

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER
to
THE OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE
Notice of Privacy Act Systems of Records

May 12, 2010

By notice published on April 2, 2010, the Office of the Director of National Intelligence (“ODNI”) announced that it is “establishing fourteen (14) new systems of records,” and proposes to exempt these systems from significant provisions of the Privacy Act.¹

Pursuant to the ODNI notice in the Federal Register, the Electronic Privacy Information Center (“EPIC”) submits these comments to address the substantial privacy issues raised by the proposed exemptions. EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC routinely comments in public rulemakings on agency proposals that would diminish the privacy rights and agency obligations set out in the federal Privacy Act. EPIC has particular interest in preserving privacy safeguards in the development of new information systems.²

¹ ODNI Notice to Establish Systems of Records, 75 Fed. Reg. 63, 16853 (Apr. 2, 2010); ODNI Privacy Act of 1974: Implementation, 75 Fed. Reg. 63, 16698 (to be codified at 32 C.F.R. pt. 1701).

² See EPIC: Global Entry, http://epic.org/privacy/global_entry/default.html; EPIC: DOD Recruiting Database, <http://epic.org/privacy/student/doddatabase.html>; [more stuff].

Scope of Rulemaking

ODNI seeks to make fourteen new systems of records exempt from provisions in the Privacy Act. ODNI proposes to exempt these systems of records “To protect classified and sensitive personnel or law enforcement information contained in these systems.”³ The fourteen new systems of records are: (1) Manuscript, Presentation and Resume Review Records, (2) Executive Secretary Action Management System Records, (3) Public Affairs Office Records, (4) Office of Legislative Affairs Records, (5) ODNI Guest Speaker Records, (6) Office of General Counsel Records, (7) Analytic Resources Catalogue, (8) Intelligence Community Customer Registry, (9) EEO and Diversity Office Records, (10) Office of Protocol Records, (11) IC Security Clearance and Access Approval Repository, (12) Security Clearance and Access Approval Repository, (13) Civil Liberties and Privacy Office Complaint Records, and (14) National Intelligence Council Records.⁴

EPIC believes that these systems of records should not be exempt from provisions in the Privacy Act, and EPIC especially objects to the exemption of three systems of records that clearly contain information on members of the public: the Executive Secretary Action Management System Records, the Public Affairs Office Records, and the Civil Liberties and Privacy Office Complaint Records. According to ODNI, the Executive Secretary Action Management System Records “incorporates taskings, messages, correspondence, reports, studies, and communications with Congress, the National Security Council, the White House, other government departments and agencies as well as ODNI components, non-government organizations and the public.”⁵ The Public Affairs Office Records include,

³ ODNI Notice to Establish Systems of Records, *supra* note 1, at 16853.

⁴ ODNI Privacy Act of 1974: Implementation, *supra* note 1, at 16699.

⁵ ODNI Notice to Establish Systems of Records, *supra* note 1, at 16854.

among other records, “relevant correspondence from the public and ODNI responses.”⁶

Lastly, the Civil Liberties and Privacy Office Complaint Records contains “Records alleging violations of civil liberties or privacy arising from the programs and activities of the ODNI or any of the IC elements; and records of review, investigation, acknowledgment or disposition of allegations received.”⁷

EPIC’s Comments and Recommendations

Exemption of These Systems of Records Contravenes the Intent of the Privacy Act

Many of these systems of records contain information pertaining to members of the public and provide the basis for agency determinations about citizens and lawful permanent residents. However, the agency seeks to invoke broad exemptions from the Privacy Act that would allow the ODNI to use the information with little accountability and deny individuals access to records with information pertaining to them.

When it enacted the Privacy Act, 5 U.S.C. § 552(a), in 1974, Congress sought to restrict the amount of personal information that federal agencies could collect and required agencies to be transparent in their information practices.⁸ The Supreme Court underscored the importance of the Privacy Act’s restrictions upon agency use of personal information to protect privacy interests, noting that:

[I]n order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary . . . to regulate the collection, maintenance, use, and dissemination of information by such agencies. Privacy Act of 1974, §2(a)(5), 88 Stat. 1986. The Act gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government’s part to comply with the requirements.⁹

⁶ *Id.* at 16855.

⁷ *Id.* at 16866.

⁸ S. Rep. No. 93-1183 at 1 (1974).

⁹ *Doe v. Chao*, 540 U.S. 614, 618 (2004).

The Privacy Act is intended “to promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems data banks of the Federal Government[.]”¹⁰ It is also intended to guard the privacy interests of citizens and lawful permanent residents against government intrusion. Congress found that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies,” and recognized that “the right to privacy is a personal and fundamental right protected by the Constitution of the United States.”¹¹ It thus sought to “provide certain protections for an individual against an invasion of personal privacy” by establishing a set of procedural and substantive rights.¹²

The ODNI invokes 5 U.S.C. §§ 552a(k)(1) as authority for the systems of records exemption from the following subsections in the Privacy Act: (c)(3); (d)(1), (2), (3), (4); (e)(1) and (e)(4)(G), (H), (I); and (f). Subsection (c)(3) requires an agency to make an accounting, including the date, nature, purpose of each disclosure of a record to any person or to another agency, and name and address of the person or agency to whom the disclosure is made, available to the individual named in the record at his request.¹³ Not making these fourteen systems of records subject to this subsection in the Act would prevent an individual from knowing with whom ODNI was disclosing records pertaining to that individual.

¹⁰ S. Rep. No. 93-1183 at 1.

¹¹ Pub. L. No. 93-579 (1974).

¹² *Id.*

¹³ 5 U.S.C. § 552a(c)(3).

The ODNI seeks to exempt the fourteen systems of records from key fair information practices such as the requirements that an individual be permitted to access personal information,¹⁴ that an individual be permitted to correct and amend personal information,¹⁵ that an individual have redress if he is denied the ability to amend the record¹⁶ and that an agency assure the reliability of personal information for its intended use.¹⁷ The rights of access and correction were central to what Congress sought to achieve through the Privacy Act:

The committee believes that this provision is essential to achieve an important objective of the legislation: Ensuring that individuals know what Federal records are maintained about them and have the opportunity to correct those records. The provision should also encourage fulfillment of another important objective: maintaining government records about individuals with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to individuals in making determinations about them.¹⁸

Withdrawing a citizen's statutory, judicially enforceable right of access provided by the Act, without providing an alternative right of access and redress, leaves citizens without a way to request records pertaining to them or contest the accuracy of information pertaining to them. It is also likely to lead to decision-making that is less accurate, less reliable, and ultimately less likely to fulfill a legitimate agency purpose.

In addition to the access and correction exemptions, ODNI seeks to exempt these systems of records from maintaining "in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to

¹⁴ 5 U.S.C. § 552a(d)(1).

¹⁵ 5 U.S.C. § 552a(d)(2).

¹⁶ 5 U.S.C. § 552a(d)(3) & (4).

¹⁷ See U.S. Dep't of Health, Education and Welfare, *Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and Rights of Citizens* viii (1973).

¹⁸ H.R. Rep. No. 93-1416, at 15 (1974).

be accomplished by statute or by Executive order of the President.”¹⁹ Exempting these systems of records from this provision gives the ODNI free reign to collect and maintain records beyond the scope of its authority without any repercussions. Accountability will be diminished and the risk of misuse of the data on citizens and lawful permanent residents will increase.

Under subsections (e)(4)(G), (H), and (I), an agency is required to publish a notice of the existence of records in the Federal Register, the procedures to be followed to obtain access, and categories of sources of records.²⁰ Permitting these systems of records to operate without being subject to these requirements will prevent an individual from ever knowing if records in these systems are maintained pertaining to him. Lastly, the ODNI proposes to exempt these fourteen systems of records from promulgating rules that establish procedures whereby an individual can access records pertaining to him,²¹ thereby shutting off any means by which an individual could seek out records with information concerning him. Each claimed exemption includes a mechanism for requesting non-exempt records, but no information is given on how a potential requester would know which records in the broad category of claimed exemptions are not exempt.

The most egregious of the proposed Privacy Act exemptions is the thirteenth—the proposal to exempt from the Act the complaint records of the ODNI Civil Liberties and Privacy Office (“CLPO”). The CLPO records include “Records alleging violations of civil liberties or privacy arising from the programs and activities of the ODNI or any of the [Intelligence Community] elements; and records of review, investigation, acknowledgment

¹⁹ 5 U.S.C. § 552a(e)(1).

²⁰ 5 U.S.C. § 552a(e)(4)(G), (H), & (I).

²¹ 5 U.S.C. § 552a(f).

or disposition of allegations received.”²² These records are retrievable by name or by case number.²³ In other words, this directory of complainants and the complaints they have filed is exactly the sort of system of records that the Privacy Act was designed for. Preventing individuals from determining what information is stored about them in such a database flies in the face of congressional intent.

Seeking to exempt these fourteen systems from substantial sections in the Privacy Act will allow the ODNI to obscure what data it is collecting and prevent individuals from accessing information they have a right to possess. For example, the Civil Liberties and Privacy Office Complaint Records house complaints, including those by members of the public, of violations of civil liberties or privacy arising from ODNI programs and activities. An individual who submitted a complaint would not be able to view any records pertaining to his complaint, such as records of review, investigation, or acknowledgement or disposition of allegations received. A complainant would be left without any means to inquire about the status of his complaint or to help facilitate the resolution of his complaint.

It would be a perverse outcome for the ODNI to invoke Privacy Act exemptions to prevent effective oversight of the agency’s own handling of privacy-related complaints.

Conclusion

For the foregoing reasons, the Electronic Privacy Information Center urges the ODNI to reconsider the claimed exemptions for the announced fourteen new systems of records.

²² ODNI Notice to Establish Systems of Records, *supra* note 1, at 16866.

²³ *Id.*

Respectfully Submitted,

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