



Building American Institutions to Protect Privacy in the Face



November 2009

Written by Jay Stanley

THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures, and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

OFFICERS AND DIRECTORS

Susan N. Herman, President

Anthony D. Romero, Executive Director

Richard Zacks, Treasurer

ACLU

AMERICAN CIVIL LIB

National Office
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
www.aclu.org

EXECUTIVE SUMMARY

Privacy laws are of limited value if institutions for enforcing such laws do not exist. The United States, unlike nearly every other advanced-industrial nation, does not have an independent data protection official or privacy commissioner to fill that role. We recommend that Congress take several steps to bridge this gap:

1. Activate the independent Privacy and Civil Liberties Oversight Board (PCLOB) and expand its scope and powers to turn it into a full-fledged privacy body with oversight of all government agencies.
2. Supplement the strengthened PCLOB with multiple overlapping layers of privacy protection, by creating a statutorily mandated Privacy Advisor within the White House's OMB, and bolstering and expanding federal agency privacy offices.

a range of rights and protections in order to “promote accountability” with respect to the “personal information systems and data banks of the Federal Government.”⁸

Unfortunately, the act is riddled with loopholes and exceptions that have grown over time. Some agencies, especially law enforcement, have taken to exploiting the act’s exemptions to avoid compliance with basic privacy policies. Many of the Privacy Act’s protections have eroded, in part, because there has been no counterbalancing institution to push back and defend it when agencies seek to interpret away its often inconvenient provisions.

A variety of other laws govern privacy among government agencies and across the private sector. These laws make up a patchwork of inconsistent, often tangled and complicated, yet simultaneously weak and incomplete rules. This inconsistent situation – video rental records are more strongly protected than Americans’ banking or health data, for example – must be addressed by Congress through the enactment of an overarching privacy law that will put clear, fair privacy standards into law (without endless loopholes) and create stable expectations for businesses, government and individuals alike.

Whether the United States eventually enacts a meaningful version of the Fair Information Practices that the rest of the industrialized world has embraced,⁹ or continues to limp along with an ever-more-complicated patchwork of laws, the need is urgent for a vigorous privacy oversight institution in the United States.

What Should Privacy Institutions Do?

With government agencies rapidly assuming new powers, and technology opening up new avenues for surveillance on what seems to be a weekly basis, what functions should privacy institutions fill? Even if not all carried out by the same body, crucial functions include:

- *Establishing and enforcing clear privacy standards*

domestic wiretapping with approval at the very top of the executive branch, Americans needed officials in a position to launch an independent investigation on behalf of the public, and the power to do so effectively. Unfortunately, no such position existed.

-

over the years to use their secrecy powers not to protect national security but to cover up incompetence and illegality and other embarrassments and generally thwart oversight.¹⁰

- **Enforcement powers.** A true enforcement body should have the power to enforce compliance with the law, subject to judicial review, as opposed to merely making a public report or falling back upon the courts.
- **Leadership and research.** An oversight body should be empowered to provide leadership on privacy issues by a provision authorizing the body to comment upon legislative provisions, government or private-sector plans for new programs or services, new technologies, or other developments that have privacy implications, and to conduct research on current and emerging trends in such areas.
- **Staff and resources.** A broad mandate and strong legal powers do no good if an agency lacks the staff and resources necessary to make use of them. Some privacy officials complained that they simply didn't have sufficient resources to do anything but react to complaints, not to mention carrying out the full extent of their powers under the law.

the records of an energy task force led by Vice President Dick Cheney, which the GAO lost and did not appeal), the GAO's ability to access executive branch information as part of its investigations is limited.¹¹ On the other hand, while insufficient on its own, the GAO has produced good work on privacy issues and can be counted upon to remain a key part of the overall oversight landscape.

- [The Judiciary's Role in Privacy Protection](#), The judiciary's independence is without question. However, under the Anglo-American legal system the judiciary does not conduct investigations or pro-active oversight. It is purely reactive in that it only decides cases that are brought before it.
- [Independent Regulatory Agencies: A Model for Privacy Protection](#), Among the most prominent of the many such institutions are the Federal Trade Commission (FTC), the Federal Communications Commission (FCC) and the Federal Election Commission (FEC). The independent federal commission is the best model for an institution designed to protect privacy within the U.S. system of government.

Independent regulatory agencies have long been used by Congress as a way to

AMERICAN CIVIL LIBERTIES UNION

- “Interview, take statements from, or take public testimony from personnel” of any element of the executive branch.
- “Request information or assistance from any State, tribal, or local government.”
- When supported by a majority of the board, ask the Attorney General to issue a subpoena on behalf of the board. Within 30 days of a board request, the AG must either comply or provide a written explanation for a denial to the board and to the House and Senate Judiciary Committees.¹⁹





	<p>The PCLOB’s status as an independent agency ensures that it will be independent as far as possible within the U.S. system of separation of powers.</p>
	<p>Congress endowed the PCLOB with significant powers to obtain information “necessary to carry out its responsibilities” and to issue subpoenas through the Attorney General. However, PCLOB should have its own subpoena power, and its mission needs to be expanded to cover all government agencies, not just those related to anti-terrorist efforts.</p>
	<p>Congress should explore how the PCLOB can be given authority to act when confronted with violations of privacy and civil liberties.</p>
	<p>The PCLOB’s congressional charter is quite broad, encompassing many of the crucial oversight functions needed in a privacy oversight body such as conducting oversight over executive branch policies and actions, ensuring consideration of privacy in policy formation, and informing the public. However, it should be expanded in scope to all of government (rather than just anti-terrorism programs), given additional powers to overcome secrecy and access information by subpoena.</p>
	<p>Congress must give PCLOB resources commensurate with its needed role serving as a check on the gigantic U.S. national security establishment. A few million dollars and a staff of ten will amount to little more than a gesture toward the establishment of a meaningful oversight body.</p>

appropriate, coordinating “the activities of such officers on relevant interagency matters.”²² As the PCLOB’s authority is expanded beyond the scope of anti-terrorism initiatives, its coordinating role should likewise be expanded to encompass the whole range of privacy issues within government. Ultimately, PCLOB should be positioned to create and maintain a broader government privacy oversight community, including agencies, inspector generals’ offices, OMB, and the PCLOB itself. Congress should seek to increase the likelihood that even privacy officials who report to privacy-hostile political leaders will be guided and restrained by professional, personal, and reputational ties to such a community.

One function that privacy commissioners in many countries have is to be responsive to individual complaints. In many European nations and Canada, officials have a duty to respond to complaints from individuals and others within a certain period of time. This system guarantees that problems will be addressed, and that individuals will receive attention for their complaints. However, data-protection authorities in some countries have found that complaint resolution can absorb all an agency’s time and resources – especially if there are insufficient funds for activities other than complaint resolution. Congress should establish a separate division of the PCLOB with its own budget to respond to individual complaints. Failing that, Congress should charge PCLOB with generally monitoring and analyzing individual complaints to identify patterns and problems but not necessarily to respond individually to each one.

Given the strong start that the PCLOB represents, its conformance to the optimal independent commission model, and the difficulty of creating a new institution from scratch, it makes the most sense to expand and augment the powers of the PCLOB, while retaining the characteristics that give the PCLOB strength and independence (especially its structure as an independent commission with overlapping 6-year, Senate-confirmed commissioners).

AMERICAN CIVIL LIBERTIES UNION

	
	<p>The PCLOB has been charged by Congress with performing an oversight function, continuously reviewing the implementation of executive branch policies and rules. It is also tasked with overseeing agency privacy offices. However, the PCLOB needs additional powers to fulfill that role properly. Agency privacy officials and the 2014 Privacy Advisory Board (affidavit 34(e) source t]TJETEMC /Span AMO play an important oversight role, having less independence but greater access to executive decisions makers.</p>
	<p>The PCLOB has been chartered to “investigate and review” government actions to ensure that privacy and civil liberties are being adequately y</p>

permanent privacy-related official at OMB.

OMB currently has more power over existing government practices than any other agency. The Privacy Act of 1974 gave OMB authority to issue guidelines and regulations²⁵ and OMB has powers under other statutes such as the E-government Act and the Paperwork Reduction Act.²⁶ However, OMB has never issued formal regulations under the Privacy Act. OMB rarely issues formal regulations, but the agency has never shown much interest in its privacy role. Except for the period when the original Privacy Act guidelines were written in 1975 and when Peter Swire was the privacy counselor between 1999 and 2001, privacy staffing at the Office of Information and Regulatory Affairs at OMB was typically less than one full-time person.²⁷

In much the same way as a White House privacy chief, a privacy office within each federal agency can serve an important function. Existing agency privacy officials should be retained and their powers expanded consistent with their roles as inside-agency watchdogs.

In 1998, President Clinton issued a memorandum requiring all agencies to designate a senior official within each agency to “assume primary responsibility for privacy policy.”²⁸ Under this order, echoed in a similar 2005 memorandum from OMB²⁹, any official could be designated – including one with other heavy responsibilities such as an agency’s Chief Information Officer. As a result, privacy was often an afterthought for those ostensibly in charge of it.

The nation’s first statutorily mandated privacy officer was created in the Homeland Security Act of 2002, which designated a Chief Privacy Officer for the new Department of Homeland Security. The law gave that official the explicit duty to ensure compliance with Fair Information Practices. The officer was also charged with ensuring that “the use of technologies” does not erode privacy, evaluating legislative and regulatory proposals, conducting privacy impact statements, and reporting to Congress. The officer reports directly to the DHS secretary.³⁰

In 2007, Congress increased the number of statutory privacy officers to eight, adding the Departments of Defense, Health and Human Services, Justice, State, Treasury, the CIA, and the Office of the Director of National Intelligence.³¹

Notwithstanding these actions, further steps are needed. Congress should:

The United States has an enormous security establishment with strong secrecy and other powers, without sufficient institutional checks and balances to counterbalance all that power. One way to remedy such a gap is to institutionalize privacy protection in the way that nearly all other economically advanced democracies have done.

Congress should start by expanding the scope and powers of the already created independent Privacy and Civil Liberties Oversight Board to turn it into a full-fledged privacy body with oversight of all government agencies. The strengthened PCLOB should be supplemented by multiple overlapping layers of privacy protection. The creation of a statutorily mandated Privacy Advisor within the White House's OMB and the bolstering and expansion of federal agency privacy offices will accomplish that end.

Finally, Congress should expand the mission of the Federal Trade Commission to include the duties and powers of a full-fledged private-sector privacy regulator charged with enforcing the Fair Information Practices recognized around the world as the embodiment of human beings' right to privacy.

- 1 CIA employee numbers are classified. One site that reports a figure is <http://www.soyouwanna.com/site/syws/cia/ciafull.html>. On NSA see National Security Agency, "About NSA," available online at <http://www.nsa.gov/about/about00018.cfm#7>; the DNI reported a 2008 budget appropriation of \$47.5 billion, but Steven Aftergood of the Federation of American Scientists pointed out that this estimate omits the Military Intelligence Program. Steven Aftergood, "Intel Budget Disclosure and the Myths of Secrecy," *Secrecy News*, Oct. 28, 2008; online at http://www.fas.org/blog/secrecy/2008/10/budget_disclosure.html; Office of the Director of National Intelligence, "DNA Releases Budget Figure for 2008 National Intelligence Program," press release, Oct. 28, 2008; online at http://www.dni.gov/press_releases/20081028_release.pdf.
- 2 Italian Data Protection Code (2003), <http://www.garanteprivacy.it/garante/document?ID=727068>, esp. Sections 154-172. For other examples see the German Bundesdatenschutzgesetz (Federal Data Protection Act) (1977), last amended in 2006, http://www.bfdi.bund.de/nn_535764/EN/DataProtectionActs/DataProtectionActs__node.html, or France's Act No. 78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties (1978), <http://www.cnil.fr/fileadmin/documents/uk/78-17VA.pdf>, last amended in 2007, http://www.cnil.fr/fileadmin/documents/uk/Decree_No_2005-1309.pdf.
- 3 World Bank list of "High-income OECD members," online at <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20421402~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>. The OECD (Organization for Economic Cooperation and Development) is a group of nations that subscribe to the "basic values" of "an open market economy, democratic pluralism and respect for human rights." OECD, "Becoming a Member of the OECD: the Accession Process," online at http://www.oecd.org/document/11/0,3343,en_2649_201185_1958091_1_1_1_1,00.html. While Korea does not have a privacy commissioner, it does have a national human rights commission which monitors privacy issues.
- 4 Emphasis added. "Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data," Article 28; online at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31995L0046&model=guichett or <http://tinyurl.com/5owgpa>
- 5 International Covenant on Civil and Political Rights, online at <http://www2.ohchr.org/english/law/ccpr.htm>.
- 6 David H. Flaherty, *Protecting Privacy in Surveillance Societies* 22 (1989), p. 381.
- 7 In 1967 the Supreme Court finally recognized the right to privacy in telephone conversations in the case *Katz v. U.S.* (389 US 347), reversing the 1928 opinion *Olmstead v. U.S.* (277 US 438).
- 8 The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (1974), codified in part at 5 U.S.C. § 552a, "Records maintained on individuals"; online at http://www4.law.cornell.edu/uscode/uscode05/usc_sec_05_00000552---a000-.html; S. Rep. No. 93-1183 at 1 (1974).
- 9 U.S. Dept of Housing, Education and Welfare, "Records, Computers and the Rights of Citizens: Report of the Secretary's Advisory Committee on Automated Personal Data systems," July 1973; online at <http://aspe.hhs.gov/DATACNCL/1973privacy/tocprefacemembers.htm>.
- 10 For examples of the abuse of secrecy, see e.g. Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006) .

AMERICAN CIVIL LIBERTIES UNION

- 11 *Walker v. Cheney*, 230 F.Supp.2d. 51 (D.D.C. 2002). Rep. Henry Waxman, a critic of the current situation, issued a statement, "Cheney Task Force Records and GAO Authority," Feb. 12, 2003; online at <http://oversight.house.gov/documents/20050203120224-65645.pdf>.
- 12 *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). Roosevelt was attempting to remove the commissioner due to policy differences; however, "Any Commissioner may be removed by the

AMERICAN CIVIL LIBERTIES UNION

- 27 On OMB's lack of interest and activity on privacy, see for example US Government Accountability Office, "Privacy Act: OMB Leadership Needed to Improve Agency Compliance," GAO-03-304, June 2003; online at <http://www.gao.gov/new.items/d03304.pdf>
- 28 President William J. Clinton, *Memorandum for the Heads of Executive Departments and Agencies Regarding Privacy and Personal Information in Federal Records*, May 14, 1998, available at <http://privacy.navy.mil/presmemo.asp>.
- 29 Office of Mgmt. & Budget, *Memorandum for the Heads of Executive Departments and Agencies Regarding Designation of Senior Agency Officials for Privacy, M-05-08*, Feb. 11, 2005, available at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-08.pdf>.
- 30 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2002), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ296.107.
- 31 Implementing the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 803, 121. Stat. 266 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ053.110.
- 32 Implementing the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 803, 121. Stat. 266 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ053.110.
- 33 These are among the recommendations made by Marc Rotenberg of the Electronic Privacy Information Center in his study "The Sui Generis Privacy Agency: How the United States Institutionalized Privacy Oversight After 9-11," SSRN WPS (Sept. 2006); online at <http://epic.org/epic/ssrn-id933690.pdf>. See also Rotenberg, "In Support of a Privacy Protection Agency in the United States," *Government Information Quarterly* (Winter 1991). For another thoughtful proposal, see Robert Gellman, "A Better Way to Approach Privacy Policy in the United States: Establish a Non-osal, see