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Privacy Protection: Mandating New Arrangements to Implement and Assess Federal Privacy Policy and Practice

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Summary

When Congress enacted the Privacy Act of 1974, it established a temporary national study commission to conduct a comprehensive assessment of privacy policy and practice in both the public and private sectors and to make recommendations for better protecting the privacy of individuals. While the panel subsequently produced a landmark July 1977 report, its recommendations were not legislatively implemented. Nonetheless, interest in creating new arrangements for better implementing and assessing federal privacy policies and practices continued, as the recent report of the 9/11 Commission attests. A responsive proposal offered of late in the 108th Congress (H.R. 4414) would mandate designating a Chief Privacy Officer within the Office of Management and Budget, as well as privacy officers in each principal department and the independent agencies, and establishing a temporary commission to examine privacy issues related to the government's anti-terrorism efforts. This report will be updated as events warrant.

An expectation of personal privacy — not being intruded upon — seemingly has long prevailed among American citizens. By one assessment, American society, prior to the Civil War, “had a thorough and effective set of rules with which to protect individual and group privacy from the means of compulsory disclosure and physical surveillance known in that era.”¹ Toward the end of the 19th century, new technology — the telephone, the microphone and dictograph recorder, and improved cameras — presented major new challenges to privacy protection. During the closing decades of the 20th century, extensions of these and other new technology developments — the computer, genetic profiling, and digital surveillance — further heightened anxieties about the loss of personal privacy. In response, Congress has legislated various privacy protections. To assist in this effort, Congress, on two occasions, has sought the views of a temporary national study commission.

¹ Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1970), pp. 337-338.

Privacy Protection Study Commission

While the Privacy Act of 1974 directly addressed several aspects of personal privacy protection, the statute also mandated the Privacy Protection Study Commission, a temporary, seven-member panel tasked to “make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information.”² The commission was to “recommend to the President and the Congress the extent, if any, to which the requirements and principles of [the Privacy Act] should be applied to the information practices of [such] organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.”³

The commission began operations in early June 1975 under the leadership of chairman David F. Linowes, a University of Illinois political economist, educator, and corporate executive.⁴ The final report of the panel, published in July 1977, offered 162 recommendations.⁵ In general, the commission urged the establishment of a permanent, independent entity within the federal government to monitor, investigate, evaluate, advise, and offer policy recommendations concerning personal privacy matters; better regulation of the use of mailing lists for commercial purposes; adherence to principles of fair information practice by employers; limited government access to personal records held by private sector recordkeepers through adherence to recognized legal processes; and improved privacy protection for educational records. The panel also recommended the adoption of legislation to apply principles of fair information practice, such as those found in the Privacy Act, to personal information collected and managed by the consumer credit, banking, insurance, and medical care sectors of the U.S. economy.

Congressional response to the commission’s report was largely positive; some 200 bills incorporating its recommendations were introduced. However, an effort to enact legislation applying fair information practice principles to personal information collected and managed by the insurance and medical care industries failed in the final days of the 96th Congress. The opposition was sufficient to discourage a return to such legislative efforts for several years.

² 88 Stat. 1906.

³ Ibid.

⁴ See David F. Linowes, “The U.S. Privacy Protection Commission,” *American Behavioral Scientist*, vol. 26, May-June 1983, pp. 577-590.

⁵ U.S. Privacy Protection Study Commission, *Personal Privacy in an Information Society* (Washington: GPO, 1977).

Federal Paperwork Commission

In 1974, Congress also established a temporary, 14-member Commission on Federal Paperwork, giving it a broad mandate to consider a variety of aspects of the collection, processing, dissemination, and management of federal information, including “the ways in which policies and practices relating to the maintenance of confidentiality of information impact upon Federal information activities.”⁶ The panel was cochaired by Representative Frank Horton (R-NY) and Senator Thomas J. McIntyre (D-NH); conducted its work largely in parallel with the Privacy Protection Study Commission; and produced 36 topical reports, with recommendations, as well as a final summary report of October 3, 1977.⁷ One of these reports was devoted to confidentiality and privacy. Issued July 29, 1977, it offered 12 recommendations.⁸ Although a House subcommittee devoted a hearing to the report, no immediate action was taken on its recommendations.⁹

Subsequently, however, a recommended new organization to centralize and coordinate existing information management functions within the executive branch was realized in the Paperwork Reduction Act of 1980.¹⁰ Located within the Office of Management and Budget (OMB), the Office of Information and Regulatory Affairs (OIRA) was to assist the OMB director with the government-wide information coordination and guidance functions assigned to him by the act.

Indicating that one of the purposes of the Paperwork Reduction Act was “to ensure that the collection, maintenance, use and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality, including ... the Privacy Act,”¹¹ the statute assigned the OMB director the several privacy functions: “(1) developing and implementing policies, principles, standards, and guidelines on information disclosure and confidentiality, and on safeguarding the security of information collected or maintained by or on behalf of agencies; (2) providing agencies with advice and guidance about information security, restriction, exchange, and disclosure; and (3) monitoring compliance with [the Privacy Act] and related information management laws.”¹² These privacy functions would be expanded, and privacy responsibilities would be specified for the federal agencies, in a 1995 recodification of the

⁶ 88 Stat. 1789.

⁷ U.S. Commission on Federal Paperwork, *Final Summary Report: A Report of the Commission on Federal Paperwork* (Washington: GPO, 1977).

⁸ U.S. Commission on Federal Paperwork, *Confidentiality and Privacy: A Report of the Commission on Federal Paperwork* (Washington: GPO, 1977), pp. 139-175.

⁹ U.S. Congress, House Committee on Government Operations, *Privacy and Confidentiality Report and Final Recommendations of the Commission on Federal Paperwork*, hearing, 95th Cong., 1st sess., Oct. 17, 1977 (Washington: GPO, 1978).

¹⁰ 94 Stat. 2812; 44 U.S.C. 3501 et seq.

¹¹ 94 Stat. 2813.

¹² 94 Stat. 2816.

act.¹³ In 1988, amendments governing computer matches of personal information by government agencies were enacted.¹⁴

Pursuing New Privacy Arrangements

As the 21st century approached, heightened interest in a new privacy study commission was evidenced. During the 106th Congress, three bills were introduced to establish a temporary study commission to examine personal privacy issues. One of these (H.R. 4049), offered by Representative Asa Hutchinson (R-AR), would have created a 17-member Commission for the Comprehensive Study of Privacy Protection to “conduct a study of issues relating to protection of individual privacy and the appropriate balance to be achieved between protecting individual privacy and allowing appropriate uses of information.” Referred to the Committee on Government Reform, the bill was considered by the Subcommittee on Government Management, Information, and Technology.¹⁵ The subcommittee amended the bill, increasing the panel’s funding authorization from \$2.5 million to \$5 million; authorizing it to issue subpoenas to obtain needed information, but prohibiting the panel from acquiring any classified information relating to national security; and reducing the number of required field hearings from 20 to 10. Further modified by the Committee on Government Reform, the bill was brought up on the floor on October 2, 2000, for approval under a suspension of the House rules, but the bill failed to pass on a vote of 250 yeas to 146 nays (two-thirds approval required).¹⁶

Representative Hutchinson introduced a modified version of his earlier privacy commission bill, with bipartisan support, in the 107th Congress (H.R. 583), but it was not reported by the Committee on Government Reform. A companion bill, of sorts, was introduced in the Senate, with bipartisan support (S. 851), by Senator Fred Thompson (R-TN), the chairman of the Committee on Governmental Affairs, to which the bill was referred.¹⁷ Unlike the Hutchinson bill, the Thompson measure would have focused commission attention on public sector privacy issues, including the extent to which federal, state, and local governments collect, use, and distribute personal information; their compliance with the Privacy Act; and the extent to which individuals can obtain redress for privacy violations by these governments. The Committee on Governmental Affairs took no action on the legislation.

In the 108th Congress, Representative Kendrick Meek (D-FL) introduced, for himself and 25 cosponsors, on May 20, 2004, a bill (H.R. 4414) requiring the presidential designation of a senior official within OMB as the Chief Privacy Officer, with primary responsibility for privacy policy throughout the federal government; requiring the heads

¹³ 109 Stat. 163; 44 U.S.C. 3501 et seq.

¹⁴ 102 Stat. 2507.

¹⁵ U.S. Congress, House Committee on Government Reform, *H.R. 4049, to Establish the Commission for the Comprehensive Study of Privacy Protection*, hearings, 106th Cong., 2nd sess., May 15-16, 2000 (Washington: GPO, 2001); also see U.S. Congress, House Committee on Government Reform, *The Privacy Commission: A Complete Examination of Privacy Protection*, hearing, 106th Cong., 2nd sess., Apr. 12, 2000 (Washington: GPO, 2001).

¹⁶ *Congressional Record*, daily edition, vol. 146, Oct. 2, 2000, pp. H8561-H8570, H8588-H8589.

¹⁷ See *Congressional Record*, daily edition, vol. 147, May 9, 2001, pp. S4604-S4607.

of the principal departments and each independent agency in the executive branch to appoint a senior official to assume primary responsibility for privacy policy; and mandating a temporary Commission on Privacy, Freedom, and Homeland Security to conduct a comprehensive legal and factual study relating to United States efforts to further homeland security in a manner that protects privacy, civil liberties, and individual freedoms. During the Clinton Administration, attorney Peter Swire served as Chief Counselor for Privacy at OMB, a new position he held from March 1999 to January 2001. The successor Bush Administration did not continue the position. When the Department of Homeland Security was established with the Homeland Security Act of 2002, the statute mandated a Privacy Officer for the department.¹⁸ Some other entities — such as the Department of Health and Human Services, Department of Justice, and Internal Revenue Service — have an administratively established Privacy Officer.

Representative Meek's legislation, denominated the Strengthening Homeland Innovation to Emphasize Liberty, Democracy, and Privacy Act, or the SHIELD Privacy Act, seeks to create new arrangements to avoid proactively privacy problems or violations arising from new and expanded efforts at combating terrorism. Its introduction occurred coincidentally in the aftermath of the March release of the report of the Technology and Privacy Advisory Committee, a temporary study panel appointed by Secretary of Defense Donald H. Rumsfeld in February 2003, following considerable public controversy concerning Department of Defense sponsorship of the development of data mining technology thought by some to be threatening to personal privacy values.¹⁹ The panel's report was apparently of broader scope than some anticipated and, according to one press view, "offers sweeping recommendations for privacy safeguards throughout the government."²⁰

The proposed SHIELD Privacy Act does not create new privacy leadership positions, but requires that a senior official at OMB and within the principal departments and the independent agencies be designated to assume certain responsibilities, specified in the legislation, regarding personal privacy policy. The 10-member study commission established by the legislation would be chaired by a presidential appointee (other members would be appointed by majority and minority leaders of the House and Senate), function for two years, possess subpoena authority, and issue a final report (and might issue interim reports). The measure authorizes \$4,750,000 for the commission to carry out its work. The study commission aspect of the legislation parallels a civil liberties oversight board recommended in the final report of the 9/11 Commission. One of the responsibilities of the board would be to monitor presidential guidelines for information sharing which should also "safeguard the privacy of individuals about whom information is shared."²¹ The bill was referred to the House Committee on Government Reform.

¹⁸ 116 Stat. 2135 at 2155.

¹⁹ See U.S. Department of Defense, Technology and Privacy Advisory Committee, *Safeguarding Privacy in the Fight Against Terrorism* (Washington: March 2004).

²⁰ Robert Pear, "Panel Urges New Protection on Federal 'Data Mining'," *New York Times*, May 17, 2004, p. A12.

²¹ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), pp. 394-395.