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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. 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 establishment of a Privacy and Civil Liberties Oversight Board and assignment of privacy officer responsibilities in certain departments and agencies attests. This report tracks active legislative efforts (H.R. 1271, H.R. 1310, H.R. 2360, H.R. 3041, H.R. 3058, H.R. 3402) to further privacy policy in the 109th Congress, and 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 and, on two occasions, mandated national study commissions to assist in this effort.

[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. The final report of the panel, published in July 1977, offered 162 recommendations.[4] In general, the commission urged the establishment of a permanent, independent entity within the federal government to monitor, investigate, evaluate, advise, and offer personal privacy policy recommendations; 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.

Some 200 bills incorporating recommendations from the commission's report were introduced during the 96th Congress, but major legislation applying fair information practice principles to personal information collected and managed by the insurance and medical care industries failed to be enacted, and the opposition was sufficient to discourage a return to such legislative efforts for several years.

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

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[2] 88 Stat. 1906.

[3] Ibid.

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

information impact upon Federal information activities."[5] The panel was cochaired by Representative Frank Horton and Senator Thomas J. McIntyre; conducted its work largely in parallel with the Privacy Protection Study Commission; and produced 36 topical reports, as well as a final summary report of October 3, 1977.[6] One of these reports, issued July 29, 1977, was devoted to confidentiality and privacy, and offered 12 recommendations.[7] A House subcommittee devoted a hearing to the report, but no immediate action was taken on its recommendations.[8]

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 (PRA) of 1980.[9] 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 PRA.

Indicating that one of the purposes of the PRA 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,"[10] the statute assigned the OMB director 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."[11] These duties would be expanded, and privacy responsibilities would be specified for the federal agencies, in a 1995 recodification of the act.[12] Earlier, in 1988, amendments governing computer matches of personal information by government agencies were enacted.[13]

Pursuing New Privacy Arrangements

Among the successful efforts of the 108th Congress to strengthen privacy protection was the establishment of the Privacy and Civil Liberties Oversight Board (PCLOB) by

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[5] 88 Stat. 1789.

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

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

[8] 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).

[9] 94 Stat. 2812; 44 U.S.C. 3501 et seq.

[10] 94 Stat. 2813.

[11] 94 Stat. 2816.

[12] 109 Stat. 163; 44 U.S.C. 3501 et seq.

[13] 102 Stat. 2507.

Section 1061 of the Intelligence Reform and Terrorism Prevention Act of 2004, implementing many of the recommendations of the 9/11 Commission.[14] Located within the Executive Office of the President, the board consists of a chair, vice chair, and three additional members, all appointed by, and serving at the pleasure of, the President. Nominees for the chair and vice chair positions are subject to Senate approval. While the board does not have subpoena power, it may request the assistance of the Attorney General in obtaining desired information from persons other than federal departments and agencies.

Section 1062 of the statute expressed "the sense of Congress that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer." The obligation of the relevant departments and agencies in this regard, however, is less than mandatory.

Section 1011 amended the National Security Act of 1947 with language at Section 103D, which established a Civil Liberties Protection Officer within the office of the newly created Director of National Intelligence. This official has various responsibilities for civil liberties and privacy protection within the intelligence community.

Elsewhere, when reporting the Transportation, Treasury and General Government Appropriations Bill, 2005, the Senate Committee on Appropriations indicated that Section 520 of the legislation (S. 2806) "directs each agency to acquire a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy." Section 520 appeared in Title V of the legislation. "Those general provisions that address activities or directives affecting all of the agencies covered in this bill," the committee report explained, "are contained in title V." Thus, the provision applied only to agencies directly funded by the legislation. "General provisions that are governmentwide in scope," noted the report, "are contained in title VI of this bill."[15]

Transportation, Treasury and General Government appropriations were among those which came to be included in the Consolidated Appropriations Act, 2005 (H.R. 4818), and constituted Division H of that legislation.[16] Within that division, Section 522 stated: "Each agency shall have a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy," and specified nine particular activities to be undertaken by such officers. The section further prescribed privacy and data protection policies and procedures to be established, reviews to be undertaken, and related reports to be made. Located in Title V of the division, the requirements of the section appeared to be applicable only to agencies directly funded by the division. Furthermore, it did not appear that the section created new positions, but instead prescribed privacy officer responsibilities to be assigned to an appropriate individual in an existing position.[17]

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[14] P.L. 108-458; 118 Stat. 3638.

[15] U.S. Congress, Senate Committee on Appropriations, *Transportation, Treasury and General Government Appropriations Bill, 2005,* S.Rept. 108-342, report to accompany S. 2806, 108th Cong., 2nd sess. (Washington: GPO, 2004), pp. 200, 202.

[16] P.L. 108-447; 118 Stat. 2809.

[17] *Congressional Record,* daily edition, vol. 150, Nov. 19, 2004, pp. H10358-H10359.

No nominations to membership positions on the PCLOB were made in the early weeks of the 109th Congress, and the President's initial FY2006 budget documents contained no request for funds for the panel, although a later justification document requested $750,000.[18]

In a January 2005 interview with *Federal Computer Week* staff covering a range of issues, Representative Tom Davis, chairman of the House Committee on Government Reform, took issue with the Consolidated Appropriations Act's Section 522 requirement concerning privacy officers. He expressed concern that these privacy officers might undercut the authority of chief information officers. "Let's not make it so confusing that the CIO's basically lose control of computer security and privacy becomes the overriding concern," he said in the interview. Indicating he would seek to eliminate Section 522, he also suggested he was not opposed to the concept, saying: "These privacy officers have got to be put into perspective."[19] Representative Davis subsequently introduced H.R. 1271, repealing the privacy section, on March 14; the bill was referred to the Committee on Government Reform.

A February 11, 2005, memorandum to the heads of the executive departments and agencies from Clay Johnson III, Deputy Director for Management, Office of Management and Budget (OMB), appeared to sweep beyond the Section 522 requirement, and asked recipients, within the next 30 days, "to identify to OMB the senior official who has the overall agency-wide responsibility for information privacy issues." Expressing the administration's commitment "to protecting the information privacy rights of Americans and to ensuring Departments and agencies continue to have effective information privacy management programs in place to carry out this important responsibility," it noted that a Chief Information Officer or "another senior official (at the Assistant Secretary or equivalent level) with agency-wide responsibility for information privacy issues" could be named.[20]

At about the same time, efforts were underway among some House members to develop legislation that would, if enacted, reconstitute the PCLOB as an independent agency within the executive branch, make all appointments to the board's membership subject to Senate confirmation, and limit the board's partisan composition to not more than three being from the same political party. Such legislation was introduced on March 15 by Representative Carolyn B. Maloney for herself and 23 bipartisan cosponsors as H.R. 1310, which was referred to the Government Reform, Homeland Security, Intelligence, and Judiciary committees.[21]

In early May, when recommending funds for the Department of Homeland Security (DHS) for FY2006, the House Committee on Appropriations "included a new general

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[18] U.S. Office of Management and Budget, *Executive Office of the President: Fiscal Year 2006 Congressional Budget Submission* (Washington: n.d.), p. 111.

[19] FCW staff, "The Davis Plan," *Federal Computer Week*, vol. 19, Jan. 24, 2005, pp. 16, 18.

[20] U.S. Office of Management and Budget, "Designation of Senior Agency Officials for Privacy," Memorandum for Heads of Executive Departments and Agencies from Clay Johnson III, Deputy Director for Management (Washington: Feb. 11, 2005).

[21] See *Congressional Record*, daily edition, vol. 151, Mar. 16, 2005, p. E456.

provision (Section 528) to ensure that the Privacy Officer has the independence necessary to report privacy abuses directly to Congress and has all documents and information necessary to carry out statutory responsibilities." It was the committee's view that the Privacy Officer "should provide Congress, and thus the public, an unfettered view into the operations of the Department and its impact on personal privacy."[22] The House approved the appropriations bill (H.R. 2360), with the reporting provision, on May 17, 2005. It was continued by the final version of the legislation, which the President signed into law on October 18, 2005.[23]

Also, in mid-May, a bipartisan group of Senators queried the White House concerning a timetable and details on how the membership and staff of the PCLOB would be put in place. Mandated by the Intelligence Reform and Terrorism Prevention Act of 2004, the board's membership still awaited appointment by the President.[24] On June 10, the White House announced that President Bush would nominate Carol Dinkins to be chair and Alan Charles Raul to be vice chair of the board, both subject to Senate approval. The President also would name Lanny Davis, Theodore Olsen, and Francis Taylor to serve as members of the board.

During June 29-30 House consideration of the Transportation, Treasury appropriation bill (H.R. 3058), amendments increased funding for the Privacy and Civil Liberties Oversight Board from $750,000 to $1.5 million, and otherwise prohibited the use of funds by any department or agency in contravention of the of the Privacy Act or Title 48 (Federal Acquisition Regulations System) of the *Code of Federal Regulations*. Both provisions remained in the bill as approved by the House. In late July, Senate appropriators recommended $1.5 million for the board.[25] This amount was allocated in the final version of the legislation, which the President signed into law on November 30, 2005.[26]

On July 27, the House Committee on the Judiciary marked up and ordered reported a Department of Justice authorization bill (H.R. 3402) directing the Attorney General to designate a senior official to assume primary responsibility for privacy policy in the department (Section 305).[27] The House approved the bill on September 28, 2005, on a 415-4 vote, and sent the measure to the Senate.

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[22] U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2006*, report to accompany H.R. 2360 , 109th Cong., 1st sess., H.Rept. 109-79 (Washington: GPO, 2005), p. 7.

[23] P.L. 109-90; 119 Stat. 2064.

[24] Eric Lichtblau, "Senators Say Bush Lags on Creating Terror Panel," *New York Times*, May 15, 2005, p. 25.

[25] U.S. Congress, Senate Committee on Appropriations, Transportation, Treasury, the Judiciary, Housing and Urban Development, and Related Agencies Appropriations Bill, 2006, report to accompany H.R. 3058, 109th Cong., 1st sess., S.Rept. 109-109 (Washington: GPO, 2005), p. 201 (preprint).

[26] P.L. 109-115; 119 Stat. 2396.

[27] U.S. Congress, House Committee on the Judiciary, *Department of Justice Appropriations Authorization Act, Fiscal Years 2006 Through 2009*, report to accompany H.R. 3402, 109th Cong., 1st sess., H.Rept. 109-233 (Washington: GPO, 2005), pp. 105-106.