inefficiency, as such. But to remind the listeners of the importance of keeping both governmental and private power under legal control. And of ensuring that the individual remained in ultimate control of most personal data concerning that individual. The memory of the misuse of data by officials was too fresh to warrant enlarging official power and especially given the growth of multi-national corporations often insusceptible to local regulation.

I never forgot the point which this contributor made in the presence of the French President. My own legal training and tradition was sympathetic to the emphasis placed by the United States participants in

the expert group on the value of TBDF. However, the reminder from the heart of Europe, of the importance of democratic values and individual integrity was equally important and useful.

The task of the OECD expert group was to build on the work previously undertaken within the Nordic Council, the Council of Europe, the European Economic Community and in academic writing. It was to bring the principles that were by then emerging in that context into an intercontinental application so that they would extend, as far as agreed, without a treaty, to other member countries of the OECD, such as the United States, Canada, the United Kingdom, Japan and Australian and New Zealand.

To tackle this task, the members of the expert group had the assistance of brilliant officials, and an excellent consultant, provided by the OECD Secretariat. Mr. Hanspeter Gassmann, who is here and whom I honour, led the Secretariat team. He had an established expertise in information technology and policy. He was supported by Miss Alice Frank, also an officer of the Secretariat, who was a brilliant drafter. One of the first professors of information technology and the law, Professor Peter Seipel (Sweden) was appointed consultant to the expert group. He showed not only intellectual brilliance but great skill in drafting and a large capacity in the preparation of the explanatory memorandum that accompanied the publication of the OECD Guidelines. I pay a heartfelt tribute to each of these colleagues. Nothing that the expert group achieved would have been possible without their support, stimulus and guidance.

The members of the expert group were all people of great intelligence and devotion to the task. The Vice-President was Mr. Louis Joinet. I

honour his presence today. Before him lay a most distinguished career in the Cabinet of President François Mitterrand and, like myself, in United Nations human rights activities. To the task of the expert group, he brought enormous skill, integrity and power. He spoke from the standpoint of the civil law tradition. Throughout, he insisted on conceptual approaches to the problems we faced. He was assisted by Mr. Philippe Lemoine and other fine members of the French delegation. They became the primary advocates of the viewpoint of the European countries. They were supported in this respect by a Scandinavian delegation of outstanding individuals. These included Mr. Jan Freese (Sweden), the first head of the Swedish Data Protection Authority, Hans Corell (later General Legal Counsel to the United Nations) (Sweden), and Professor Jon Bing (head of the Norwegian data protection body). Many of the future global leaders in the field of informatics and the law cut their teeth in the policy debates of the OECD expert group.

The expert from Italy was Professor Stefano Rodota, later a member of the Italian Parliament and long-time advocate of privacy protection. Professor Spiros Simitis brought to his contribution trail-blazing work in one of the first data protection agencies in one of the Länder of Germany.

The Canadian delegation was also especially strong. It included Ms. Alice Desjardins, later a federal judge, and Ms. Inger Hansen (later Canadian Privacy Commissioner).

But if every argument has a thesis and antithesis, the clash of ideas was refined in our expert group by Mr. William Fishman, then an official of the Department of Commerce in the United States of America. He was as



brilliant in oral debate as was Mr. Louis Joinet. He was supported by Ms. Lucy Hummer (of the U.S. State Department). Between them, they ensured that no proposition was left unchallenged which the strong American advocacy of TBDF insisted should be stated. Out of the clash of these values emerged the OECD Guidelines.

My task as chairman was to uphold a ruthless work ethic to the expert group. In such a group this was not a special challenge. We worked extremely hard in our dungeons. But the intellectual rewards were great. And in the end, the Guidelines emerged that have proved so influential over thirty years when so much else in law, politics and technology has changed.

## **II. THE ACHIEVEMENT**

The achievement of the Guidelines fell into four categories:

1. *Building on predecessors*: We did not set out to reinvent the wheel or to alter needlessly sensible approaches that had been revealed by our predecessors. We derived much assistance from academic writing (especially of Allan Westin and David Flaherty, fathers of privacy analysis). We drew on governmental reports including that of the Department of Health Education and Welfare in the United States (HEW); the Younger report in the United Kingdom and the report of Mr. Bernard Tricot in France. Above all, we drew on the regional work of the Nordic Council, the Council of Europe and the European Communities Commission. At most of our meetings, we enjoyed the assistance of Mr. Frits Hondius, long-time officer of the Council of Europe. He was an outstanding theorist on many subjects, including data protection and data security. He assisted us to draw upon the

Council's work as we translated that work into an inter-continental context.

2. *OECD value added*: There were at least seven features of the Guidelines that constituted the 'value added' that the OECD offered in its project:

- (1) The Guidelines were expressed in technologically neutral terms. They were not confined to automated data or to any particular information systems. This feature has helped them survive the intervening three decades notwithstanding the astonishing technological developments they have witnessed;
- (2) The Guidelines were expressed as non-binding. They did not adopt the language of a treaty. The verb used throughout was "should". The coercive element in the Guidelines came from their demonstrated utility and self-interest on the part of the OECD member countries;
- (3) There was also a broad ambit. The Guidelines were not confined to the public or private sectors. They did not resolve all issues over their application but they were expressed in very broad terms so as to have maximum influence;
- (4) The Guidelines acknowledged the value of TBDF in itself. Not only did this reflect the common democratic culture and free market values of the OECD member countries. It was essential to securing the participation and support of the United States with its strong commitment to First Amendment values;
- (5) The OECD Guidelines added the "accountability principle" (para.14). That principle had not been included, as such, in

the earlier European work. It reinforced the individual participation principle (para.13) also contained in the OECD Guidelines. It sought to identify a duty-bearer so that there would be no doubt as to who had the obligation to comply with the Guidelines in particular cases. The passive voice and subjunctive mood of hortatory language can sometimes weaken the power of its instruction. The value of the “accountability principle” is that it permits elaboration and identification of the duty-bearer. This is important for the effective implementation of the Guidelines;

- (6) The Guidelines also called on the OECD member countries to implement the principles and to co-operate with other member countries in such implementation so that gaps would not arise in the operation of the Guidelines as between different nation states. Such gaps were a practical danger against which the European participants frequently warned the expert group. The haemorrhaging of personal information through TBDF was a major consideration that urged all of us on to a successful conclusion; and
- (7) Above all, the simple conceptual language of the Guidelines strengthened their influence in the succeeding years. In a field that is beset by technological complexity and verbal obscurity, the OECD Guidelines shine forth as an example of clear and simple writing. A great part of the credit for this must be shared by Peter Seipel, Hanspeter Gassmann and Louis Joinet. They are all distinguished conceptualists. They could even make the English language seem clear and simple. Which, of itself, is a major achievement.

3. *Flexible implementation:* A key to the success of the OECD Guidelines is the way in which they envisage that national implementation will follow their own regulatory cultures. This had been a large potential obstacle standing in the way of success because of the concern in non-European countries about what they saw as the expensive and intrusive bureaucratic tradition of European data protection. Invoking domestic procedures for regulation and protection was both wise and necessary. It has meant that the European countries could continue on the path of data protection agencies while other countries could embrace a looser system from a one harmonious with their institutional traditions. I believe that this flexibility explains the way in which the OECD Guidelines have influenced subsequent developments in privacy law, principle and practice in countries as diverse as the Russian Federation, Mexico, South Africa, Turkey and nations of the APEC region. This influence, which is itself a contribution to the objective of TBDF, might not have occurred without the express provision envisaging respect for the differing implementation traditions of the member countries of the OECD.
4. *Survival of the Guidelines:* Against this background, the survival of the Guidelines, and their continuing utility thirty years later is remarkable but perhaps understandable. In that thirty years interval, we have seen the development of the internet and worldwide web; of search engines; of technology for location detection; of social networking which challenge the very concept of what is 'private' and what is secret; of biometrics and other technologies. These developments undoubtedly raise questions about the OECD Guidelines. But the basic principles that the

Guidelines established remain an efficient foundation for the operation of global information systems.

### III. THE FUTURE

What of the future? Given the astonishing developments of technology, can we really expect that the OECD Guidelines will continue to be relevant and influential in the future? To answer this question, it is necessary to face once again the difficulties that the OECD expert group faced in 1980:

- (1) *Realism:* It is important to tackle issues presented to information, computer and communications policies with realism. That realism must be founded in the recognition of the objective value of TBDF, something that the Guidelines specifically recognise and assert. TBDF undoubtedly has great utility to the economies and societies of OECD member states. That utility has extended to citizens and to corporations. Prosperity is dependent on these characteristics. There is an extent, of course, to which the advance of information technology reduces the capacity of the individual to control his or her information penumbra. This is the aspect of individual privacy that is placed at risk by informatics. To some extent, that risk must be candidly acknowledged in measuring the value of the technology itself to the lives of all people living in a modern community. Putting it in terms that would be understood in the OECD, there is an ultimate economic question to be addressed by policy-makers as they reflect on the continuing utility of the OECD Guidelines in today's world. That question may be expressed thus: does the marginal utility of attempting to impede TBDF, so as to protect attributes of individual privacy, outweigh the marginal costs involved in any such

interference in the operation of TBDF. It is necessary to face this quandary candidly and to discuss it openly so that decisions are made transparently. The use limitation principle in the OECD Guidelines (para.10) is an example. The social networks that have arisen in the past decade are an illustration. To what extent would the utility of endeavouring to impose individual control over data in information systems outweigh the cost of erecting impediments and providing pre-access controls? These are eternal questions. They remain applicable today, although the technology that presents them for resolution changes every year.

- (2) *Protecting privacy:* Having acknowledged the inevitability of some erosion of aspects of personal control over data and individual privacy, it is important not to give up on protection of this value. It is a value that lies deep in the desires of the human person and affects the dignity and integrity of that person. Privacy as a value is not something dreamed up by the OECD. It was recognised as a basic human right in the *Universal Declaration of Human Rights* (art.12) and in the *International Covenant on Civil and Political Rights* (art.17). Accordingly, there is much wisdom in the *Madrid Privacy Declaration* of November 2009. In that declaration, civil society organisations, convening in association with the annual meeting of the Privacy and Data Protection Commissioners Conference, re-asserted the centrality of fair information practices; of principled decision-making; of effective and enforceable protection; of international implementation; and accessible remedies for individuals. Uncritical technological euphoria is not a proper response to the challenge for privacy presented by new technology and the shifting public use of it. This is not a subject where ‘anything goes’;

- (3) *Importance of empiricism:* One feature of the work of the OECD expert group in 1980 was its insistence that the Guidelines, and all policy and law in this area, should be based on an accurate and thorough understanding of the operation of the relevant technology. Any acquaintance with that technology teaches that failure of action amounts to making a decision. That decision permits technology, developed generally for profit, to take the user and society where the technology leads. The intervention of law and principle and of effective practice is needed to continue protection for the individual that safeguards fundamental human rights and upholds the integrity of information systems;
- (4) *Reconceptualising issues:* To some extent, in the decades since the OECD Guidelines were adopted, policy developments have been confined to particular areas of information, computer and communications policy. Thus, treaties or guidelines have been adopted to deal with the special problems of spam; cybercrime; malware; worms and viruses and other attributes of modern informatics. One role of the OECD is surely to link these issues in conceptual terms and to ensure that these separated responses operate in harmony and in a way that defends their interlinked values. It may be that the responses to the foregoing issues can be seen, with privacy protection, as an endeavour of the global community to preserve the benefits of information technology while guarding users and others affected from anti-social information activities. The OECD should constantly be on the alert, as the expert group was in 1978-80, against a fractured approach to what are basically integrated social and ethical problems. If there is one organisation in the global community that has the legitimacy and mandate to maintain this conceptual

approach, it is the OECD. It can derive encouragement, and lessons, from the way in which the expert group which developed the 1980 Guidelines tackled its task within the broader context of information, computer and communications policy;

(5) *New challenges:* There is no doubt that many new challenges face any organisation that is addressing computer and communications policy today. Some of the challenges include:

- i) The development and implementation of new systems of mass surveillance, including facial recognition, whole body imaging, biometric identifiers and imbedded RFID tags which the *Madrid Declaration* suggests should not be implemented at all without “a full and transparent evaluation by independent authorities and democratic debate”;
- ii) Privacy protectors must ever be on the lookout for privacy enhancing technology (PET) and the ways in which such technology itself can be invoked to afford better privacy protection to the individual;
- iii) Cross-border co-operation in drafting, implementing and enforcing laws for privacy protection is a daily challenge but one that is already attracting responses. Such responses were envisaged by the provision in the 1980 Guidelines (para.20) for measures of international co-operation that included (para.21) information exchanges and mutual assistance in any procedural and investigative matters involved;
- iv) End-user education may be necessary to sustain community awareness about the value of privacy. The social networks that have grown up in recent years are often used by young persons who may not be fully aware of the way in which their personal data, disclosed today, can return to affect their lives in years or



decades to come. Balancing individual freedom against personal immaturity may sometimes require new responses and some impediments to TBDF at least for vulnerable users. But these need to be developed in conformity with the basic objectives of the OECD Guidelines which continue to provide a framework for resolving such issues; and

- v) Beyond the OECD, even as its membership has expanded in the decades since 1980, lie the overwhelming majority of nation states and peoples of the world. Inevitably, the OECD Guidelines (for default of any other global principles) affect the privacy of individuals throughout the developing world. But are the values of the Guidelines in harmony with the values of people living in such countries? Are those people really concerned about values such as privacy? What should the OECD do to include representative opinions from developing countries in the expression of values that impact on global technology? Given the rapid advance of information technology in most developing countries, these are valid questions. They present important dilemmas for the OECD as it takes forward its work on information, computer and communications policy.

#### **IV. RE-ASSURANCE**

There is a last thought which I leave as a re-assurance. From this Roundtable, I return to Australia. But, in less than a week, I travel once again to Europe to a conference on a different but equally urgent and important issue – the AIDS epidemic and religion. This will take place in Utrecht, The Netherlands, 21-23 March 2010.

If there are difficulties in getting common ground within the OECD and beyond on the issues of privacy, data protection and data security, as considered in this Roundtable, they pale in significance beside the larger problem of tackling an epidemic whose vectors include sexual activity, drug use and whose vulnerable populations include sex workers, drug users, homosexuals and women. At least in information policy, it may be hoped that an agreed, rational and empirical approach will prevail. Where God is said to intervene, the mind of the policy-maker will often be influenced by holy texts and religious doctrines.

I mention these facts to remind the OECD that its tasks, although substantial and difficult, are basically manageable. The technology is shared. The challenges can generally be addressed without the intrusion of non-objective factors. From this, the OECD and its committees can take encouragement. As they can from the work of the expert group thirty years ago and the success of that work and its utility in the intervening decades.

I invoke the spirit of the late Jan Freese and the late Frits Hondius as I return to the OECD. I invoke the participation today of Louis Joinet and Hanspeter Gassmann, here with me. I pay tribute to Peter Seipel, Bill Fishman, Hans Corell, Inger Hansen, Stefano Rodata and all the others who worked on our project. But above all, I pay respects to those who continue to work in the field of privacy protection and security of information, whether in the OECD or in national privacy data protection authorities or in civil society organisations such the Electronic Privacy Information Center (EPIC), the Centre for Information Policy Leadership (CIPL) and leaders in public institutions and academic life.

The level of control which the individual maintains over personal data in the future will depend on the efforts made today by these bodies and individuals. They are guardians of a fundamental attribute of the human personality. They deserve our support and our acknowledgement. The OECD does well to take stock, to reflect on its achievements and to derive strength for the greater challenges that lie ahead.

\*\*\*\*\*