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Privacy Act of 1974 Has Little Impact on Federal Contractors. LCD-78-124; B-130441. November 27, 1978. Released December 7, 1978. 27 pp. + 4 appendices (21 pp.).

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Under the Privacy Act of 1974, Federal agencies must publish at least annually in the Federal Register notices on all their "systems of records" containing information about people. Information to be published in the Federal Register describes categories of records maintained, sources for the information, and the routine uses of the records. Subsection 3(m) of the Privacy Act, the only one focusing on the private sector, states that, "When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of the act to be applied to each system." Findings/Conclusions: The applicability of the Privacy Act to Federal contractors is not clearly understood, and implementation of subsection 3(m) addressing contractors has been given low priority by contracting agencies and by contractors. This is evident from: the sparse and sometimes unclear guidelines issued to implement subsection 3(m), the low level of training given to agency and contractor personnel to acquaint them with the subsection, acknowledgement by agency officials that they had not included the Privacy Act clause in many cases where it should have been included, the almost complete lack of monitoring by contracting agencies, and the general absence of new initiatives by contractors obligated to

meet the act's requirements. Agency and contractor officials believe that this is not a cause for concern because prior practices by contractors often already assure the protection of personal information; in few, if any, cases have Federal contractors violated the privacy rights of individuals.

Recommendations: The Director of the Office of Management and Budget (OMB) should: improve and expand OMB guidelines to assist agencies in making decisions as to which contracts should be subject to the act, encourage the Civil Service Commission and agencies to include appropriate coverage of subsection 3(m) in training programs, work with agencies to clarify procurement regulations so that they are consistent with OMB guidelines, reemphasize OMB existing guidance to agencies, direct agencies to acquaint contractors with the act's requirements, and require that the agencies establish an appropriate method of monitoring contractors' compliance with the act. The Congress should improve the clarity of the act as it relates to contractors by making subsection 3(m) more definitive, extending the act to all personal information handled by contractors, or by repealing subsection 3(m). (RRS)

REPORT BY THE

Comptroller General

OF THE UNITED STATES

8418

Released 12-7-78

Privacy Act Of 1974 Has Little Impact On Federal Contractors

In response to a request from the Chairman, Subcommittee on Government Information and Individual Rights, House Committee on Government Operations, GAO reviewed efforts to implement subsection 3(m) of the Privacy Act of 1974 at 10 Federal departments and agencies and at about 60 Federal contractors.

The purpose of subsection 3(m) is to provide appropriate safeguards when contractors are handling personal information subject to the act.

Abuses of personal information by contractors, to the extent it can be determined, are not widespread. If they occur, however, they can cause much harm.

GAO recommends ways to correct several problems agencies and contractors have in understanding and carrying out the subsection and presents the pros and cons of alternative ways the Congress can clarify the law.





COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-130441

The Honorable Richardson Preyer, Chairman
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

In response to your August 29, 1977, request, we have reviewed implementation of subsection 3(m) of the Privacy Act of 1974 at selected Federal departments and agencies and contractors. At your request, we did not take the time needed to obtain written agency comments. However, we discussed the matters presented with Office of Management and Budget and agency officials and have considered their comments in this report.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 10 days after its issue date. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

A handwritten signature in black ink, reading "James B. Heath".

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE SUBCOMMITTEE
ON GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS
HOUSE COMMITTEE ON GOVERNMENT
OPERATIONS

PRIVACY ACT OF 1974
HAS LITTLE IMPACT ON
FEDERAL CONTRACTORS

D I G E S T

The applicability of the Privacy Act of 1974 to Federal contractors is not clearly understood.

What is to prevent Government contractors that use personal information, such as personnel and medical records in Government files or similar information required to do their work, from willingly or inadvertently releasing it to other people?

Implementing subsection 3(m) of the act applicable to contractors has been given low priority by contracting agencies and contractors reviewed by GAO. This is evident from

- sparse and sometimes unclear Federal guidelines issued to implement subsection 3(m);
- the low level of training given to agency and contractor personnel to acquaint them with the subsection;
- the acknowledgement by agency officials that they had not included the Privacy Act clause in many cases where it should have been included;
- the almost complete lack of monitoring by contracting agencies to determine whether those contractors considered subject to the act do, in fact, comply with its requirements; and
- the general absence of new initiatives by contractors obligated to meet the act's requirements.

Many agency and contractor officials believe this is not a cause for concern because

- prior practices by contractors often already assured the protection of personal information and
- in few, if any, cases have Federal contractors violated the privacy rights of individuals.

Even so, there is a potential for harm of varying consequences to persons involved, because some Federal contractors handle highly sensitive and/or commercially valuable personal information and security practices vary extensively among contractors. Moreover, although the existing legislation perhaps could be further clarified, there is no doubt that the Congress intended Federal contractors that operated "systems of records" containing personal data that, in effect, replace agency systems to comply with the Privacy Act's requirements.

RECOMMENDATIONS

The Director, Office of Management and Budget, should direct and encourage Federal agencies to improve their efforts to comply with the subsection 3(m) of the Privacy Act. Specifically, the Director should:

- Improve and expand Office of Management and Budget guidelines to assist agencies in making decisions as to which contracts should be subject to the act. A clear explanation of the rationale for coverage, and more examples, would be useful.
- Encourage the Civil Service Commission (and its successor) and agencies to include appropriate coverage of subsection 3(m) in Privacy Act training programs.
- Work with agencies to clarify procurement regulations so that they are consistent with Office of Management and Budget

guidelines and ensure that contractors are aware of what information is subject to the act's requirements.

- Reemphasize Office of Management and Budget existing guidance to agencies that all contracts be reviewed for possible applicability of the Privacy Act.
- Direct agencies to acquaint contractors-- through training programs or, if appropriate, less costly measures, such as periodic written reminders--of the Privacy Act's requirements.
- Require that agencies establish an appropriate method of monitoring contractors' compliance with the act.

If resources are unavailable for regular on-site reviews of contractors, other less costly alternatives, such as contractor certifications of compliance and periodic spot-checks, should be considered.

GAO believes that, to an undetermined extent, the problems in implementing subsection 3(m) relate to language in the legislation. The Congress could improve the clarity of the act as it relates to contractors by

- making subsection 3(m) more definitive,
- extending the Privacy Act to all personal information handled by contractors, or
- repealing subsection 3(m).

Of these alternatives GAO believes making subsection 3(m) more definitive would be preferable.

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ABBREVIATIONS

CHAMPUS	Civilian Health and Medical Program of the Uniformed Services
DOD	Department of Defense
FPRS	Federal Procurement Regulations
GAO	General Accounting Office
GSA	General Services Administration
HEW	Department of Health, Education, and Welfare
OMB	Office of Management and Budget
VA	Veterans Administration

CHAPTER 1

INTRODUCTION

The Privacy Act of 1974 (Public Law 93-579, Dec. 31, 1974) is to protect each person's privacy by requiring Federal agencies to establish rules and procedures for maintaining and protecting personal data in agency record systems. The act became effective September 27, 1975.

It generally gives each person the right to (1) know what personal information is collected, maintained, used, or distributed by the agencies, (2) have access to agency information on him or her and to amend or correct the information, and (3) prevent information obtained by agencies for a specific purpose from being disclosed for another purpose without the person's consent.

The act also usually requires an agency to ensure that any identifiable personal information it keeps is for a necessary and lawful purpose, is current and accurate for its intended use, and is adequately protected. Individuals can sue agencies to enforce their rights under the act, and Government employees can be fined up to \$5,000 for intentionally violating certain provisions of the act.

The Subcommittee on Government Information and Individual Rights, House Committee on Government Operations, asked us to review how agencies carried out subsection 3(m) of the act, which says that the act must be applied to systems of records on people operated by Federal contractors to accomplish an agency function. Specifically, we determined how agencies interpreted subsection 3(m) of the Privacy Act, evaluated how consistently the Office of Management and Budget (OMB) and the Federal agencies implemented the provisions in their own guidelines, and reviewed whether contractors properly carried out their responsibilities.

WHAT THE PRIVACY ACT REQUIRES OF FEDERAL AGENCIES

Agencies must publish at least annually in the Federal Register notices on all their "systems of records" containing information about people. (A system of records is a group of any records under agency control from which information is retrieved by an individual's name or some identifying number, symbol, or other particular assigned to the individual.) Information to be published in the Federal Register describes categories of records maintained, sources for the information, and the routine uses of the records.

An agency must allow a person to look at and copy his or her record. Anyone disagreeing with the record may ask to have it amended. If the request is denied, or if the matter is not satisfactorily resolved, the person may appeal the decision within the agency. If the matter is still unresolved, appeal can be made to a district court and/or a statement about the disagreement placed in the record. The agency must distribute the statement with all future disclosures of the record and to any person or agency that had previously received the record. An agency may not disclose records in a system of records without the consent of the people involved, unless the disclosure is specifically permitted by the act. Disclosure is allowed for 11 reasons, including disclosures:

- To those agency employees that need the record to do their work.
- Required under the Freedom of Information Act.
- To the Congress, the courts, and our Office.
- For routine use. (The act defines "routine use" as the use of a record for a purpose compatible with the purpose for which the record was collected. The routine uses must be included in the published description of systems in the Federal Register.)

For most categories of disclosure, agencies must record the dates, nature, and purpose of disclosures and the names and addresses of whoever received the records.

Other provisions of the act require that agencies

- collect information, if practicable, directly from a person, when using the information might result in adverse determinations about that person's rights under Federal programs;
- tell each person asked to supply personal information of the authority for the request, the principal purpose for which the information will be used, any routine uses, consequences of failing to provide the requested information, and whether the disclosure is mandatory or voluntary;
- maintain records with enough accuracy, relevance, timeliness, and completeness to ensure fairness when disseminating information to others;

- maintain no records describing how any individual exercises rights guaranteed by the First Amendment (religion, beliefs, or association) unless expressly authorized by statute or unless the records pertain to authorized law enforcement activities;
- establish appropriate administrative, technical, and physical safeguards of records;
- not sell or rent mailing lists unless specifically authorized by law; and
- issue rules to implement these provisions.

OMB was given responsibility for developing guidelines and regulations for agencies to use in implementing the provisions of the act. OMB issued Circular No. A-108, "Responsibilities for the Maintenance of Records About Individuals by Federal Agencies," and Privacy Act implementation guidelines in July 1975. OMB also issued supplementary guidance to agencies in November 1975 and issued four supplements to Circular No. A-108 between 1975 and 1978.

WHAT SUBSECTION 3(m) SAYS ABOUT CONTRACTORS

Subsection 3(m) of the Privacy Act, the only one focusing on the private sector, states that:

"When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of (the Act) to be applied to such system. For the purposes of subsection (i) (the criminal penalties provision) of (the Act) any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of (the Act), shall be considered to be an employee of an agency." (5 U.S.C. 552a(m))

Although contractors often perform similar functions as Federal grantees, the terms of the Privacy Act do not extend to grantees. We did not review grantees' handling of personal information. However, it is interesting to note that,

measured in dollar terms, the annual amount of Federal grants is nearly equal to that of Federal contracts. 1/

SCOPE OF REVIEW

We reviewed various offices of 10 major Federal departments and agencies and the effect of the Privacy Act on about 60 contractors of the departments and agencies. (See apps. I and II.)

We reviewed guidelines on subsection 3(m) issued by OMB, the General Services Administration (GSA), and the 10 departments and agencies. We interviewed agency or departmental officials with Privacy Act or legal responsibilities and those with contracting and/or program responsibilities. We also reviewed summary contract data and numerous contracts.

We attempted to determine through interview and/or observation what effect the Privacy Act had on contractors obligated to it by contracts.

1/For example, in fiscal year 1977 the dollar amount of Federal grants was about \$68 billion, compared to about \$80 billion for Federal contracts.

CHAPTER 2

HOW SUBSECTION 3(m) OF THE PRIVACY ACT HAS BEEN INTERPRETED

Subsection 3(m) of the Privacy Act contains terms that reasonable people can interpret differently and presumes an understanding of other important terms in the act such as "system of records." Perhaps the two most problematic terms in subsection 3(m) are "operation" (of a system of records) and "agency function." Despite written guidelines and legal interpretations, the exact applicability of the subsection remains unclear within many Federal offices.

AGENCY GUIDANCE ON SUBSECTION 3(m) NOT SPECIFIC

OMB, GSA, and other Federal offices have issued guidelines and procurement regulations explaining the relationship of subsection 3(m) to contractors.

OMB's guidelines

- leave the term "operation" of a system of records unclear but imply that it does not include design of a system;
- define "agency function" as a function the agency would have carried out itself if the contractor were not involved; and
- direct Federal agencies to review their contracts before they are awarded, to determine whether contractors will be working with records involving personal information and, if so, to include legally required language in the contract.

OMB's guidelines give some direction to agencies through examples of contractors' work that does and does not come under the act. Contractors that keep administrative records, such as personnel and payroll records, for a Federal agency must follow the act, as must contractors that provide health services to agency personnel and keep their health records. Contractors that determine benefits for Federal employees must also follow the act for those records. Contractors do not need to follow the act for records on their employees while providing goods and services to the Government.

Similarly, when an agency contracts with a State or private educational organization to provide training to its employees and the records on their attendance (admission forms, grade reports) are like those on other students and combined with records on other students, the contractor need not follow the act for those records.

Agency officials, however, still felt OMB's guidelines were not detailed enough. They could not easily determine whether the act applied to particular contracts.

The 10 departments and agencies reviewed had their own directions for interpreting subsection 3(m). Sometimes their interpretations were the same as OMB's interpretation, with the same examples, but usually these guidelines were even less clear than OMB's. Again, some agency personnel wanted more precise department and agency guidelines to help them decide which contracts were subject to the Privacy Act.

Although OMB, departmental, and agency guidelines give examples of the contracts to which the subsection applies, they are just that: examples. They do not provide the underlying reasoning necessary to determine whether the act applies to the many other types of contracts and systems of records that Federal contractors use.

Varying interpretations of "operation"

The Privacy Act does not define "operation" of a system of records in subsection 3(m). According to OMB guidelines, the operation of a system is not the same as the design of a system. However, one department's guidelines use the term "maintains" instead of "operates" in stating which contracts are subject to the subsection. Three departments' guidelines use "design, development, operation or maintenance" of systems of records by contractors. Others use only the term "operation."

Questionable interpretations of "agency function"

The Privacy Act does not define "agency function." OMB guidelines state that this term is meant to limit the act to those systems actually taking the place of Federal systems which, but for the contract, would have been set up by an agency and covered by the Privacy Act. No agency guidelines further explain this term.

However, some agencies--notably the Department of Health, Education, and Welfare (HEW) and the Veterans Administration (VA)--have issued legal decisions further explaining when the act applies to Federal contractors. As a result of these decisions, these agencies consider fewer contracts subject to the Privacy Act.

For example, HEW and VA interpreted "agency function" in a way that excluded many contracts from the act, even though the contracts involved personal information on individuals. Both HEW and VA maintain that the contractor is exempt from subsection 3(m) when the agencies (1) obtain only the summary results of the contractor's work (usually in a statistical report) and (2) do not require the contractor to furnish individually identifiable data. They reason that an "agency function" is not involved when the contracting agency is interested only in the results of the research or other work done under the contract, generally in the form of a report, and does not require the contractor to furnish individually identifiable records.

The Privacy Protection Study Commission reviewed HEW's position and concluded that its interpretation, although narrow, was consistent with OMB's guidelines. However, the Commission felt that a position opposite to HEW's would also be easy to defend. We agree with the Commission on both points. (See app. IV.)

Although the other departments and agencies did not have legal interpretations of "agency function," many officials said they considered this term the most difficult to interpret. One official commented that, if "contracting" were to be viewed as an agency function, then presumably all contracts involving personal information would be subject to the act.

PROCUREMENT REGULATIONS DIFFER FROM OMB GUIDELINES

When an agency determines that a Federal contract should be subject to the Privacy Act, the contract should specifically say that the act applies. At OMB's direction, GSA, in September 1975, revised the Federal Procurement Regulations (FPRs), instructing agency procurement offices to put this specific language in such contracts. In November 1975 the U.S. Postal Service revised its procurement regulations, and in July 1976 the Department of Defense (DOD) revised the Armed Services Procurement Regulations for the same purpose.

Revisions to all three procurement regulations generally require the same contractual language:

"(a) The Contractor agrees:

(1) To comply with the Privacy Act of 1974 and the rules and regulations issued pursuant to the Act in the design, development, or operation of any system of records on individuals in order to accomplish an agency function when the contract specifically identifies (i) the system or systems of records and (ii) the work to be performed by the contractor in terms of any one or combination of the following: (A) design, (B) development, or (C) operation * * *." (Underscoring supplied.)

The language shows that, when the contract specifically identifies the system of records and states how the records are to be used, the contractor can be held liable for violating the Privacy Act. On the other hand, OMB guidelines recognize that contractors may, sometimes, be subject to the Privacy Act even if a system of records cannot be specifically identified when the contract is awarded. This raises the question: Why do the procurement regulations include this requirement?

According to a GSA official, FPRs were written that way because the agency felt contractors should not have to pay possible penalties for not complying with the Privacy Act unless they knew precisely what information was subject to the act. However, Department of Transportation officials complained that specific systems or records could not always be identified when a contract was awarded, since predicting at that time whether a system of records, as defined in the act, would be needed was not always possible. Transportation issued its own internal procedure require that contractors be made aware that they might need to comply with the requirements of the Privacy Act, even if their contracts did not refer to a system of records.

We believe that agencies which have difficulties in deciding whether contractors will need a system of records (as defined in the Privacy Act) at the time of contract award should devise a method to ensure that contractors establishing needed systems of records after contract award are aware that the Privacy Act applies to those systems also.

An appropriate way to do this would be to provide in the contract that the contractor must apprise the contracting agency if, in performing under the contract, it becomes necessary for the contractor to establish a system or systems of records containing personal information, since these would be subject to the Privacy Act.

Guidelines may not be available
to those needing them

Although our review of the dissemination of OMB and agency guidelines was general, in several cases agency groups responsible for implementing subsection 3(m) did not have copies of the guidelines. Many contractors were in a similar situation.

LACK OF TRAINING OF AGENCY
AND CONTRACTOR PERSONNEL

Formal training programs, either Government-wide or within individual agencies, would help to acquaint agency and contractor personnel with Privacy Act requirements. Possible interpretations of subsection 3(m) could then be made more consistent, and the relatively limited agency guidance already issued could be explained. However, with rare exceptions, such training programs have been minimal. Most agencies did provide brief--normally a day or less--orientation programs for selected personnel. The programs were on the overall requirements of the Privacy Act; but, according to agency officials, subsection 3(m) was normally discussed briefly, if at all.

Contractor personnel generally have had even less formal training than agency personnel of the Privacy Act. One notable exception is the DOD Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) contractors that have agreed within their contracts to provide Privacy Act training to their employees.

DOD requested \$2.4 million specifically to conduct training sessions in fiscal year 1977 on the Privacy Act and Freedom of Information Act. As part of this program, contracting personnel were to be trained on the requirements of subsection 3(m). This request was turned down in conference by the Senate and House Appropriations Committees. According to DOD officials, the reason was that providing funds for this special training was considered to be a Civil Service Commission responsibility. We did not assess how this action affected DOD's ability to provide subsection 3(m) training.

CHAPTER 3

AGENCIES AND CONTRACTORS HAVE DONE

LITTLE TO CARRY OUT SUBSECTION 3(m)

The 10 agencies and about 60 contractors reviewed paid little attention to implementing subsection 3(m). Agency officials sometimes had difficulty deciding which contracts should be subject to the Privacy Act, and, even when they considered it applicable, most agencies did not monitor contractors to make sure they complied with the act's requirements. The contractors generally were not familiar with the act's requirements and did little, if anything new, when contracts included a Privacy Act clause. Many did recognize the need to keep personal information confidential and secure.

PROBLEMS DECIDING WHICH CONTRACTS SUBJECT TO THE ACT

Partially because of difficulties in interpreting the act and guidelines, agencies sometimes had problems deciding which contracts should be subject to the Privacy Act's requirements. Generally, contracting officials made each decision without any special training and without the advice of legal or Privacy Act officials. The rationale for these decisions was neither routinely documented nor centrally reviewed for appropriateness or consistency. In this environment, decisions were sometimes inconsistent and questionable, as shown in examples on pages 12 and 13 of this report.

At most contracting offices visited, the policy was to look at each contract to see whether the Privacy Act clause should be included. In a few instances, contracting officials stated that they simply included the clause in all contracts to be "safe." Another view was that this would be unwise, since it would unnecessarily increase administrative work and possibly dilute the importance of clearly applicable contractual clauses. A few officials thought that contractors would be subject to the act whether or not the clause was in the contract.

CONTRACTS IDENTIFIED BY AGENCIES AS SUBJECT TO PRIVACY ACT

Readily identifying Federal contractors involved with systems of records as defined in the act is not easy. Agencies' systems are often not thoroughly described in the Federal Register because requirements to do so are not

specific and agencies use discretion. We found that contractors' involvement with systems of records fall into the following patterns:

- No reference to contractors, even though they are involved.
- Reference to contractors only in a general way, without reference to specific contractors' names.
- Reference to some, but not all, contractors involved.
- Reference to contractors' names, but not all locations.
- Complete reference to all contractors involved and their locations.

At our request, the 10 departments and agencies identified 172 systems of records in which contractors were involved. In accordance with our request, most of these systems had 10,000 or more individual records; some agencies also identified smaller systems.

Total Systems of Records and Those Involving Contractors for 10 Selected Departments and Agencies

Department or agency	Total (note a)		Systems involving contractors		Percentage of individuals where contractor is involved
	Number of systems	Number of individuals	Number of systems	Number of individuals	
DOD	2,219	321,300,000	79	19,442,852	6.0
Labor	97	23,300,000	5	b/18,793,250	80.7
Housing and Urban Development	58	27,200,000	5	c/8,274,900	30.4
Transportation	263	25,000,000	9	471,612	1.9
Agriculture	235	28,500,000	9	168,760	.6
Interior	274	15,000,000	1	10,500	.1
U.S. Postal Service	71	107,700,000	4	1,479,873	1.4
HEW	693	1,313,000,000	53	d/111,038,822	8.4
Commerce	95	446,800,000	4	e/3,616,804	.8
VA	52	156,300,000	3	f/74,790,312	48.0
Total	4,057	2,464,100,000	172	238,087,685	9.6
Government-wide	6,753	3,852,800,000			
Percentage reviewed	60		64		

a/Source: OMB's annual report on the Privacy Act for calendar year 1976.

b/Two systems, including 18,000,000 individuals (96 percent), were established by the agency with later contractor involvement.

c/One system of 7,155,000 individuals (87 percent) was established by the agency with later contractor involvement.

d/One component with a maximum of 493,000 individuals was not included.

e/One system of 3,514,265 (97 percent) individuals was established by the agency with later contractor involvement.

f/Conceivably, any record is available to contractors; however, at any given time, the number of records handled by contractors would vary.

Most large systems identified were not initiated by contractors; rather, they were initially established by the agency with a contractor becoming involved later, such as in microfilming or automating records containing personal information. Agencies would have to comply with the act for systems they established--whether or not a contractor was involved.

A few contracts the departments and agencies identified as subject to the act did not contain the Privacy Act clause. In some cases, the clause was left out by mistake, and agency officials stated this would be corrected. In other cases, agency officials stated that their contracts should not have included the clause, since they believed the contracts should not be subject to the act.

Although we did not review the statement of work in all contracts identified, many of those reviewed did not identify a specific system of records. As discussed in chapter 2, the inclusion of a Privacy Act clause without identification of a specific system of records in the contractual statement of work might not bind the contractor to comply with the act. Therefore, even where a clause is in the contract, if specific systems are not identified, it would be questionable as to whether a contractor could be held liable to comply with the requirements of the act.

OTHER CONTRACTS THAT INVOLVE PERSONAL INFORMATION

At 9 of 10 agencies, we found contracts other than those identified in response to our request which involved contractors maintaining or using personal information--but did not include Privacy Act clauses. In questioning agency officials about this, we received the following categories of explanations.

- The act clearly or probably should apply, and the clause was omitted inadvertently.
- The personal information was not considered a system of records, as defined in the law and implementing guidance.
- The contractor was not considered to be performing an "agency function."
- Due to other individual interpretations of the law and existing guidelines, the contract was not considered subject to the act.

After reconsideration, agency officials at eight agencies agreed that some contracts identified by us should clearly or probably be subject to the act. (See app. II.) The pertinent clause had not been included in the original contract, usually because of human error or the contracting official's lack of familiarity with Privacy Act requirements. Agency officials agreed to either add the clause or at least study the matter further.

For some contracts, agency officials did not agree that the act applied because personal information used by Federal contractors was not considered a system of records as defined in the act. For example, several hundred Department of Housing and Urban Development contractors that managed rental properties maintained various personal information, such as employer, income, and credit references. However, agency officials did not include the Privacy Act requirement in these contracts. They did not consider the personal information a system of records since it was retrieved by address or apartment number, which was not considered a unique individual identifier. Some contractors also maintained cross indexes from addresses to names. However, agency officials responded that such cross indexes were not necessary to the contractor's work, and, therefore, the Privacy Act did not apply.

Agency interpretations of the term "agency function" like those of HEW and VA have excluded some contractor-operated systems from the requirements of the act. Also we found that officials in other agencies used similar thinking in deciding to exclude research contracts from Privacy Act requirements.

Individual contracting officials even within the same department or agency sometimes reached different conclusions about the same type of contracts. For example, two different DOD sites had contracts for the same type of radiological services; one had a Privacy Act clause but the other did not. Also, within HEW different offices made different decisions about whether the same types of contracts should be subject to the Privacy Act.

The 10 departments and agencies reviewed award thousands of individual contracts annually. Identifying all individual contracts involving personal information and possibly subject to the act would have been impractical for us. However, examples cited in this report, in our opinion, clearly show that many Federal contractors are handling personal information pursuant to contracts that do not include the Privacy Act clause.

AGENCIES USUALLY DO NOT MONITOR
CONTRACTOR PRIVACY ACT COMPLIANCE

After agencies determine which contracts are subject to the Privacy Act, a system to ensure that those contractors comply with the many requirements of the law would seem necessary. Theoretically, the responsibility for monitoring contractors' compliance with the act's requirements could be assigned to the contracting office, the program office, Privacy Act officials, an internal audit or review office, or a combination of these. Although this responsibility was usually not formally assigned, agency officials generally identified the contracting and program offices as jointly responsible. However, with rare exceptions, agencies have simply not monitored contractors' Privacy Act compliance.

One exception was CHAMPUS. In December 1977 CHAMPUS established the Contract Performance Review Division to monitor its contractors. Such Privacy Act duties as maintaining confidentiality, permitting access to records, and training personnel are a small part of the division's overall review.

According to agency officials, the two most compelling reasons for the lack of monitoring are:

- A lack of resources. According to agency officials, they usually had to comply with the requirements of the act and with subsection 3(m) in particular without any additional funds or personnel. They noted that monitoring contractors' actions could be very costly, particularly if numerous onsite visits to contractors were required.
- The facts that few, if any, alleged abuses of personal privacy involving Federal contractors have surfaced.

Other reasons were:

- The competing demands of assuring compliance with many other contractual clauses, some of which the public is more aware of, such as the Equal Employment Opportunity clause.
- A judgment by agency officials that some contractors, due to other laws, their profession, or tradition, could be relied on to keep personal information confidential and secure without monitoring.

Generally, the agencies' lack of monitoring creates a situation in which only those Privacy Act issues or problems which the contractor chooses to highlight would come to the attention of the contracting agency. The situation is aggravated by the usual lack of formal training given contractor personnel, making it difficult for them to detect important issues or problems. Although agencies and contractors do communicate on many other subjects and some Privacy Act matters may come up incidentally, agencies clearly have little means of finding out about substantive privacy-related issues.

MINIMAL IMPACT OF PRIVACY ACT ON CONTRACTORS

Visits or telephone contacts with about 60 Federal contractors showed that, even where the Privacy Act clause was in the contract, contractor operations usually did not change. Moreover, with minor exceptions, the contractors had not billed the Government for additional costs related to the Privacy Act requirements. However, HEW officials noted that, at the time of our review, Medicaid contractors had been given new guidelines on the security requirements of the act. Some contractors had provided a preliminary assessment to HEW that their security measures would need to be upgraded at substantial costs, although no specific estimates were available.

Most contractor officials simply stated that they were not doing anything new because of the Privacy Act clause in their contracts. Many also acknowledged they were not familiar with the details of the act. We blame this on the lack of training or other orientation programs to acquaint contractors with the act.

According to many contractor officials, there was no need to do anything new because of the Privacy Act, since prior practices assured them that personal information would be kept confidential and secure. For example, representatives of

- the medical profession pointed out that their long-standing practices were to treat patient information confidentially and
- several corporations noted that they normally processed sensitive data, such as bank records, for non-Federal clients whose businesses they could not solicit and retain without assurances of confidentiality and security.

One measure of the act's effect on contractors might be how frequently access is requested to systems of records in which they are involved. We did not identify any contractors that handled requests for access to records without agency involvement. Since most published systems of records refer individuals to the agency rather than the contractor, we asked how many requests had been received at the agencies. As best we could determine, agencies had received requests for access to very few contractor-operated systems.

CHAPTER 4

WHAT HARM CAN BE DONE?

Recognizing that agencies and contractors have paid little attention to implementing subsection 3(m), the basic question remains: What harm can be done? The answer is not simple, since contractors handle many types of personal information with different commercial value and potential harm to individuals if it is released to an unauthorized party. Even contractors' lack of concern or compliance with the act would not necessarily lead to harm in all cases. However, how contractors handle information either raises or lowers the chance of unauthorized disclosure or misuse of information.

We learned of only one instance of misuse of personal information that was handled by a Federal contractor. 1/ In this case, personal information used by a contractor was stolen after the effective date of the Privacy Act; the contract was awarded earlier but had not been amended to include a Privacy Act clause. However, to be reasonably sure that other or widespread privacy-related problems were not occurring would have required a far more exhaustive study than ours.

A list of theoretical problems that could occur would be lengthy. To name just a few:

- Contractors may decide after getting the contract they will need to establish a system of records to do their work, but simply not tell the agency of its existence.
- Individuals may request access to contractors for contracted systems of records as published in the Federal Register but be denied their legal right to them, if contractor personnel do not know the law.
- Contractors' security practices, particularly if they are unfamiliar with the act, could lead to willful or inadvertent disclosure of data.

1/Other misuses or inappropriate ways of collecting personal information by private firms, not necessarily under Federal contracts, have been reported elsewhere. For example, see pp. 173 and 174 of "Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission," July 1977.

Such problems may cause severe or minor harm. No evidence shows that such problems are widespread; on the other hand, no evidence shows that they do not exist. Although contracting agencies have done little beyond including a Privacy Act clause in some contracts, we believe the mere inclusion of this clause and reference to possible criminal penalties may be serving as a deterrent to contractors that might violate privacy rights.

PERSONAL INFORMATION CONTRACTORS HANDLE

Discussed below are some examples of personal information subject to the act and contractors' involvement in the 172 systems of records identified by 10 departments and agencies. (See p. 11.)

In DOD

- 1 contractor placed about 300,000 Army personnel records on microfiche,
- 17 contractors processed claims for reimbursement for medical services under a medical program (claims from about 1,500,000 people processed annually), and
- 1 contractor designed a microfilming system and helped to microfilm about 885,000 Navy personnel records.

Within HEW

- 17 contractors doing dental research established records on a total of about 67,000 individual participants;
- medical doctors each provided medical services to varying numbers of American Indians annually;
- a large corporation, which normally provided credit ratings to other businesses, provided credit ratings to HEW on applicants for student loans or loan guarantees; and
- over 120 contractors processed claims for reimbursements under the Medicare program (about 26,000,000 active records).

In the Department of Labor

- 2 other Federal departments and 14 private firms, State/local governments, or nonprofit organizations operated 60 Job Corps centers with 200 to 2,200 enrollees per center; and
- 1 contractor developed a system to automate files used under the Federal Employees' Compensation Act, involving about 13,000,000 records.

Other contracts awarded by the 10 departments and agencies involved such personal information as

- Federal employees' personnel, payroll, and benefit records;
- psychological and medical records on veterans, American Indians, Federal employees, and others;
- various educational and aptitude records; and
- miscellaneous others, such as the names of stamp collectors and applicants for flood insurance.

Some of the above types of records, such as credit ratings, have direct commercial value. Also a mailing list audience could exist for others, such as names of military personnel, older citizens, or students--depending on what a commercial firm may be selling or promoting. Some information, on the other hand, may have very limited commercial value, such as the names of a few children participating in dental research.

Also the unauthorized disclosure of information, such as poor credit ratings or psychological records, could do much more harm than records on military service.

KEEPING IT SAFE

As discussed in chapter 3, most contractors we met with were not familiar with the detailed requirements of the Privacy Act, or more specifically, subsection 3(m). On the other hand, many contractors said they understood and appreciated the importance of keeping confidential and personal information safe. They added that they had security-minded practices, with or without a specific contractual requirement relating to the Privacy Act. Some examples of the environments observed or discussed at the 60 contractors we reviewed are discussed below.

One large corporation had a contract with one agency of the Department of Agriculture to prepare individual statements of employee benefits. To complete the contract, the contractor needed access to the payroll and personnel records of the agency's employees. Contractor officials stated that, as a matter of corporate practice, no one other than authorized Agriculture officials was permitted access to these records while they were being used and that the entire files were returned to Agriculture after the contract was completed. Contractor officials noted that they have several hundred other clients, such as commercial banks, whose business was obtained partially based on the corporation's reputation for handling sensitive data in a confidential and secure manner. Accordingly, the corporation needed to be especially attuned to confidentiality and security needs.

Generally, the medical doctors, hospitals, and other providers of medical services who had contracts with HEW, VA, and other departments and agencies expressed a similar view when we contacted them. That view was that the medical profession has longstanding traditions of keeping patient files confidential. We noted some variations in how securely files were maintained, but the concern with patient confidentiality was common.

One CHAMPUS contractor had several security measures, partly because of the requirements of the Privacy Act and partly because of the nature of its business. Security measures included guarding entrances and exits and separating employees involved in the CHAMPUS contract from other company business. The contractor also had plans to make a formal study of the security needs of its computer system and to offer Privacy Act training to its employees.

Another contractor, assisting Navy personnel in micro-filming personnel records, worked completely on the Navy's premises and under control of Navy personnel. In this environment, the likelihood of misuse or unauthorized disclosure of information by the contractor should be considerably reduced, even if the contractor knew little about the Privacy Act's requirements.

Other measures relating to confidentiality and security of personal information at some contractors were

- a requirement to have contractor employees sign statements acknowledging their awareness of Privacy Act requirements and

- a corporate practice of discharging employees who made unauthorized disclosures of confidential information.

On the other hand, many contractors had not yet made formal studies of the possible security risks associated with computer systems used to process personal information. And we found a few cases of rather loose security practices over manual systems. For example, personal information was sometimes stored in unsecured areas, such as unlocked cabinets or on open shelves.

In summary, contractors handle many kinds of information to perform a variety of tasks for the Federal Government. Their practices regarding security and confidentiality of this information have changed little because of the Privacy Act. Those practices often afford some protection, but more could be done, such as improving computer security. Unauthorized release or misuse of some kinds of information clearly poses a threat to individuals, but other information may pose little harm.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The applicability of the Privacy Act of 1974 to Federal contractors is not clearly understood. Implementation of the subsection of the act addressing contractors has been given low priority by contracting agencies and by contractors. This is evident from

- the sparse and sometimes unclear guidelines issued to implement subsection 3(m);
- the low level of training given to agency and contractor personnel to acquaint them with the subsection;
- the acknowledgement by agency officials that they had not included the Privacy Act clause in many cases where it should have been included;
- the almost complete lack of monitoring by contracting agencies to determine whether those contractors considered subject to the act do, in fact, comply with its requirements; and
- the general absence of new initiatives by contractors obligated to meet the act's requirements.

Many agency and contractor officials believe this is not a cause for concern because

- prior practices by contractors often already assured the protection of personal information; and
- in few, if any, cases have Federal contractors violated the privacy rights of individuals.

Even so, there is a potential for harm of varying consequences to persons involved, because some Federal contractors handle highly sensitive and/or commercially valuable personal information and security practices vary extensively among contractors. Abuses of personal information in the private sector have been reported. Moreover, although the existing legislation perhaps could be further clarified, there is no doubt that the Congress intended Federal contractors that operated systems of records containing personal

data that, in effect, replace agency systems to comply with the Privacy Act's requirements.

RECOMMENDATIONS

We believe the Director, OMB, should direct and encourage Federal agencies to improve their effort to comply with subsection 3(m) of the Privacy Act of 1974. More specifically, we recommend that the Director:

- Improve and expand OMB guidelines to assist agencies in making decisions as to which contracts should be subject to the act. A clear explanation of the rationale for coverage, and more examples, would be useful.
- Encourage the Civil Service Commission (and its successor) and agencies to include appropriate coverage of subsection 3(m) in Privacy Act training programs.
- Work with agencies to clarify procurement regulations so that they are consistent with OMB guidelines and ensure that contractors are aware of what information is subject to the act's requirements.
- Reemphasize OMB existing guidance to agencies that all contracts be reviewed for possible applicability of the Privacy Act.
- Direct agencies to acquaint contractors--through training programs or, if appropriate, less costly measures, such as periodic written reminders--of the Privacy Act's requirements.
- Require that agencies establish an appropriate method of monitoring contractors' compliance with the act.

If resources are unavailable for regular onsite reviews of contractors, other less costly alternatives, such as contractor certifications of compliance and periodic spot checks, should be considered.

CHAPTER 6

LEGISLATIVE ALTERNATIVES CONCERNING THE APPLICATION OF THE PRIVACY ACT TO CONTRACTS

How the Congress intended the Privacy Act to apply to Federal contractors remains unclear; the legislative history is exceptionally sparse relative to contractor obligations under the Privacy Act. The 3(m) provision of the Privacy Act is the only part of the entire act which directly affects the private sector. Some people believe that, because of this provision the act may possibly be expanded to the private sector. However, its purpose for being, in contrast to the problems in interpretation which this section has evoked, is clear. The provision provides Privacy Act application for systems of records containing personal data when they are available to a contractor because of a function the contractor performs for an agency; that is, except for the contract the agency would perform the function.

We have discussed in previous chapters of this report the general absence of effective adherence to the 3(m) provision by both agencies and contractors. We recommend in chapter 5 actions which OMB should take to hopefully improve agencies' and departments' compliance with subsection 3(m). Since to an undetermined extent the problems may relate to the legislative language, this chapter addresses the major alternatives, as we view them, that are available should the Congress decide that subsection 3(m) needs clarification to express clearly congressional intent.

SHOULD SUBSECTION 3(m) REMAIN UNCHANGED?

The primary advantage of leaving subsection 3(m) unchanged would be that agencies and contractors would not have to adjust to something new. As indicated in earlier chapters, many agency and contractor personnel are not yet familiar with the current law. But they have gained some knowledge and experience, and it can be retained and improved on if the subsection remains unchanged. The current use of the Privacy Act clause, even without further action by contracting agencies, may be serving as a deterrent to contractors who might otherwise violate the privacy rights of individuals.

The likely disadvantages of this course of action would be that:

- Some agency and contractor personnel will remain confused about the meaning and intent of the legislation.
- Without the impetus of clearer congressional intent, agencies and contractors will continue to give low priority to implementing subsection 3(m).

ALTERNATIVES

We believe the intent of the 3(m) subsection legislation can be clarified by

- modifying subsection 3(m) to make it more definitive,
- expanding the Privacy Act to include all personnel information handled by Federal contractors, or
- repealing subsection 3(m).

The major theoretical advantages and disadvantages of each alternative are presented below. In our view, the preferable approach would be to modify subsection 3(m) to make it more definitive. The other two alternatives would seem to be extreme measures.

SHOULD SUBSECTION 3(m) BE CHANGED TO MAKE IT MORE DEFINITIVE?

Some problems with implementing subsection 3(m) relate to difficulties in understanding the language in the legislation. For example, as discussed in chapter 2, many agency officials consider the terms "agency function" and "operation" (of a "system of records") to be very difficult to interpret. Changing the law to clarify or expand on the meaning of these and other problematical terms would be useful to agencies attempting to understand congressional intent.

However, in considering any possible revisions to the law, we believe the Congress should be guided by agencies' experiences to date in implementing subsection 3(m). In short, very little has been done to implement the legislation as it now exists. It is not clear how much this lack of attention is due to difficulties in understanding the law and how much is due to other reasons, such as the lack of resources or the low priority attached thereto.

Even so, the inconsistencies in interpretation of subsection 3(m) should be lessened by clarifying the legislative language. We recognize that it may not be feasible to develop legislative language that would completely preclude variations of interpretation. For example, the Privacy Protection Study Commission--after a major effort--proposed revisions to the entire Privacy Act, including subsection 3(m). We believe the Commission's proposed revision of subsection 3(m) would lessen, but not eliminate, the inconsistencies in interpretation.

In short, the theoretical advantages of modifying subsection 3(m) to make it more definitive would be:

- Clarification of congressional intent.
- Better likelihood of consistent interpretation of the law.
- A catalyst for agencies to do more to implement the law.

The main disadvantages would be:

- A need for agencies to become familiar with changes.
- The continuing possibility that the revised law may also be subject to varying interpretations.

On balance, in enacting any future legislation affecting the Privacy Act, we believe the Congress should revise subsection 3(m) to ensure that it expresses congressional intent as definitively as practicable.

SHOULD THE PRIVACY ACT COVER ALL PERSONAL INFORMATION HANDLED BY CONTRACTORS?

The legislation and OMB guidelines--as presently written--clearly exclude from the act certain contractor-handled personal information, such as records on individuals employed in providing goods and services to the Government. In addition to such clear exclusions, other contractor-handled information has been excluded by guidelines and interpretations of the law. The law could be changed to simply include all systems of records containing personal information handled by contractors in federally financed activities.

The primary advantage of this major legislative change would be to greatly clarify how the Privacy Act applies to contractors. Contracting agencies would still need to understand the other provisions and terms, such as "system of records," in the act. But the need to understand and interpret the term "agency function" would be eliminated.

The main disadvantages would likely be:

--Significant resistance from Federal contractors.

--Increased cost of contracted activity.

--A larger drain on the resources and energies of contracting agencies to cause contractors to comply with the legislative requirements.

SHOULD SUBSECTION 3(m) BE REPEALED?

Other than expanding subsection 3(m) to include all Federal contractors, the most radical legislative alternative would be to repeal the subsection.

The primary advantages of this alternative would be:

--An end to questions about the applicability of the Privacy Act of contractors.

--A reduction in costs, however minimal, associated with the implementation of the subsection.

The main disadvantage would be that Federal agencies would have opportunities to circumvent the Privacy Act through contracting out activities involving systems of records which the agency otherwise would have had to protect in accordance with the act's requirements, although the likelihood of this occurring is difficult to assess.

Another disadvantage would be that Federal privacy legislation extending to the private sector would no longer exist. This could be construed as a signal to the private sector that the Congress does not attach a high priority to privacy issues. As a result, enactment of any privacy legislation relating to the private sector may become very difficult in the future.

INSTALLATIONS AND LOCATIONS REVIEWED

<u>Installation</u>	<u>Location</u>
DEPARTMENT OF AGRICULTURE:	
Animal and Plant Health Inspection Service	Hyattsville, Md.
Farmers Home Administration	Washington, D.C.
Forest Service	Washington, D.C.
Forest Service, Region V	San Francisco
Office of General Counsel	Washington, D.C.
Science and Education Administration	Hyattsville
Science and Education Administration, Western Area Region	Berkeley, Calif.
DEPARTMENT OF COMMERCE:	
Office of the Secretary	Washington, D.C.
Patent and Trademark Office	Washington, D.C.
DEPARTMENT OF DEFENSE:	
Army Forces Command Headquarters	Fort McPherson, Ga.
Army Material Development and Readiness Command Headquarters	Alexandria, Va.
Army Military Personnel Center	Alexandria
Army Training and Doctrine Command Facility	Fort Benning, Ga.
Civilian Health and Medical Program of the Uniformed Services	Denver, Colo.
Defense Contract Audit Agency, San Francisco Region	San Francisco
Defense Logistics Agency	Alexandria
Defense Privacy Board	Washington, D.C.
Naval Bureau Personnel	Washington, D.C.
Naval Regional Procurement Office	Washington, D.C.
HEW:	
Office of the Secretary	Washington, D.C.
Office of Education	Washington, D.C.
Public Health Services:	Washington, D.C.
Health Services Administration:	
Bureau of Medical Services	Hyattsville
Indian Health Service	Rockville, Md.
National Institutes of Health	Alberquerque, N. Mex.
Public Health Service	Rockville
Hospital	San Francisco
Regional Office VIII	Denver

<u>Installation</u>	<u>Location</u>
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT:	
Atlanta area offices	Various locations
Headquarters	Washington, D.C.
Region IV	Atlanta
DEPARTMENT OF THE INTERIOR:	
Bureau of Indian Affairs.	Washington, D.C.
Bureau of Indian Affairs, Sacramento Region	Sacramento, Calif.
Bureau of Land Management	Washington, D.C.
Bureau of Land Management, California State Office	Sacramento
Bureau of Reclamation	Washington, D.C.
Bureau of Reclamation, Sacramento Region	Sacramento
National Heritage and Recreation Service, San Francisco Region	San Francisco
National Park Service: District Office	Yosemite National Park, Calif.
Western Regional Office	San Francisco
Office of Administrative and Management Policy	Washington, D.C.
DEPARTMENT OF LABOR:	
Employment Standards Administration	Washington, D.C.
Employment Standards Administra- tion, District Office of Workers Compensation	Jacksonville, Fla.
Employment Standards Administra- tion, Region IV	Atlanta
Employment Training Administration	Washington, D.C.
Employment Training Administration, Region IV	Atlanta
Occupational Safety and Health Administration, Region IV	Atlanta
Office of Assistant Secretary for Administration and Management Region IV	Washington, D.C.
Solicitor Office	Atlanta Washington, D.C.
U.S. POSTAL SERVICE:	
Headquarters	Washington, D.C.
San Jose District Office	San Jose, Calif.
Western Regional Headquarters	San Bruno, Calif.

InstallationLocation

DEPARTMENT OF TRANSPORTATION:

Office of the Secretary
 Federal Aviation Administration
 Federal Aviation Administration,
 Western Region
 Federal Highway Administration,
 Region IX
 Federal Railroad Administration
 National Highway Traffic Safety
 Administration
 National Highway Traffic Safety
 Administration, Region IX

Washington, D.C.

Washington, D.C.

Los Angeles, Calif.

San Francisco

Washington, D.C.

Washington, D.C.

San Francisco

VA:

Headquarters
 Veterans Administration Hospital

Washington, D.C.

Salt Lake City, Utah

IMPLEMENTATION OF SUBSECTION 3(m) BY OFFICES VISITED

	<u>Agriculture</u>	<u>Commerce</u>	<u>Defense</u>	<u>HEW</u>	<u>Housing and Urban Development</u>	<u>Interior</u>	<u>Labor</u>	<u>Postal Service</u>	<u>Transportation</u>	<u>VA</u>
Privacy Act responsibilities (note a)	Part time	Part time	Some full time; some part time	Some full time; some part time	Some full time; some part time	Part time	Part time	Part time	Part time	Part time
Written guidelines on subsection 3(m) issued by (note b):	X	X	X	X	X	X	X	X	X	X
Department/										
headquarters										
Components										
Other written interpretation	None	None	On disclosures to contractor	On research contracts where agencies do not receive individually identifiable records	None	None	None	None	On contracts awarded before Privacy Act and state-ments of work	Similar to HEW's
Privacy Act clause in contracts (note c):	X	X	X	X	X	X	X	X	X	X
Cases by case										
All contracts										
Agency training for Privacy Act:										
General										
Subsection 3(m)	Some	Some	Some	Some	Some	Some	Some	Some	Some	Some
For contractors	Little	None	None	Little	Little	None	None	None	None	None
Has agency monitored contractors' compliance with act (note d)?	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
Per agency, number of systems of records involving contractors	9	4	79	53	5	1	5	6	9	3
Number of associated contractors (note e)	86	5	472	(£)	(£)	1	(£)	4	9	2

Privacy Act responsibilities (note a)

Written guidelines on subsection 3(m) issued by (note b):

Department/

headquarters

Components

Other written interpretation

Privacy Act clause in contracts (note c):

Cases by case

All contracts

Agency training for Privacy Act:

General

Subsection 3(m)

For contractors

Has agency monitored contractors' compliance with act (note d)?

Per agency, number of systems of records involving contractors

Number of associated contractors (note e)

	<u>Agriculture</u>	<u>Commerce</u>	<u>Defense</u>	<u>RFW</u>	<u>Housing and Urban Development</u>	<u>Interior</u>	<u>Labor</u>	<u>Postal Service</u>	<u>Transportation</u>	<u>VA</u>
Other contracts without the Privacy Act clause in which contractors handle personal information:										
Number of contracts	2	-	5	14	700	18	9	3	21	10
Agency position on whether clause should be added:										
Agreed	-	-	5	8	-	18	9	1	4	10
Disagreed	-	-	-	4	-	-	-	2	15	-
Pending	-	-	-	2	700	-	-	-	2	-
Number of contractors reviewed:										
Washington, D.C., area	1	1	2	2	1	-	3	1	1	1
Other locations	3	-	5	18	-	8	3	2	5	6
Impact of clause on contractors	None	None	Minimal	Minimal	None	None	Minimal	Minimal	None	None

a/None of the Privacy Act officials contracted indicated any significant involvement in implementation of subsection 3(m).

b/Generally, written guidelines do not go beyond the legislation and/or OMB guidelines. In some instances, agency guidelines are even less clear.

c/Decisions are made by contracting offices. Although legal reviews of contracts are normal, the Privacy Act does not appear to be of particular concern in such review.

d/While no specific monitoring of Privacy Act compliance was identified, in isolated instances broader contract reviews have incidentally looked at privacy issues. No internal audits have been done.

e/We asked agencies to identify systems of 10,000 or more records; however, agencies were not consistent in their responses. In several cases, contracts did not include Privacy Act clauses.

f/Undetermined.

EXCERPTS FROM OMB GUIDELINESON SUBSECTION 3(m) OF PRIVACY ACT OF 1974

Agencies should review all agency contracts which provide for the maintenance of systems of records by or on behalf of the agency to accomplish an agency function to assure that, where appropriate and within the agency's authority, language is included which provides that such systems will be maintained in a manner consistent with the Act. See 5 U.S.C. 552a(m).

The Privacy Act provides that systems operated under a contract which are designed to accomplish an agency function are, in effect, deemed to be maintained by the agency. It was not intended to cover private sector record keeping systems but to cover de facto as well as de jure Federal agency systems.

'Contract' covers any contract, written or oral, subject to the Federal Procurement Regulations (FPR's) or Armed Services Procurement Regulations (ASPR's), but only those which provide '* * * for the operations by or on behalf of the agency of a system of records to accomplish an agency function * * *' are subject to the requirements of the subsection. While the contract need not have as its sole purpose the operation of such a system, the contract would normally provide that the contractor operate such a system formally as a specific requirement of the contract. There may be some other instances where this provision will be applicable even though the contract does not expressly provide for the operation of a system: e.g., where the contract can be performed only by the operation of a system. The requirement that the contract provide for the operation of a system was intended to ease administration of this provision and to avoid covering a contractor's system used as a result of his management discretion. For example, it was not intended that the system of personnel records maintained by large defense contractors be subject to the provisions of the act.

Not only must the terms of the contract provide for the operation (as opposed to design) of such a system, but the operation of the system must be to accomplish an agency function. This was intended to limit the scope of the coverage to those systems actually taking the place of a Federal system which, but for the contract, would have been performed by an agency and covered by the Privacy Act. Information pertaining to individuals may be maintained by an agency

(according to subsection (e)(1)) only if such information is relevant and necessary to a purpose of the agency required to be accomplished by statute or Executive Order of the President. Although the statute or Executive Order need not specifically require the creation of a system of records from this information, the operation of a system of records required by contract must have a direct nexus to the accomplishment of a statutory or Presidentially directed goal.

If the contract provides for the operation of a system of records to accomplish an agency function, then '. . . the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system.'

The clause '. . . consistent with its authority . . .' makes it clear that the subsection does not give an agency any new authority additional to what it otherwise uses. The subsection clearly imposes new responsibilities upon an agency but does not confer any new authority to implement it. Although the method by which agencies cause the requirements of the section to be applied to systems is not set forth, the manner of doing so must be consistent with the agency's existing authority. The method of causing was envisioned to be a clause in the contract, but as with the 'Buy America' provision in Government contracts, the breach of the clause was not necessarily intended to result in a termination of the contract. In addition, several of the requirements of the Privacy Act are simply not applicable to systems maintained by contractors, and this clause was a method of indicating that an agency was not required to impose those new standards. Agencies were given some discretion in determining the method or methods by which they would cause the otherwise applicable requirements to be applied to a system maintained under contract. This subsection does not merely require that an agency include provisions consistent with the Privacy Act in its contracts. It requires, in addition, that the agency cause the requirements of the act to be applied, limited only by its authority to do so. Because of this agency accountability--which underlies many of the provisions of the Privacy Act--there should be an incentive for an agency to cause its contractors who are subject to this subsection to apply the requirements of the section in a manner which is enforceable. Otherwise, the agencies may end up performing those functions in order to satisfy the activity of the 'cause' requirement.

The decision as to whether to contract for the operation of the system or to perform the operation 'in-house' was not intended to be altered by this subsection. Furthermore, this

subsection was not intended to significantly alter GSA and OMB authority under the Brooks Act (P.L. 89-306) or Executive Order No. 11717 dated May 9, 1973, concerning the method of ADP [automatic data processing] procurement. The principles concerning reliance upon the private sector, in OMB Circular No. 1-76, and related provisions were also not intended to be changed.

The provisions would apply to all systems of records where, for example--

the determinations on benefits are made by Federal agencies:

the records are maintained for administrative functions of the Federal agency such as personnel, payroll, etc: or health records being maintained by an outside contractor engaged to provide health services to agency personnel.

The provisions would not apply to systems of records where:

records are maintained by the contractor on individuals whom the contractor employs in the process of providing goods and services to Federal government.

an agency contracts with a state or private educational organization to provide training and the records generated on contract students pursuant to their attendance (admission forms, grade reports) are similar to those maintained on other students and are commingled with their records on other students.

When a system of records is to be operated by a contractor on behalf of an agency for an agency function, the contractual instrument must specify, to the extent consistent with the agency's authority to require it, that those records be maintained in accordance with the Act. Agencies will modify their procurement procedures and practices to ensure that all contracts are reviewed before award to determine whether a system of records within the scope of the Act is being contracted for and, if so, to include appropriate language regarding the maintenance of any such systems.

For systems operated under contracts awarded on or after September 27, 1975, contractor employees may be subject to the criminal penalties of subsections (i) (1) and (2) (for disclosing records the disclosure of which is prohibited by

the act or for failure to publish a public notice). Although the language is not clear on this point, it is arguable that such criminal liability only exists to the extent that the contractual instrument has stipulated that the provisions of the act are to be applied to the contractually maintained system. However, an agency which fails, within the limits of its authority, to require that systems operated on its behalf under contracts, may be civilly liable to individuals injured as a consequence of any subsequent failure to maintain records in conformance with the act. The reference to contractors as employees is intended only for purposes of the requirements of the act and not to suggest that, by virtue of this language, they are employees for any other purposes.

1-1.327-4 Applicability.

(a) Whenever a Federal agency contracts for the design, development, operation, or maintenance of a system of records on individuals on behalf of the agency in order to accomplish an agency function, the agency must apply the requirements of the act to the contractor and his employees working on that contract. Systems of records on individuals operated under a contract which are designed to accomplish an agency function are deemed to be maintained by the agency and are subject to Section 3 of the Act.

(b)(1) In order to establish the applicability of the clause in 1-1.327-5, it is necessary for the agency awarding a contract to determine whether a purpose of any system of records on individuals which may be involved is to accomplish an agency function. For the act to be applicable, the contract should specifically state whether it involves the design, development, or operation of such a system of records, but the contract should specifically state whether it involves the design, development, or operation of a system of records. The Act is not applicable to a system of records used by a contractor as a result of his management discretion. For example, it is not applicable to systems of personnel records maintained by contractors on their own behalf.

(2) Illustrations of systems of records to which the act applies include the following:

(i) The determinations on benefits are made by Federal agencies;

(ii) Records are maintained for administrative functions of a Federal agency, such as personnel and payroll; or

(iii) Health records are maintained by an outside contractor engaged to provide health services to agency personnel.

(3) Illustrations of systems of records to which the act does not apply include the following:

(i) Records are maintained by the contractor on individuals whom the contractor employs in the process of providing goods and services to the Federal Government; or

(ii) An agency contracts with a State or private educational organization to provide training, and the records generated on contract students pursuant to their attendance (admission forms, grade reports) are similar to those maintained on other students and are commingled with their records on other students. (40 FR 44503, Sept. 26, 1975)

1-1.337-5 Procedures

(a) All procurement requirements shall be reviewed to determine whether the design, development, or operation of a system of records on individuals to accomplish an agency function will be required and the related contract shall identify specifically which of those functions is to be performed by the contractor. If the design, development, or operation of such a system is required, related solicitations and contracts shall include the notification set forth in 1-1.337-5(b) and the clause set forth in 1-1.337-5(c). Pertinent implementing agency rules and regulations shall be made available in accordance with agency procedures. All contract work statements shall specifically identify (1) the system or systems of records and (2) the work to be performed by the contractor in terms of any one of the following: (i) Design, (ii) development, or (iii) operation.

(b) The following notification shall be included in every solicitation and resulting contract, and in every contract awarded without a solicitation, when the statement of work requires the design, development, or operation of a system of records on individuals for an agency function.

Privacy Act Notification

This procurement action requires the contractor to do one or more of the following: design, develop, or operate a system of records on individuals to accomplish an agency function in accordance with the Privacy Act of 1974. Public Law 93-579, December 31, 1974 (5 U.S.C. 552a) and applicable agency regulations. Violation of the act may involve the imposition of criminal penalties.

(c) The following clause shall be included in every solicitation and resulting contract, and in every contract awarded without a solicitation, when the statement of work requires the design, development, or operation of a system of records on individuals to accomplish an agency function.

Privacy Act

(a) The contractor agrees:

(1) To comply with the Privacy Act of 1974 and the rules and regulations issued pursuant to the act in the design, development, or operation of any system of records on individuals in order to accomplish an agency function when the contract specifically identifies (i) the system or systems of records and (ii) the work to be performed by the contractor in terms of any one or combination of the following: (A) design, (B) development, or (C) operation;

(2) to include the solicitation notification contained in this contract in every solicitation and resulting subcontract and in every subcontract awarded without a solicitation when the statement of work in the proposed subcontract requires the design, development, or operation of a system of records on individuals to accomplish an agency function; and

(3) to include this clause, including this paragraph (3), in all subcontracts awarded pursuant to this contract which require the design, development, or operation of such a system of records.

(b) In the event of violations of the act, a civil action may be brought against the agency involved where the violation concerns the design, development, or operation of a system of records on individuals to accomplish an agency function. Criminal penalties may be imposed upon the officers or employees of the agency where the violation concerns the operation

of a system of records on individuals to accomplish an agency function. For purposes of the act when the contract is for the operation of a system of records on individuals to accomplish an agency function, the contractor and any employee of the contractor is considered to be an employee of the agency.

(c) The terms used in this clause have the following meanings:

(1) 'operation of a system of records' means performance of any of the activities associated with maintaining the system of records including the collection, use, and dissemination of records.

(2) 'Record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transaction, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

(3) 'System of records' on individuals means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. (40 FR 44503, Sept. 26, 1975)

INTERPRETATIONS OF SUBSECTION 3(m), GAO'S LEGAL ANALYSISINTERPRETATION OF SUBSECTION 3(m)BY DEPARTMENT OF HEALTH, EDUCATION, AND WELFAREMAY 14, 1976

DATE: May 14, 1976

TO : John Ottina
Assistant Secretary for Administration
and Management

FROM : William H. Taft, IV (signed)
General Counsel

SUBJECT: Application of Privacy Act to HEW Contracts

This memorandum confirms the conclusion we reached at our meeting last week that the requirements of the Privacy Act of 1974 are not applicable to HEW research and other contracts which call for the contractor merely to furnish to the HEW contracting agency statistical or other reports, even though it is necessary for the contractor to establish a system of records to perform the contract. Our conclusion was based upon the statutory language and the interpretative guidelines on the Privacy Act issued by OMB.

The applicable provision of the Privacy Act is 5 U.S.C. 552a(m), which reads:

'Government Contractors--When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.'

It is clear that this provision does not apply to all Government contracts which entail the establishment of systems of records. Had Congress intended to cover all such

contracts, there would have been no need to include in 5 U.S.C. 552a(m) the phrase 'to accomplish an agency function.' This interpretation of the reach of 5 U.S.C. 552a(m) is consistent with OMB's interpretation of that subsection. In discussing the applicability of subsection (m), the OMB Privacy Act Guidelines state:

'Not only must the terms of the contract provide for the operation (as opposed to design) of such a system, but the operation of the system must be to accomplish an agency function. This was intended to limit the scope of the coverage to those systems actually taking the place of a Federal system which, but for the contract, would have been performed by an agency and covered by the Privacy Act.' (40 F.R. [Federal Register] 28948, 28976 (July 9, 1975))

It is fair to conclude that a system of records established by an HEW contractor for the purpose of enabling the contractor to prepare and submit to the HEW contracting agency statistical or other reports is not a system 'actually taking the place of a Federal system which, but for the contract, would have been performed' by the contracting agency. Where the contracting agency is interested only in obtaining the results of the research or other work performed under the contract (generally in the form of a report) and does not require the contractor to furnish it individually identifiable records from the system established by the contractor, it cannot be said that the system is one which 'but for' the contract, the agency would have established.

The examples given in the OMB Guidelines of types of contracts to which subsection (m) is applicable comport with the conclusion we have reached. Thus, OMB lists as examples of systems of records established by contract which are subject to the Privacy Act (1) records involving determination on benefits made by Federal agencies; (2) records which are maintained for administrative functions of a Federal agency such as personnel and payroll; and (3) health records maintained by an outside contractor engaged to provide health services to agency personnel (p. 28976).

Unlike contracts under which the creation of a system of records is merely a means to enable the contractor to meet its requirements to the contracting agency, the examples given in the OMB Guidelines involve the creation of systems of records which 'but for' the contract would have been performed by a Government agency.

The fact that a number of HEW contracts which entail the creation of systems of records would not be subject to the Privacy Act does not preclude the contracting agencies from including in the contract provisions designed to protect the confidentiality of the records and the privacy of the individual identified in the records. Indeed, we strongly recommend the inclusion of such provisions, where appropriate, in contracts not subject to the requirements of 5 U.S.C. 552a(m).

I understand that your office will issue appropriate instructions to Department personnel engaged in contracting activities in line with the conclusions expressed in this memorandum.

EXCERPTS FROM INTERPRETATIONOF SUBSECTION 3(m) BY VAMARCH 3, 1977

This is in reference to several cases * * * all of which raise the same basic legal question: in contracting situations, when must the agency include a provision making the Privacy Act, 5 U.S.C. 552a, applicable to the contractor? Subsection (m) of the Privacy Act and guidelines on this subsection, issued by the Office of Management and Budget (OMB), are pertinent to this inquiry. The Federal Procurement Regulations, section 1-1.327, follow and implement these guidelines.

* * * where the agency enters into a contract the purpose of which is to provide a statistical, research or other report in which individuals need not be identified to make the report, subsection (m) generally would not be applicable. For example, such a situation would be present when the agency merely wants to know the percentage of veterans have utilized a particular benefit, or to what extent a medical device improves the degree of mobility of veteran patients who have a particular type of disability. On the other hand, where the agency needs to be able to identify individuals to accomplish an agency purpose, a system of records identifying the individuals involved usually is necessary, and, generally, except in the education contractor situation, indicated below, subsection (m) would apply to such a system. Such a situation would be present where the agency utilized a contractor to provide medical care and treatment to VA patients. Another example would be where overpayments were being collected for the VA by a contractor. Additional examples have been published in the OMB guidelines and are adopted in the Federal Procurement Regulations. See Federal Register, July 9, 1975, p. 28976, subsection 1-1.327-4(b)(2), F.P.R.

GAO'S LEGAL ANALYSIS OF HEW'S POSITION

Richardson Preyer, Chairman of the Government Information and Individual Rights Subcommittee, House Committee on Government Operations, which has responsibility for oversight of the Privacy Act of 1974, 5 U.S.C. 552a, asked GAO about the implementation of subsection (m) of that act. The Subcommittee's particular interest was whether agencies' interpretation of coverage of the Privacy Act was consistent with its legislative intent. More specifically, the Chairman asked whether GAO finds that the Health, Education, and Welfare memorandum of May 14, 1976, from William H. Taft IV, General Counsel, to John Ottina, Assistant Secretary for Administration and Management, relative to subsection (m), is legally correct in limiting the scope of that section of the act.

Subsection (m) of the Privacy Act of 1974, 5 U.S.C. 552a, provides as follows:

"Government contractors

"When an agency provides a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency."

We agree with the statement in the HEW opinion that the above provision does not apply to all Government contracts which entail the establishment of systems of records. A system of records established by an HEW contractor for the purpose of enabling the contractor to prepare and submit to the HEW contracting agency statistical or other reports would not appear, as a general rule, to be subject to the requirements of subsection (m) of the Privacy Act. Such contracts apparently do not provide for the operation of a system of records, and even if a particular contract did so provide, it is not evident from the facts at hand that the operation would accomplish an agency function which, but for the contract, would have been performed by the agency. In this latter regard, see 40 Federal Register 28948, 28976 (July 9, 1975), which sets forth OMB's position as follows:

"Not only must the terms of the contract provide for the operation (as opposed to design) of such a system, but the operation of the system must be to accomplish an agency function. This was intended to limit the scope of the coverage to those systems actually taking the place of a Federal system, which, but for the contract, would have been performed by an agency and covered by the Privacy Act."

Also see the OMB guidelines at 40 Federal Register 28948, 28976 (July 9, 1975) which states:

"Although the statute or Executive order need not specifically require the creation of a system of records from this information, the operation of a system of records required by contract must have a direct nexus to the accomplishment of a statutory or Presidentially directed goal."

Mr. Ottina states in his memorandum:

"It is fair to conclude that a system of records established by an HEW contractor for the purpose of enabling the contractor to prepare and submit to the HEW contracting agency statistical or other reports is not a system 'actually taking the place of a Federal system which, but for the contract, would have been performed' by the contracting agency. Where the contracting agency is interested only in obtaining the results of the research or other work performed under the contract (generally in the form of a report) and does not require the contractor to furnish it individually identifiable records from the system established by the contractor, it cannot be said that the system is one which 'but for' the contract, the agency would have established."

The HEW memorandum concludes that since these systems of records do not accomplish an agency function and do not take the place of a Federal system which, but for the contract, would have been performed by the contracting agency, the systems need not be made subject to the requirements of subsection (m). We have no basis for disagreeing with this conclusion. However, HEW bases this conclusion upon the

fact that it does not want the system of records for the contracts in question, but only the results of the research. In our judgment, the fact that HEW only wants the results or end product of the research does not have a direct bearing on whether the system of records is subject to subsection (m). It is conceivable to us, at least in principle, that an agency may provide by contract for the operation of a system of records necessary to perform an agency function, an operation that the agency itself would have performed but for the contract, and in those circumstances the system should be made subject to the requirements of subsection (m) even though the system may even be destroyed after it has served its usefulness without the agency ever seeing any part of the system.

The above HEW opinion is discussed in the "Report of the Privacy Protection Study Commission" (1977) on page 592, and the following observation is made:

"Some agencies interpret this clause (subsection m) to mean that contractors may not collect information about individuals under conditions that are less confidential than the conditions applying to records maintained by the agency itself. In a May 1976 memorandum, however, the General Counsel of DHEW interpreted it (subsection m) to mean that, in performing this kind of work, contractors are comparable to grantees 1/ * * *. Although contractor records compiled under these conditions are not thought to be subject to the Privacy Act, the memo advises DHEW contracting officers to incorporate into contracts, where appropriate, '* * * the provisions designed to protect the confidentiality of the records and the privacy of individual identifiers in the record.'"

As a result of the "less than satisfactory disclosure situation" brought about by differences in agency interpretation of obligations under the Privacy Act, the report makes the following recommendation on page 593.

1/Under the Privacy Act of 1974, individually identifiable information collected by grantees is not subject to provisions of the Privacy Act. "Personal Privacy in an Information Society," p. 592 (1977).

"Recommendation (9)

"That any person, who under Federal contract or grant collects or maintains any record or information contained therein for a research or statistical purpose, be prohibited from disclosing such record or information in individually identifiable form for another research or statistical purpose, except pursuant to a written agreement that meets the specifications of Recommendations (7) and (8) above, and has been approved by the Federal funding agency."

The above recommendation represents one view of what subsection (m) should be rather than what it is. Subsection (m) as it is presently written is considered by some to apply to the following systems of records:

1. Where the determinations on benefits are made by Federal agencies. 1/
2. Where the records are maintained for administrative functions of the Federal agency such as personnel, payroll, etc. 1/
3. Where health records are maintained by an outside contractor engaged to provide health services to an agency personnel. 1/

The provisions of subsection (m) are not considered to apply to the following systems of records:

1. Where records are maintained by the contractor on individuals whom the contractor employs in the process of providing goods and services to Federal Government; 1/ for example, personnel systems of major defense contractors. 2/

1/OMB guidelines for Privacy Act Implementation 40 Federal Register 28976, July 9, 1975.

2/Robert P. Bedall, "Government Contractors; and the Initial Steps of the Privacy Act," 34 Fed. B. J. 330, 331 (1975).

2. Where an agency contracts with a State or private educational organization to provide training and the records generated on contract students pursuant to their attendance (admission forms, grade reports) are similar to those maintained on other students and are commingled with their records on other students. 1/
3. Employment, personnel, or administrative records the contractor maintains as a necessary aspect of supporting the contract or grant, but which bear no other relation to its performance. 2/
4. Records that are neither required nor implied by terms of the contract, for which no representation of Federal sponsorship or association is made, that will not be provided to the Federal agency with which the contract is established, except for authorized audits or investigations. 2/

1/OMB guidelines for Privacy Act Implementation 40 Federal Register 28976, July 9, 1975.

2/The Privacy Protection Study Commission, "Personal Privacy in an Information Society" (1977) pp. 505, 506.