

The Relationship between the Private Sector and Fusion Centers: Potential Causes for Concern and Realities¹

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The emergence of fusion centers has been met with much anticipation, as well as feelings ranging from relief to fear.² Much of the latter has focused on the potential for fusion centers to disregard civil liberties. In December 2007, the American Civil Liberties Union (ACLU) published a report entitled *What's Wrong With Fusion Centers*, in which it states,

Fusion centers are poised to become part of a wide-ranging trend of recent years in the United States: the creation of a "Surveillance-Industrial Complex" in which security agencies and the corporate sector join together in a frenzy of mass information gathering, tracking and routine surveillance.³

The report goes on to state that "while it is entirely appropriate for law enforcement to confer with private entities for specific, well-defined purposes, breaking down the arms-length relationship between government and the private sector by incorporating private entities into fusion centers is a bad idea."⁴ Potential by-products of this union, according to the ACLU, include, but are not limited to: the potential for private companies using classified information to gain an unfair business advantage over competitors; private companies funneling private information to the government without "proper legal process," which could subsequently be 'mined'; and ultimately, the private sector becoming "an extension of the surveillance state."⁵

Even the slight potential for civil rights abuses needs to be taken seriously, but the degree of concern expressed in the ACLU report with regard to fusion center-private sector relations is largely unwarranted. To date, none of the scenarios described by the ACLU have been reported. This is not to say that private sector integration and civil liberties protection are not areas of concern, but rather, that the ACLU's pessimistic predictions have not been realized. This is largely due to the current state of relationships between the private sector and fusion centers, which are still in the early stages, and in some cases, have yet to be established. Even if relations are eventually established, there are forces on both sides that discourage the abusive behavior described by the ACLU.

In 2007, the Congressional Research Service conducted interviews of nearly forty fusion centers around the country. The data suggest that the image of a fully integrated, open data-sharing relationship between fusion centers and the private sector, as envisioned by the ACLU report, has not been realized. Rather, there is a great deal of variation in the existence, and types, of relationships between the private sector and fusion centers. In some cases, a relationship was non-existent. Fusion centers in this position often lack the personnel and/or the wherewithal to establish such a relationship. Others have a narrow mandate, and/or are focused on addressing more pressing law enforcement and first responder commitments. In still other cases, there is another related entity, often the state homeland security advisor, division of public safety, or the Information Sharing Analysis

Centers (ISACs), among others, that engages in private sector outreach and/or information sharing, and as such, the fusion center does not have direct contact with the private sector.

On the other end of the cooperation continuum, there are some fusion centers that have established points of contacts with the private sector to be used in case of an emergency. In several cases, as a result of creating points of contact, private sector-related information flows into and/or out of the fusion center. For example, several centers create non-law enforcement sensitive versions of their products for certain private sector entities to keep them abreast of threats and trends. Other centers provide periodic threat briefings for the private sector. In a few rare cases, fusion centers provide private sector representatives with desks and clearance to operate out of the center in the event of an emergency. One center provides permanent seats for private sector representatives but, as of July 2007, none of the representatives had yet to populate those desks.⁶

Overall, information between fusion centers and the private sector appears to flow sporadically and on a case-by-case basis. There was no evidence of permanent electronic connections from law enforcement databases to the private sector or vice versa. There was no information that indicates that fusion centers were violating federal clearance handling requirements or law enforcement protocol in providing desensitized information to the private sector. Furthermore, fusion center personnel were well-versed in the limitations on information and intelligence collection and sharing specified by 28 CFR Part 23.⁷

There even appears to be a degree of enduring trepidation within fusion centers and the private sector about working with each other. There are indications that law enforcement, the dominant force at fusion centers, remains somewhat wary of how to share information with non-law enforcement public agencies in support of the center's homeland security mission. This apprehension is often even more acute with regards to private sector relationships. As law enforcement remains largely case and prosecution focused, the potential of compromising prosecution remains a paramount concern and will likely lead to a conservative approach to information sharing outside of law enforcement agencies. In addition to the legal restrictions and internal concerns that restrain law enforcement, there are also forces that act to inhibit abusive private sector behavior in this area. Even the perception of violating the privacy rights of clients would likely carry a significant cost for the private sector, including bad press, loss of business, a drop in stock prices, shareholder intervention, and litigation.

Irrespective of the existence of, and/or depth of, ties between fusion centers and the private sector representatives at the time of the CRS research which this paper draws on, there was a near universal recognition by fusion center leadership across the country that the private sector played an important role in homeland security. Frequently, fusion center representatives cited the number of critical infrastructure sites within their jurisdiction that were owned and/or operated by private companies. Furthermore, there was an understanding that to create a comprehensive risk assessment of their state/region, fusion centers would need to establish a viable relationship with, and ascertain some information from, private sector entities within their jurisdiction. Despite these realizations, the progress toward establishing relationships with the private

sector, much like all aspects of fusion centers, differ significantly from center to center. The varied nature of fusion center relations with the private sector is symptomatic of the grass roots development of these centers, and the lack of strong federal direction or national consensus on their purpose, organization, and scope.

The potential problems highlighted by the ACLU are not inevitable. Nor are they particularly likely at this point in time given the embryonic nature of such relations, if they exist at all. Nor is the nature of a relationship between fusion centers and the private sector problematic in and of itself. The private sector is not collecting intelligence illegally. It is not illegal or unethical for private sector owners and operators to provide information to fusion centers. The private sector owns the overwhelming majority of critical infrastructure in the United States and as such, the private sector must be a player in information collection and analysis to prevent future terrorist attacks. However, to enhance the efficacy of intelligence and information fusion does not require that privacy become a casualty.

Potential civil liberties concerns should not be treated as the disease, but rather symptoms of a more fundamental problem: the failure to address the core philosophical and structural issues surrounding fusion centers. Despite numerous federal guidance documents and national conferences on the subject, key issues that are paramount to creating a strategic vision for fusion center development have repeatedly been ignored. Some key issues include:

- What is intelligence fusion?
- How active and pro-active, if at all, should fusion centers be in the collection of intelligence that is not directly tied to a specific and identifiable criminal act?
- While there is no single model for how each center is structured or operates, is there a basic level of common standards necessary in order for fusion centers to offer a national benefit?
- Who “owns” and benefits from fusion centers and who should staff, fund, and oversee them?
- Is the current configuration of forty-plus fusion centers, with, in some cases, several operating within one state, the most efficient organizational structure?
- Is the current approach to creating, authorizing, funding, and supporting fusion centers sustainable?
- What are the risks to the fusion center concept and how have those risks been specifically weighed and balanced against the stated goals of fusion center operations?

Conceptually, fusion centers pose a significant value proposition to bolster our nation's security. Today, it is widely accepted that effective intelligence processes are essential in terrorism prevention, and that state, local, and tribal law enforcement and other public sector agencies are in a unique position to play a role in this process. There is agreement that as the majority of critical

infrastructure sites in the country are owned and/or operated by the private sector, that it too has an important role to play. However, the uneven, grassroots development of fusion centers, devoid of strong federal direction and national consensus on their mission, scope, and 'ownership' threatens the value of their contribution and increases the risk of abuse.

Given that fusion centers are entities established by states and localities to serve their own law enforcement, emergency response, and homeland security needs, and compounded by the sensitivities associated with federalism, the federal government is in a difficult position of balancing its interests and respecting the local nature of fusion centers. As such, the federal government has been understandably hesitant to place requirements on fusion centers. Instead, federal agencies have produced guidelines, which have not been compulsory, to include the *National Strategy for Information Sharing* and *Fusion Center Guidelines*.⁸ While these documents address some of the tactical and operational concerns related to fusion centers, they are often vague to a fault and fail to provide the comprehensive vision for fusion centers as part of the nation's homeland security posture.

Failure to create a consensus on the role, structural requirements, and responsibilities for fusion centers is apt to increase the potential for ineffectiveness, which threatens the viability of fusion centers. If fusion centers fail to demonstrate their worth and strengthen and augment our nation's homeland security efforts, political support and external agency engagement with these centers is likely to decline. Moreover, potential civil liberties abuses could damage fusion centers' credibility and undermine their public support. It has rightfully been warned that even rumors of impropriety and civil liberties abuses associated with a single fusion center can cause irreparable damage to the reputation of all fusion centers nationwide. This would be unfortunate given the potential for fusion centers to provide public safety and homeland security benefits to both local communities and the nation.

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¹ This paper draws heavily from Todd Masse, Siobhan O'Neil, and John Rollins, *Fusion Centers: Issues and Options for Congress*, CRS Report for Congress, RL34070, July 6, 2007. Like the CRS Report, this paper explores the evolving nature of fusion centers and specifically the relationship between state and local fusion centers and the private sector.

² The *Fusion Center Guidelines* define a fusion center as "a collaborative effort of two or more agencies that provide resources, expertise, and information to the center with the goal of maximizing their ability to detect, prevent, investigate, and respond to criminal and terrorist activity." *Fusion*

Center Guidelines: Developing and Sharing Information and Intelligence in a New Era, August 2006, 2, available from [\[http://it.ojp.gov/documents/fusion_center_guidelines_law_enforcement.pdf\]](http://it.ojp.gov/documents/fusion_center_guidelines_law_enforcement.pdf), accessed on January 20, 2008. Some apply this definition broadly to include any multi-jurisdictional anti-crime or response effort that may utilize intelligence and/or information, to include federally-owned and operated collaborative efforts, like FBI-led Joint Terrorism Task Forces (JTTFs) or High Intensity Drug Trafficking Area (HIDTA). The authors, however, limit their discussion of fusion centers to those 40+ largely state and regional entities created to enhance the ability of the jurisdiction to prevent, mitigate, and in some cases, respond and recover, from man-made threats, attacks, and natural disasters.

³ Michael German and Jay Stanley, *What's Wrong with Fusion Centers*, American Civil Liberties Union (ACLU) report, December 2007, 11, http://www.privacycoalition.org/fusioncenter_20071212.pdf.

⁴ *Ibid.*, 12.

⁵ *Ibid.*, 13-14.

⁶ Masse, et al., *Fusion Centers: Issues and Options*.

⁷ Institute for Intergovernmental Research, "Criminal Intelligence Systems Operating Policies (28 CFR Part 23) Technical Assistance and Training," available from [\[http://www.iir.com/28cfr/28\]](http://www.iir.com/28cfr/28), accessed on January 20, 2008. For entire CFR Part 23, see www.it.ojp.gov/documents/28CFR_Part_23.PDF.

⁸ Office of the President, *National Intelligence Sharing Plan*, available from [\[http://www.whitehouse.gov/nsc/infosharing/index.html\]](http://www.whitehouse.gov/nsc/infosharing/index.html), accessed on January 20, 2008.