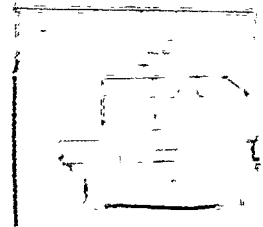




U.S. Department of Justice  
Office of Legal Counsel



Office of the  
Assistant Attorney General

Washington, D.C. 20530

3 MAY 1983

MEMORANDUM FOR MARY C. LAWTON  
Counsel for Intelligence Policy  
Office of Intelligence Policy and Review

Re: Application of Privacy Act to  
FBI Domestic Security Guidelines

This responds to your request of February 23, 1983, for the views of this Office on a draft opinion prepared by your Office for the FBI regarding the application of the Privacy Act (hereinafter the Act) to the collection of publicly available information. The issue has arisen in connection with the new FBI Domestic Security Guidelines, which provide that "[n]othing in these Guidelines is intended to prohibit the FBI from collecting and maintaining publicly available information consistent with the Privacy Act." We have summarized our general comments below. We are also attaching as an appendix more detailed comments and suggestions which we trust will be of assistance to your Office in the preparation of a final opinion on this complex subject.

I. Applicability of the Privacy Act

The premise of your Office's draft memorandum, as well as the FBI's position (as evidenced by Mr. Hotis's February 7, 1983, memorandum to you) and the OMB guidelines promulgated to implement the Act, 40 Fed. Reg. 28949 (July 9, 1975), as amended, 40 Fed. Reg. 56741 (Dec. 4, 1975), is that the Act does apply to the collection of publicly available information. We agree that the Act does apply to such information. Thus, the FBI is subject to the prohibition under 5 U.S.C. § 552a(e)(7), that it shall

"maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly

authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

The legal problem raised by the provision in the Domestic Security guidelines quoted above is to determine the extent of the permissible collection activity under the Act.

The Act itself contains one relevant exception, in subsection (e)(7), for "authorized law enforcement activity." The OMB guidelines identify another exception for certain library materials. See 40 Fed. Reg. at 56742. The draft memorandum concludes, on page 2, that

"the FBI may collect, retain and use publicly available information concerning individuals or groups:

1. When it does so in the context of maintaining a general reference library;
2. When it does so as an adjunct to a preliminary inquiry to full investigation undertaken pursuant to the guidelines; and
3. When the standards of the guidelines would permit a preliminary inquiry or full investigation, even though, for other reasons, an investigation has not been initiated."

The situation described in paragraph 1 apparently relates to the OMB library "exception," and the situations described in the last two paragraphs relate to the subsection (e)(7) exception for law enforcement activity. We agree that collection of publicly available information is generally permissible in these three situations. Nevertheless, we believe that the draft memorandum should take into consideration the differences between the two "exceptions" because they are different in purpose and effect. Further, we believe that each of the three situations described in paragraphs 1 through 3 above should be analyzed under the exception that would appear to us to be relevant. Finally, we differ somewhat with your formulation of the extent of the permissible activity as described in the draft memorandum in each of the three situations.

## II. The Library "Exception"

To our knowledge, the library "exception" is not based on any express exemption in the Privacy Act. OMB adopted this "exception" in the implementing OMB guidelines in 1975, and we believe that it is supportable as generally described in those guidelines. The guidelines provide:

"Libraries. Standard bibliographic materials maintained in agency libraries, such as library indexes, Who's Who volumes and similar materials are not considered to be systems of records. This is not to suggest that all published material is, by virtue of that fact, not subject to the Act. Collections of newspaper clippings or other published matter about an individual maintained other than in a conventional reference library would normally be a system of records."

40 Fed. Reg. 56742 (Dec. 4, 1975)(emphasis in original).

Notwithstanding the literal applicability of the prohibitions of the Privacy Act, we do not think that the Act can reasonably be read to prohibit the library of a federal agency from subscribing to newspapers and magazines. We have found nothing in the legislative history to indicate that an interpretation which recognized a library exception would be impermissible, and we assume that Congress could not have intended, without discussion, to impose a contrary prohibition, which would amount to a radical change in the way every federal agency library operates. Thus, under the guidelines, agencies may maintain "standard bibliographic materials" and, apparently, other published matter, provided that such material is not maintained other than in a "conventional reference library."

The formulation of the library exception in the draft memorandum, however, departs from the language of the OMB guidelines. The draft defines the exception in terms of "maintaining a general reference library." The OMB guidelines, as quoted above, use the phrase "conventional reference library." The OMB library "exception" applies government-wide, and not simply to the FBI. We believe, therefore, that it is important

to use the OMB language in describing the library exception. Moreover, we believe that the draft memorandum should attempt to develop a rationale for the library "exception" in order that its limits may be identified.

The draft memorandum recognizes that the OMB guidelines themselves do not identify with any precision the materials to which the library exception applies. Standard bibliographic works maintained in agency libraries are permitted, while collections of information about an individual maintained other than in a conventional reference library are not. Although the draft memorandum appears to focus on the type of material involved, we believe that the better approach to applying the OMB guidelines is to focus on the manner in which the material is "maintained." Under this reading, as the attached memorandum more fully explains, the agency may maintain any book or periodical in its library provided that it follows procedures customarily followed in a library, for example, indexing material in the card catalogue, filing by alphabetical or chronological order, or computer storage and retrieval. The library exception, however, does not permit the agency itself to create the records or collections of information, see Clarkson v. United States, 678 F.2d 1368 (11th Cir. 1982); Albright v. United States, 631 F.2d 914 (D.C. Cir. 1980); nor may it process in any way other than by standard library techniques the information contained in books and periodicals within its collection. See Clarkson, supra. Depending on the purpose for collecting and maintaining the agency records, however, similar compilations of personal information about individuals may fall within the the law enforcement exception discussed below. See id., 678 F.2d at 1375.

### III. The Law Enforcement Exception

We agree that the law enforcement exception generally authorizes collection and maintenance of information in the two situations described in paragraphs 2 and 3 of the summary of the draft memorandum, as set out above. Although the draft memorandum does not say so explicitly, we believe that the proper frame of reference for determining the extent of the permissible activity under the Domestic Security Guidelines is the Guidelines themselves. Our reasoning is that the subsection (e)(7) exception includes all "authorized law

enforcement activity," and the legislative history of that term indicates that it was to be given "the broadest reach." 120 Cong. Rec. 36651 (Nov. 20, 1974)(remarks of Rep. Ichord), reprinted in "Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579)," Joint Committee Print, 94th Cong., 2d Sess. 296 (1976). Thus, whatever the FBI is "authorized" to do pursuant to the Domestic Security Guidelines or otherwise, falls within the law enforcement exception of subsection (e)(7).

With regard to the issues of intelligence activities and preventative law enforcement in particular, we think that the Guidelines indicate the balance to be struck. The Guidelines were drafted to provide the FBI with a greater margin of preventative capability, while at the same time to be sensitive to First Amendment guarantees. Consistent with the legislative history of subsection (e)(7) and the case law interpreting that provision, to the extent that the Guidelines authorize FBI intelligence and prophylactic activity, such activity falls within the statutory exception. As the attached memorandum indicates, we find nothing in the case law to compel or even suggest a contrary conclusion.

In light of this conclusion, it is clear that the activity that the draft memorandum describes in paragraph 2 is fully consistent with the statutory exception. We would suggest that the extent of the permissible activity should be described in terms of information that is "relevant" to an inquiry or investigation instead of as an "adjunct" to an inquiry or investigation. This formulation is more consistent with the scope of the exception as defined in the case law. See, e.g., Jabara v. Webster, 691 F.2d 272, 280 (6th Cir. 1982).

We believe paragraph 3 to be somewhat overbroad in suggesting that the law enforcement activity exception pursuant to the Guidelines includes circumstances in which neither an inquiry or an investigation is begun. In that situation, a question might be raised whether the FBI is engaged in an "authorized law enforcement activity" within the meaning of the Privacy Act. This question seems to follow from the fact that the FBI is relying on the Guidelines for the "authorization" that will meet the requirements of the statutory exception. Under this view, to the extent that the Guidelines do not explicitly authorize a law enforcement activity, there

is no sufficient authority. Because the Guidelines as presently drafted do not, so far as we are aware, authorize FBI activity except in the course of an ongoing inquiry or investigation, we believe that it is necessary either to amend the Guidelines or to provide specific authority by some internal FBI rule or regulation that information can be collected and maintained in circumstances in which an inquiry or investigation could be initiated, even though, for certain reasons, it has not been.

#### IV. Expungement or Amendment of Records

The draft memorandum discusses the applicability of the Privacy Act to the Domestic Security Guidelines only in terms of the FBI collection of publicly available information. It does not discuss the issues whether, and under what circumstances, the Privacy Act might require the amendment or expungement of the records so collected. The Guidelines themselves seem to raise this latter issue, because the proviso in the Guidelines relates to the collection and maintenance of records. We believe that a more thorough treatment of the Privacy Act questions should address the issues of amendment and expungement.

Several cases suggest that the FBI might have some duty to allow amendment or expungement of records that it collects in the belief that an inquiry or investigation is warranted if it subsequently turns out that the individual posed no real threat to domestic security interests. See, e.g., Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975) (federal court is empowered to order expungement of records when necessary to vindicate constitutional or statutory rights); Clarkson v. IRS, supra (expungement is available for records maintained in violation of subsection (e)(7)); Paton v. La Prade, 524 F.2d 862 (3rd Cir. 1975) (expungement of FBI records collected on the suspicion of domestic security implications which later proved to be groundless).

#### V. Conclusion

In sum, we agree with the general conclusions in your draft opinion that the Privacy Act does apply to publicly available information but that the FBI nevertheless has authority to maintain records of individual information, including publicly available information, in the course of

domestic security enforcement activities in two circumstances:  
(1) pursuant to the library exception as identified in the OMB guidelines and as further defined in this memorandum; and  
(2) pursuant to the subsection (e)(7) exception for law enforcement activity to the extent that the information is relevant to an inquiry or investigation which is within the scope of authority under the Domestic Security Guidelines. This authority extends both to ongoing inquiries and investigations and to circumstances that otherwise meet the criteria of the Guidelines and which could be made the basis for an inquiry or investigation even though none is ongoing at the time, provided that, in the latter situation, the Guidelines or an internal regulation of the FBI specifically authorizes the collection and maintenance of such records. We believe that a legal opinion on the application of the Privacy Act to the Domestic Security Guidelines should set out these conclusions and provide a detailed analysis in support. We also believe that the opinion should include a discussion of the FBI's obligation to amend or expunge its files following the termination of an inquiry or investigation or other authorized collection of information. We hope that our comments will be helpful to you in your preparation of a final opinion.

Theodore B. Olson  
Assistant Attorney General  
Office of Legal Counsel

Attachment