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JAN 28 2015

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
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DIRECTOR, OPERATIONAL TEST AND EVALUATION
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ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: DoD Component Responsibility to Ensure Government Contract Compliance with the Privacy Act

References: (a) Section 552a of Title 5, United States Code (also known as "the Privacy Act," as amended) (specific portion attached)
(b) Federal Acquisition Regulation, current edition (specific portion attached)
(c) DoD 5400.11-R, "Department Of Defense Privacy Program," May 14, 2007 (specific portion attached)

This memorandum reminds all DoD Components of their responsibility to apply the requirements of The Privacy Act of 1974, section 552a of Title 5, (Reference (a)), to government contractors and their employees working on contracts for the design, development, or operation of DoD systems of records.

Reference (a) states, "[w]hen 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 [Reference (a)] to be applied to such system." Furthermore, part 24 of the Federal Acquisition Regulation (FAR) prescribes policies and procedures to ensure the requirements of the Privacy Act are applied to government contracts. The FAR also delineates specific privacy clauses contracting officers are required to incorporate into all contracts or solicitations for the design, development, or operation of systems of records. Each DoD Component is responsible for implementing the applicable contract requirements, as required by DoD 5400.11-R, "Department of Defense Privacy Program."

All DoD Component contracting officers, in collaboration with their respective Component Senior Official for Privacy, must ensure that contracts and solicitations for the design, development, or operation of DoD systems of records comply with References (a)

through (c). The relevant portions of these References are attached to this memorandum for your convenience.

Possible further action to address DoD contractor compliance with the attached References will be initiated between the Defense Acquisition Regulation Council and the Defense Privacy and Civil Liberties Division (DPCLD) and, as necessary, will be communicated separately to the DoD Components.

Questions regarding this memorandum should be directed to Samuel P. Jenkins, Acting Chief, DPCLD at osd.ncr.odam.mbx.dpclco-correspondence@mail.mil, or at (703) 571-0070.



David Tillotson III
Senior Agency Official for Privacy

Attachment:
As stated

cc:
ODCMO Directorates

ATTACHMENT

Reference (a) - The Privacy Act, Section 552a of Title 5, United States Code

(m)

- (1) Government Contractors.— 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 this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.
- (2) A consumer reporting agency to which a record is disclosed under section 3711 (e) of title 31 shall not be considered a contractor for the purposes of this section.

Reference (b) - Federal Acquisition Regulation, Subpart 24.1—Protection of Individual Privacy

24.101 Definitions.

As used in this subpart—

“Agency” means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

“Individual” means a citizen of the United States or an alien lawfully admitted for permanent residence.

“Maintain” means maintain, collect, use, or disseminate.

“Operation of a system of records” means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

“Record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history, and that contains the individual’s name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.

“System of records on individuals” means a group of any records under the control of any agency from which information is retrieved by the name of the

individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

24.102 General.

- (a) The Act requires that when an agency contracts for the design, development, or operation of a system of records on individuals on behalf of the agency to accomplish an agency function the agency must apply the requirements of the Act to the contractor and its employees working on the contract.
- (b) An agency officer or employee may be criminally liable for violations of the Act. When the contract provides for operation of a system of records on individuals, contractors and their employees are considered employees of the agency for purposes of the criminal penalties of the Act.
- (c) If a contract specifically provides for the design, development, or operation of a system of records on individuals on behalf of an agency to accomplish an agency function, the agency must apply the requirements of the Act to the contractor and its employees working on the contract. The system of records operated under the contract is deemed to be maintained by the agency and is subject to the Act.
- (d) Agencies, which within the limits of their authorities, fail to require that systems of records on individuals operated on their behalf under contracts be operated in conformance with the Act may be civilly liable to individuals injured as a consequence of any subsequent failure to maintain records in conformance with the Act.

24.103 Procedures.

- (a) The contracting officer shall review requirements to determine whether the contract will involve the design, development, or operation of a system of records on individuals to accomplish an agency function.
- (b) If one or more of those tasks will be required, the contracting officer shall—
 - (1) Ensure that the contract work statement specifically identifies the system of records on individuals and the design, development, or operation work to be performed; and
 - (2) Make available, in accordance with agency procedures, agency rules and regulation implementing the Act.

24.104 Contract clauses.

When the design, development, or operation of a system of records on individuals is required to accomplish an agency function, the contracting officer shall insert the following clauses in solicitations and contracts:

(a) The clause at 52.224-1, Privacy Act Notification.

(b) The clause at 52.224-2, Privacy Act.

Reference (c) - Federal Acquisition Regulation, Subpart 52.2 —Text of Provisions and Clauses

52.224-1 Privacy Act Notification.

As prescribed in 24.104, insert the following clause in solicitations and contracts, when the design, development, or operation of a system of records on individuals is required to accomplish an agency function:

Privacy Act Notification (Apr 1984)

The Contractor will be required to design, develop, or operate a system of records on individuals, to accomplish an agency function subject to the Privacy Act of 1974, Public Law 93-579, December 31, 1974 (5 U.S.C. 552a) and applicable agency regulations. Violation of the Act may involve the imposition of criminal penalties.

(End of clause)

52.224-2 Privacy Act.

As prescribed in 24.104, insert the following clause in solicitations and contracts, when the design, development, or operation of a system of records on individuals is required to accomplish an agency function:

Privacy Act (Apr 1984)

(a) The Contractor agrees to—

(1) Comply with the Privacy Act of 1974 (the Act) and the agency rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals to accomplish an agency function when the contract specifically identifies—

(i) The systems of records; and

(ii) The design, development, or operation work that the contractor is to perform;

(2) Include the Privacy Act notification contained in this contract in every solicitation and resulting subcontract and in every subcontract awarded without a solicitation, when the work statement in the proposed subcontract requires the redesign,

development, or operation of a system of records on individuals that is subject to the Act; and

- (3) Include this clause, including this paragraph (3), in all subcontracts awarded under this contract which requires the design, development, or operation of such a system of records.
- (b) In the event of violations of the Act, a civil action may be brought against the agency involved when the violation concerns the design, development, or operation of a system of records on individuals to accomplish an agency function, and criminal penalties may be imposed upon the officers or employees of the agency when the violation concerns the operation of a system of records on individuals to accomplish an agency function. For purposes of the Act, when the contract is for the operation of a system of records on individuals to accomplish an agency function, the Contractor is considered to be an employee of the agency.
- (1) “Operation of a system of records,” as used in this clause, means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.
 - (2) “Record,” as used in this clause, means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains the person’s name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.
 - (3) “System of records on individuals,” as used in this clause, means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

(End of clause)

**DoD 5400.11-R, “Department Of Defense Privacy Program,” Subchapter 1.3—
Government Contractors**

C1.3.1. Applicability to Government Contractors

- C1.3.1.1. When a DoD Component contract requires the operation or maintenance of a system of records or a portion of a system of records or requires the performance of any activities associated with maintaining a system of records, including the collection, use, and dissemination of records, the record system or the portion of the record system affected are considered to be maintained by the DoD Component and are subject to this Regulation. The Component is responsible for applying the

requirements of this Regulation to the contractor. The contractor and its employees are to be considered employees of the DoD Component for the purposes of the criminal provisions of Reference (b) during the performance of the contract. Consistent with subpart 24.1 of the Federal Acquisition Regulation (Reference (j)), contracts requiring the maintenance or operation of a system of records or the portion of a system of records shall include in the solicitation and resulting contract such terms as are prescribed by Reference (j).

C1.3.1.2. If the contractor must use, have access to, or disseminate individually identifiable information subject to this Regulation in order to perform any part of a contract, and the information would have been collected, maintained, used, or disseminated by the DoD Component but for the award of the contract, these contractor activities are subject to this Regulation.

C1.3.1.3. The restriction in subparagraphs C1.3.1.1 and C1.3.1.2 of this Chapter do not apply to records:

C1.3.1.3.1. Established and maintained to assist in making internal contractor management decisions, such as records maintained by the contractor for use in managing the contract;

C1.3.1.3.2. Maintained as internal contractor employee records even when used in conjunction with providing goods and services to the Department of Defense;

C1.3.1.3.3. Maintained as training records by an educational organization contracted by a DoD Component to provide training when the records of the contract students are similar to and commingled with training records of other students (for example, admission forms, transcripts, academic counseling and similar records);

C1.3.1.3.4. Maintained by a consumer reporting agency to which records have been disclosed under contract in accordance with section 3711(e) of 31 U.S.C., the Federal Claims Collection Act of 1966, (Reference (k)); or

C1.3.1.3.5. Maintained by the contractor incident to normal business practices and operations.

C1.3.1.4. The DoD Components shall publish instructions that:

C1.3.1.4.1. Furnish DoD Privacy Program guidance to their personnel who solicit, award, or administer Government contracts;

C1.3.1.4.2. Inform prospective contractors of their responsibilities, and provide training, as appropriate, regarding the DoD Privacy Program; and

C1.3.1.4.3. Establish an internal system of contractor performance review to ensure compliance with the DoD Privacy Program.

C1.3.2. Contracting Procedures. The Defense Acquisition Regulations Council is responsible for developing the specific policies and procedures to be followed when soliciting bids, awarding contracts or administering contracts that are subject to this Regulation.

C1.3.3. Contractor Compliance. Through the various contract surveillance programs, ensure contractors comply with the procedures established in accordance with paragraph C1.3.2 of this Chapter.

C1.3.4. Disclosure of Records to Contractors. Disclosure of records contained in a system of records by a DoD Component to a contractor for use in the performance of a DoD contract is considered a disclosure within the Department of Defense. See paragraph C4.1.2 of Chapter 4. The contractor is considered the agent of the contracting DoD Component and to be maintaining and receiving the records for that Component.