



United States Department of Justice
Privacy and Civil Liberties Office
Initial and First Annual Report to Congress



Attorney General Alberto R. Gonzales has appointed me the Department of Justice's first Chief Privacy and Civil Liberties Officer. In that capacity, I am pleased to submit this report to apprise you of our current efforts (it may also be obtained online at our website, <http://www.usdoj.gov/pclo>).

The Attorney General and the Department of Justice are emphatically committed to protecting the privacy and civil liberties of the American people. The new Privacy and Civil Liberties Office I lead helps to shape and refine Departmental policies and procedures affecting privacy and civil liberties, particularly in the context of the Department's counterterrorism and law enforcement efforts. I believe you will conclude from this report that our Office has been quite active in this mission.

I speak for myself, my Office and my Department when I say that we look forward to working together and with Congress to ensure that the nation is kept safe, that justice is served, and that privacy and civil liberties are respected in the process.

Jane C. Horvath
Chief Privacy and Civil Liberties Officer

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Mission

The fundamental mission of the Department's Privacy and Civil Liberties Office is to ensure that due consideration and regard for information privacy and civil liberties are given in the formulation and execution of Departmental programs and policies.

Evolution of the Privacy and Civil Liberties Office

- 1998 Responding to concerns that “[i]ncreased computerization of Federal records [relating to individuals] permits this information to be used and analyzed in ways that could diminish individual safeguards in the absence of additional safeguards,” President William J. Clinton directs each executive agency head to “designate a senior official within the agency to assume primary responsibility for privacy policy.” Memorandum on Privacy and Personal Information in Federal Records, 34 Weekly Comp. Pres. Doc. 870 (May 14, 1998). Accordingly, the Department of Justice appoints a Privacy Officer in the Office of the Deputy Attorney General. The position is held by various Associate Deputy Attorneys General (each of whom held other duties beyond privacy protection), until Attorney General Alberto R. Gonzales appoints Jane C. Horvath as Chief Privacy and Civil Liberties Officer in February 2006.
- 2002 Intending to “provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws,” Congress passes the E-Government Act of 2002 (Pub. L. No. 107-347), Section 208 of which requires federal agencies to prepare “Privacy Impact Assessments” before developing or procuring certain kinds of information technology that collect information in identifiable form.
- 2003 In the Committee Report (H.R. Rep. 108-221) accompanying H.R. 2799, the House Appropriations Committee directs the Attorney General “to designate a senior policy official to assume responsibility for developing appropriate civil rights safeguards specifically related to the war on terrorism and for coordinating the work of the Office of Inspector General, the Civil Rights Division, the U.S. Attorneys, and the various other Justice Department entities to ensure effective oversight of Departmental activities in this area.”
- 2004 December 8 Congress approves the Conference Committee Report (H.R. Conf. Rep. No. 108-792) accompanying H.R. 4818, the Consolidated Appropriations Act, Fiscal Year 2005 (Pub. L. No. 108-447). In the Joint Explanatory Statement appended to the Report, the Conference Committee directs that not less than \$690,000 for salaries and benefits be paid to an “Office of Privacy and Civil Liberties,” with funding for two additional professional staff positions.

- 2004 December 17 In Section 1062 of its sweeping reorganization of the intelligence community in the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-796), Congress declares its sense that “each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.”
- 2005 February 11 The Office of Management and Budget (OMB) issues Memorandum 05-08, which requires the head of each executive agency to identify to OMB a senior official with “overall agency-wide responsibility for information privacy issues.”
- 2006 January 5 President George W. Bush signs into law H.R. 3402, the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. No. 109-162), which directs the Attorney General “to designate a senior official in the Department of Justice to assume primary responsibility for privacy policy.”
- 2006 February 21 Attorney General Alberto R. Gonzales appoints Jane C. Horvath as the Department’s first Chief Privacy and Civil Liberties Officer.

Before the creation of the Privacy and Civil Liberties Office, several offices within the Department dealt with the various facets of privacy policy.

Office of Information and Privacy (OIP)

While its primary responsibilities were Freedom of Information Act matters, OIP also handled Privacy Act issues. OIP’s Privacy Act functions and three staff attorneys have been transferred to the new Privacy and Civil Liberties Office, and the Department intends to rename OIP the “Office of Freedom of Information” to reflect its new role.

Justice Management Division (JMD)

Office of the General Counsel (JMD OGC). JMD OGC handled privacy issues as needed, generally in close consultation with OIP. JMD OGC will continue to work with the Privacy and Civil Liberties Office on certain privacy matters.

Office of the Chief Information Officer (JMD OCIO). JMD OCIO handled a variety of tasks with connections to privacy matters -- most specifically, responsibilities connected with Privacy Impact Assessments. JMD OCIO will continue to have review and reporting requirements relating to Privacy Impact Assessments.

Civil Division

The Civil Division had and still has primary responsibility for litigating all privacy-related civil cases on behalf of the United States.

Federal Bureau of Investigation (FBI)

Office of the General Counsel. The Deputy General Counsel in FBI's Office of General Counsel served and still serves as the Bureau's Senior Privacy Officer (SPO).

Office of the Deputy Attorney General

Until the appointment of the Chief Privacy and Civil Liberties Officer in February 2006, past Chief Privacy Officers, as Associate Deputy Attorneys General, operated out of the Office of the Deputy Attorney General. The Privacy and Civil Liberties Office similarly operates out of the Office of the Deputy Attorney General.

Office Structure

As currently constituted, the Privacy and Civil Liberties Office is comprised of five attorneys, who function as follows:

Chief Privacy and Civil Liberties Officer: The Chief Privacy and Civil Liberties Officer ensures that due consideration and regard for information privacy and civil liberties are given in the formulation and execution of Departmental programs and policies. She oversees the Privacy and Civil Liberties Office and chairs the Department's Privacy and Civil Liberties Board, comprised of representatives of certain Departmental components.

Deputy Chief Privacy and Civil Liberties Officer: The Deputy Chief Privacy and Civil Liberties Officer supports the Chief Officer in oversight of the Privacy and Civil Liberties Office.

Senior Counsel and Counsels to the Privacy and Civil Liberties Office

- *Privacy Act, Information Sharing, and Civil Liberties:* One Senior Counsel and one Counsel handle Privacy Act issues, including implementation, interpretation and guidance. They are also responsible for privacy and civil liberties issues raised by the Department's information sharing, law enforcement, and national security efforts.
- *E-Government, Federal Information Security Management Act, and Civil Liberties:* One Counsel handles E-Government issues, the privacy requirements of the Federal Information Security Management Act, and privacy and civil liberties issues relating to data collection, aggregation, and management.

Additionally, a Senior Counsel in the Office of the Deputy Attorney General assists the Privacy and Civil Liberties Office as needed.

Duties of the Privacy and Civil Liberties Office

As to privacy issues, the delineated responsibilities of the Chief Privacy and Civil Liberties Officer are to advise the Attorney General regarding:

- 1) appropriate privacy protections, relating to the collection, storage, use, disclosure and security of personally identifiable information, with respect to the Department's existing or proposed information technology and information systems;
- 2) privacy implications of legislative and regulatory proposals affecting the Department and involving the collection, storage, use, disclosure and security of personally identifiable information;
- 3) implementation of policies and procedures, including appropriate training and auditing, to ensure the Department's compliance with privacy-related laws and policies, including section 552a of title 5, United States Code, and section 208 of the E-Government Act of 2002 (Pub. L. 107-347);
- 4) ensuring that adequate resources and staff are devoted to meeting the Department's privacy-related functions and obligations;
- 5) appropriate notifications regarding the Department's privacy policies and privacy-related inquiry and complaint procedures; and
- 6) privacy-related reports from the Department to Congress and the President.

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, section 1174.¹

Toward these ends, the Privacy and Civil Liberties Office participates actively in Departmental policymaking, ensuring regard for privacy and civil liberties at the earliest stages of Departmental proposals.

One of the Privacy and Civil Liberties Office's first efforts was to launch a Departmental Privacy and Civil Liberties Board. Chaired by the Chief Privacy and Civil Liberties Officer, the Board consists of representatives at the Deputy or Assistant Director level (or equivalent) of the Federal Bureau of Investigation; Drug Enforcement Administration; Criminal Division; Civil Division; Civil Rights Division; Office of Legal Policy; Executive Office for United States Attorneys; Terrorist Screening Center; Office of Public Affairs; Bureau of Prisons; United States Marshals Service; Bureau of Alcohol, Tobacco, Firearms & Explosives; National Security Division; Office of Intelligence

¹ This law also provides that this initial report be submitted, as well as annual reports on "activities of the Department that affect privacy, including a summary of complaints of privacy violations, implementation of section 552a of title 5, United States Code, internal controls, and other relevant matters." *Id.* In order to provide you one comprehensive, efficient report, the Office has combined its interim report and first annual report into this document. Accordingly, please note, then, that no privacy violations have been reported to the Office, either by citizens or by the Departmental components.

Policy and Review; Justice Management Division; Office of Information and Privacy; and Office of Intergovernmental and Public Liaison. The Board exists to:

- 1) examine the Department's activities to ensure that they fully protect the privacy and civil liberties of all Americans;
- 2) recommend policies, guidelines, and other administrative actions; and
- 3) refer credible information pertaining to possible privacy or civil liberties violations by any federal employee or official to the appropriate office for prompt investigation.

For assistance in fulfilling its responsibility to inform Departmental policy development, the Privacy and Civil Liberties Office engages in dialogue with the privacy community and facilitates contact between the privacy community and the Department of Justice. This includes meetings with representatives from groups such as the American Civil Liberties Union, the Center for Democracy and Technology, the Cato Institute and the Heritage Foundation. The Office also consults with experts in the field such as the former Chief Counselor for Privacy in the Office of Management and Budget, and the Executive Director of the Center for Information Policy Leadership at Hunton & Williams LLP. These meetings lead to more knowledgeable policymaking and help foster understanding between governmental agencies and the broader community.

The Privacy and Civil Liberties Office also works closely with the Presidentially appointed, Senate-confirmed Privacy and Civil Liberties Oversight Board, which was established by the Intelligence Reform and Terrorism Prevention Act of 2004 and advises the President and other senior executive branch officials regarding protection of privacy and civil liberties in the implementation of laws, regulations, and executive branch policies related to counterterrorism efforts.

The Privacy and Civil Liberties Office represents the Department through public speaking appearances and participation in various working groups. For example, Ms. Horvath recently made a presentation on the defense of civil liberties to two hundred attorneys at the National Law Enforcement Advisors Conference. The Privacy and Civil Liberties Office also recently sponsored (through the Department's Bureau of Justice Assistance) an intergovernmental focus group on privacy and civil liberties, participated in by representatives of states, localities and tribes, as well as by the Civil Liberties Protection Officer for the Director of National Intelligence, and the Privacy Office of the Department of Homeland Security. One interdepartmental issue of particular interest is redress for those misidentified on airline watch lists. The Office is working actively with the Department's Terrorist Screening Center, as well as the Office of the Director of National Intelligence, the Department of Homeland Security and the Privacy and Civil Liberties Oversight Board to address watch list redress issues.

Activities of the Privacy and Civil Liberties Office

The Privacy Act

It is simply impossible for the government to function without a certain amount of information about individuals; yet with this reality comes the great responsibility of managing and protecting such information. The balance between the government's need to maintain information about individuals and the individual's right to be protected from unwarranted invasions of personal privacy is at the core of **the Privacy Act** of 1974, 5 U.S.C. § 552a. The Privacy Act establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies.

A system of records is a group of records under the control of a federal agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual. The Privacy Act requires that federal agencies announce new systems of records via publication in the Federal Register, thereby informing the public of certain categories of information that the agencies are maintaining on individuals, the main purposes of the systems, and anticipated routine uses of the records maintained in the systems. In order to ensure that the Department complies with these system of records notice requirements, the Privacy and Civil Liberties Office works with Departmental components in the preparation of System of Records Notices (SORNs) by reviewing (and drafting, as needed) Department-wide and component SORNs, with particular attention to the routine uses included in the SORNs, giving full consideration to associated compatibility issues.

At the heart of the Privacy Act is its general prohibition on the disclosure of information from a system of records absent the written consent of the subject individual, unless the disclosure is pursuant to one of twelve statutory exceptions. Consistent with the Act's other purposes that incorporate the fair information practices, it provides individuals with a means by which they may seek access to and amendment of records about themselves.

Responsible for providing Department-wide counsel on all aspects of the Privacy Act, the Privacy and Civil Liberties Office offers guidance on numerous matters including disclosure, maintenance, access and amendment, and safeguarding of Privacy Act-protected information. The Office also advises components regarding Privacy Act implications in connection with litigation and legislative issues; offers analysis of Privacy Act case law and OMB guidance; develops and conducts Privacy Act training; and provides guidance on Privacy Act regulations.

The E-Government Act

The E-Government Act of 2002 establishes requirements for agencies' use of information technology. Most relevant to the mission of the Privacy and Civil Liberties Office are the requirement (set out in Section 208) that agencies conduct Privacy Impact Assessments (PIAs) of information technology systems that gather certain identifying

information about individuals, and the reporting requirements for agencies with regard to information security.

A PIA analyzes how information in identifiable form is collected, stored, protected, shared, and managed, and its purpose is to demonstrate that system owners and developers have consciously incorporated privacy protections throughout the entire life cycle of a system. The E-Government Act requires that PIAs be made publicly available, unless doing so would reveal particular classified or sensitive information.

The Privacy and Civil Liberties Office determined that the PIA process within the Department would be much more effective if all components were working from a standard template with standard guidance. Accordingly, utilizing some of the aspects of the Department of Homeland Security's model, the Office drafted official PIA guidance; a Privacy Threshold Analysis to determine whether a PIA is required; and a new PIA Template. Additionally, the Office maintains a listing of completed PIAs (available online at <http://www.usdoj.gov/pclo/pia.htm>).

The Office has also worked with the Department's Office of the Chief Information Officer to integrate the Privacy Threshold Analysis into the Department's "Trusted Agent" system (a computerized system used for tracking compliance with various aspects of the Federal Information Security Management Act), thereby automatically integrating the Privacy Threshold Analysis into the system development process. The Office is also working with the OCIO to integrate the PIA into the same Trusted Agent system.

The Office answers questions from Departmental employees about completing PIAs and will soon conduct PIA training. The Office has advised state, local, and tribal representatives on the efficacy of the PIA in protecting privacy at the start of an information technology program. The Office's goal is to ensure that the Department looks at the privacy impact of each information technology system at its beginning.

Federal Information Security Management Act (FISMA)

The primary purpose of **FISMA** is to "provide a comprehensive framework for ensuring the effectiveness of information security controls over information resources that support Federal operations and assets." 44 U.S.C. § 3541. FISMA recognizes the inter-relation between security and privacy, as well as the fact that effective security tools are needed to protect the privacy of information collected by information technology tools. Therefore, the Office works with the Department's OCIO to ensure that privacy protection is considered in information technology security decisions. Also, the Office is responsible for privacy-related portions of the Department's FISMA reporting requirements.

Information Sharing

Among the many important responsibilities that lie with the Privacy and Civil Liberties Office are its privacy and civil liberties responsibilities related to information sharing initiatives. The Chief Privacy and Civil Liberties Officer co-chairs the

President's Information Sharing Environment Guideline 5 Working Group, along with the Civil Liberties Protection Officer for the Directorate of National Intelligence. Guideline 5 of the December 16, 2005 Memorandum from President George W. Bush requires that the Attorney General and the Director of National Intelligence "develop guidelines designed to be implemented by executive departments and agencies to ensure that the information privacy and other legal rights of Americans are protected in the development and use of the [Information Sharing Environment], including in the acquisition, access, use, and storage of personally identifiable information." The Working Group has developed these guidelines for presidential approval.

The Privacy and Civil Liberties Office also has participated in the launching of the "One-DOJ" environment, which facilitates the sharing of Departmental information with regional partners through the Department's Regional Data Exchange System. As this program was developed, the Office's staff attorneys assisted in the identification and resolution of complex and technical legal issues, drafted the system's SORN, and participated in the drafting and review of its Privacy Impact Assessment and the memoranda of understanding among parties participating in the system.

The Office also works on other information sharing programs such as the National Data Exchange System and "fusion centers," to ensure that privacy laws are complied with and that privacy and civil liberties principles are respected from the programs' earliest stages.

Data Management and Data Security

The Privacy and Civil Liberties Office is working with the Department's OCIO on issues of data management, especially the issue of data security. The Office has issued general guidance to remind employees of their duty to protect personal information and has tasked Department component heads to designate liaisons who will report any significant data breaches to the Chief Privacy and Civil Liberties Officer.

Legislative and Policy Review

The Privacy and Civil Liberties Office works closely with the Department's Office of Legislative Affairs (OLA) to review bills concerning individual privacy matters, civil liberties issues, the collection of personal information, agency disclosure policies, or information sharing with the Department's partners. On any typical day, it is not uncommon for the Privacy and Civil Liberties Office to provide comments on numerous legislative proposals.

The Privacy and Civil Liberties Office also participates in the process of policy drafting by the Department's Office of Legal Policy (OLP). Recently, for example, the Privacy and Civil Liberties Office worked with OLP to finalize the Attorney General's Report on Criminal History Background Checks.

Outreach

The Privacy and Civil Liberties Office actively participates in public outreach activities. In addition to public speaking engagements and active dialoguing with the

privacy community, the Office participates, for example, in outreach efforts sponsored by the Department's Civil Division with regard to Arab, Muslim and Sikh communities.

International Efforts

One of the Privacy and Civil Liberties Office's goals is to promote international cooperation and understanding of privacy issues relevant to the Department's mission and operations. In support of the Department's mission, the Office:

- Enhances the Department's information-sharing opportunities with our international partners by providing educational outreach and leadership in areas such as privacy impact assessment;
- Interprets international data protection frameworks;
- Counsels the Department and other agency partners on existing and emerging changes in privacy practices and policy approaches globally;
- Engages in dialogue with international privacy commissions and bilateral partnerships, including the European Union, while also leveraging opportunities for dialogue in multilateral forums; and
- Provides counsel and oversight for international agreements related to personal information collection and sharing that impacts the Department's mission; and
- Educates foreign officials on U.S. efforts to protect privacy and civil liberties.

Privacy and Civil Liberties Board

As noted above, the Privacy and Civil Liberties Office has established and regularly convenes a Departmental Privacy and Civil Liberties Board, consisting of senior representatives of the Department's law enforcement and national security components, among others. The Office has divided the Board into three committees, which meet monthly to analyze and report on current important issues. Presently the committees are viewed as internal resources and only issue internal advice, but over time their mission might evolve to meet the goals of the Office and the Department.

- **Outreach Committee**

This Committee assesses how the Department currently handles outreach to religious or ethnic communities that might be particularly affected by Departmental policy. Currently the Committee is preparing a report on existing efforts taken to improve relations and understanding with affected communities. The goal of the report is to provide better awareness of and coordination among Department initiatives.

- **Law Enforcement and National Security Committee**

This Committee addresses privacy concerns in the realms of law enforcement and national security. It is currently examining issues such as DNA matching and redress for individuals inappropriately identified on "watch lists."

- **Data Collection, Aggregation and Maintenance Committee**

This Committee addresses issues related to information privacy within the Department. Its first task is to respond to recommendations in the April 2006 Government Accountability Office report, titled “Personal Information Agency and Reseller Adherence to Key Privacy Principles.” To that end, the Committee is analyzing the Department’s use of information reseller data – particularly any obtained from Internet data brokers – and will evaluate potential Department-wide policy with regard to such use.

Training and Education

One way to ensure that the Privacy and Civil Liberties Office's mission is successful is through a vigorous education and training program. The Office has already launched two initiatives and has plans for broader privacy training in the coming months.

The first initiative was to issue a Departmental Memorandum regarding Safeguarding of Information, which reminded Departmental employees of their responsibilities and duties in safeguarding personally identifiable information. The second initiative was Privacy Impact Assessment training. The Office recently conducted its first annual Privacy Impact Assessment half-day training session, which was attended by over seventy-five Departmental employees and featured presentations on the Privacy Act, FISMA and PIA preparation. In addition to instruction, it featured hands-on exercises such as preparation of a draft PIA based on a model question. From the feedback received, the Office believes that the training was a success.

In the next several months the Office hopes to establish privacy awareness training for all Department employees, to ensure that they are fully informed about how to handle personally identifiable information in a responsible and appropriate manner.

Conclusion

At the launch of the Department's Privacy and Civil Liberties Board, the Deputy Attorney General remarked, "We at Justice are responsible for enforcing the laws. We should be the role model for ensuring that American's privacy and civil liberties are adequately protected in everything that we do."

In its short history, the Privacy and Civil Liberties Office already has become an important part of the Department's structure. In the coming months the Office plans to further its integration into the Department. Being part of the Office of the Deputy Attorney General uniquely positions the Office on the front line of all new Departmental programs. It remains the Office's goal to ensure that privacy and civil liberties are considered and protected in carrying out the Department's mission.

Appendix – Organizational Chart of the Privacy and Civil Liberties Office

**PRIVACY AND CIVIL LIBERTIES OFFICE
(PCLO)**

