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Provisions of the Privacy Act of 1974 must be applied to systems of records on people when Federal contractors accomplish a function for a Federal agency. However, implementation of the subsection of the act addressing contractors has been given low priority by contracting agencies and by the contractors. Many agency and contractor officials believe this is not a cause for concern. Since there is a potential for harm of varying consequences to persons involved, the Office of Management and Budget should direct and encourage Federal agencies and departments to improve their efforts to comply with the relevant provisions. (SC)

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STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS

COMMITTEE ON GOVERNMENT OPERATIONS

HOUSE OF REPRESENTATIVES

ON

THE IMPACT OF THE PRIVACY ACT OF 1974

ON FEDERAL CONTRACTORS

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

We are pleased to appear here today to summarize the results of our review of how Federal agencies are applying subsection 3(m) of the Privacy Act of 1974. I have with me Mr. Robert Gilroy, Assistant Director of our Logistics and Communications Division and Thomas O'Connor, Team Leader on our review of implementation of subsection 3(m) of the Privacy Act. The work on this review, which was initiated at your request, is completed. We are in the process of finalizing a report for submission to your Subcommittee in the near future.

Subsection 3(m) basically states that Federal agencies must cause provisions of the Act to be applied to systems of records on people operated by Federal contractors to accomplish an agency function. Specifically, we looked at (1) how agencies were interpreting subsection 3(m) of the Privacy Act, (2) how consistently the Office of Management and Budget and the Federal agencies were implementing the provisions in their own guidelines, and (3) how contractors were carrying out responsibilities.

Our review involved various offices of 10 major Federal departments and agencies and about 60 contractors of those departments and agencies.

I will briefly summarize the results of this review and attempt to answer any questions you may have.

Summary of Results of GAO Review

BACKGROUND

The Privacy Act of 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 records on him or her are 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 his or her consent.

The act also usually requires an agency to insure 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.

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 Privacy Act does not appear to require any grantees to comply with it. We did not review grantees' handling of personal information.

HOW HAS SUBSECTION 3(M) OF THE PRIVACY ACT 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 troublesome 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.

The Privacy Act does not define "operation" of a system of records or "agency function." OMB's guidelines state that the operation of a system is not the same as the design of a system. However, three departments' guidelines use "design, development, operation or maintenance" of systems of records by contractors. Others use only the term "operation" and one department's guidelines use the term "maintains."

OMB guidelines state that "agency function" 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 Veteran's 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.

While the other departments and agencies did not have legal interpretations of "agency function," many officials said they consider this term the most difficult to interpret.

Procurement regulations differ from OMB's 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, the General Services Administration in September 1975 revised the Federal Procurement Regulations (FPR), instructing agency procurement offices to put this specific language in such contracts. In November 1975 the Postal Service revised its procurement regulations and in July 1976 the Department of Defense revised the Armed Services Procurement Regulations (ASPR) for the same purpose.

Revisions to all three procurement regulations generally required the same contractual language. The language suggests that, unless the contract specifically identifies the system of records and states how the records are to be used, the contractor cannot be held liable for Privacy Act violations. On the other hand, OMB's guidelines provide 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.

Lack of training of agency and contractor personnel

In our view formal training programs either Government-wide or within individual agencies, to acquaint agency and contractor personnel with Privacy Act requirements would help. 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 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 on the Privacy Act.

HOW HAVE AGENCIES IMPLEMENTED SUBSECTION 3(M)?

The 10 agencies and about 60 contractors reviewed paid little attention to implementing subsection 3(m) of the Privacy Act. 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.

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.

At nine of ten agencies, we found contracts 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 Privacy 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 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, the agency explanations cited above clearly show that many Federal contractors are handling personal information that the contracting agencies do not consider to be subject to the Privacy Act.

After agencies determine which contracts are subject to the Privacy Act, a system to assure that those contractors comply with the many requirements of the law would seem necessary. 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.

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 in general, and subsection 3(m) in particular, without any additional funds or personnel. They noted that monitoring contractors' actions could be very costly, particularly if numerous on-site visits to contractors were required.

--The fact 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 upon 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 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.

WHAT HAS BEEN THE IMPACT OF THE 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's requirement.

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. This is not surprising considering 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 business they could not solicit and retain without assurances of confidentiality and security.

WHAT HARM CAN BE DONE?

Recognizing that agencies and contractors have paid little attention to implementing subsection 3(m) of the Privacy Act, a 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. How contractors handle

information either raises or lowers the chance of unauthorized disclosure or misuse of information.

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

--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 wilful or inadvertent disclosure or misuse of data.

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.

Some of the types of records contractors handle such as credit information have direct commercial value. Also, a mailing list audience could exist for others, such as names of military personnel, older citizens, or students--depending upon what a commercial firm may be selling or promoting. Some information on the other hand, may have very limited commercial value. Also, the unauthorized disclosure of information such as poor credit ratings or psychological records could do much more harm than records on military service.

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 appreciate the importance of keeping confidential and personal information safe. They added that--with or without a specific contractual requirement relating to the Privacy Act--they had security-minded practices.

Important, however is that 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 was sometimes stored in unsecured areas such as unlocked cabinets or on open shelves.

SUMMARY

In summary 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 contracts where it should have been.

--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, while the existing legislation perhaps could be further clarified, there is no doubt that the Congress intended that Federal contractors whose contracts provide for the operation of a "systems of records" containing personal data that in effect replace agency systems, comply with the Privacy Act's requirements.

Therefore, we believe the Office of Management Budget should direct and encourage Federal agencies and departments to improve their effort to comply with the subsection 3(m) of the Privacy Act of 1974. More specifically, we believe that OMB should:

--improve and expand its own 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 agencies to include better coverage of subsection 3(m) in Privacy Act training programs;

--review and clarify procurement regulations to assure that contractors are aware of what information is subject to the act's requirements;

--reemphasize its 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 he Privacy Act's requirements; and

--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 spotchecks, should be considered.

I have discussed in this testimony the general absence of effective adherence to the 3(m) provision of the Privacy Act by both agencies and contractors. I have cited some steps OMB can take to improve agencies and departments compliance with subsection 3(m) of the Act. What has not been discussed is what the Congress can do to clarify subsection 3(m) of the Privacy Act.

At least one major bill has been introduced in the Congress to change the entire Privacy Act. While numerous changes to subsection 3(m) other than the ones cited in House Bill 10076, introduced on November 11, 1977, are possible, we believe the language in this Bill, which is based on a specific recommendation of the Privacy Protection Study Commission would solve some of the problems noted in our review. It will for instance, replace the term "system of records" with a broader definition of personal information to be covered under the act. It would also specifically legislate agency responsibilities for insuring contractors compliance with the act. Additionally, conditions for contractor exclusion from the act are defined in considerable detail.

While it may not be feasible to develop legislative language that will preclude some variations in interpretation we believe the proposed legislation, as it relates to subsection 3(m) of the current act, should lead to a more consistent interpretation of congressional intent and agency and contractor responsibility. Of course, if H.R. 10076 is enacted, the revision of subsection 3(m), while providing some clarification, would also have other possibly major consequences which we have not analyzed, and on which we take no position at this time.

This concludes my prepared statement. We will try to answer any questions you or other members of Subcommittee may have.