



Transparency, Accountability, and Consent in Evidence Building

*How Government Ethically and
Legally Uses Administrative Data for
Statistical Activities*

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DISCLAIMER

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Executive Summary

The U.S. government can only be effective if the policies it creates and the services it operates work. That's why analyzing the efficacy of those policies and services is an essential part of government program operations. Officials in government must enable analysis of data to determine whether policies and services are achieving their intended objectives. Just as program administrators use data to determine individuals' eligibility for services, policymakers also need data to inform them about the success of program decisions.

The U.S. government's executive branch uses data from the American public in order to evaluate programs, services, and policies. Transparency, accountability, and consent are vital components of these ethical and legal uses.

As the executive branch increasingly encourages agencies to evaluate programs and policies, there is an increased demand to combine data collected from different sources to provide policy-relevant conclusions. A firm understanding is needed about what consent means, how the concept is applied in conjunction with transparent notification processes, and how other accountability mechanisms are relevant.

Notification, oversight, and consent are important when using data collected primarily for administering government programs. The government's use of those data may affect individuals' rights through the provision of services or benefits. Because there is a need for the collection of these data, the government has an obligation to use evidence transparently and with accountability.

When the American public provides consent for the government to collect confidential, identifiable data for program administration, those data should also be available for statistical analyses. Individual and societal consent provided for the use of administrative data typically extends to statistical uses that do not result in the alteration of individual rights. This extension occurs when the activities are conducted under a legal framework that affords clear confidentiality protections and use restrictions for identifiable data, coupled with notice about uses.

The government's existing legal framework developed by Congress provides accountability for data collection, data disclosure, and data uses across government. A suite of laws, including the Paperwork Reduction Act, the Privacy Act, the E-Government Act, and the Confidential Information Protection and Statistical Efficiency Act. This combined framework ensures that when consent and notification exist for the use of administrative data in program operations, related uses for narrower statistical activities are generally permissible. Thus, U.S. laws include strong mechanisms that articulate the transparent processes for acknowledging consent, notice, and oversight for the government's use of administrative data to operate programs when conducted as "statistical activities" for "statistical purposes."

The existing legal framework recognizes there are multiple approaches to ensuring the ethical use of government-collected data; consent is only one of several approaches. Notification and accountability are also recognized as essential mechanisms through the inclusion of certain exceptions provided in the Privacy Act, which allow for some information to be redisclosed across agencies without explicit, individual consent when appropriate advance notice was given and when accountability mechanisms are in place. For example, data can be combined and made available (1) when for a "routine use," (2) when provided to the U.S. Census Bureau, or (3) when records are not individually identifiable and are used for research.

When the government has not made the purpose for data use clear at the time of collection, uses are limited and additional notification or consent may be required. Under current law and practice, identifiable data can typically only be used when the activities are consistent with the purpose of the data collection. Restrictions also exist when a program combines its administrative data with those from another program for evidence-building activities and the intended purposes were not sufficiently addressed when data were collected.

Lack of clarity among program administrators regarding the relationship between evidence-building activities and program operations has created confusion about how administrative data can be used. The lack of clarity about the use of data is a major impediment to evidence building in government, and it means data are often inaccessible in practice, even when they are legally available for this purpose.

Moving forward, the government must take steps to better articulate the relationships between accountability, transparency, and consent, and how to apply these concepts in practice for the use of administrative data in evidence building. An important step is to declare the right of access for certain entities to use data for evidence building, recognizing strong mechanisms are in place to review consent, protect confidentiality, limit uses, make notifications about use, and provide oversight. At the same time, the government must also do more to ensure that information about how it uses data is easy for the American public to access and understand.



Introduction

Transparency about the use of data, consent to use data for defined purposes, and accountability for uses are important for the government's ethical and legal use of those data. This is the case when using an individual's information to make decisions about benefits as well as when studying the entire population participating in a program. In whatever ways the government uses data, the American public expects its government will responsibly steward any data they provide to improve public services. Today, the government is transparent about how it collects data and how it intends to use those data, though it can still do more to increase the transparency and ease of access to information about how the government uses the data it collects.

The government needs reliable and valid information about individuals to determine eligibility for services and compliance with regulations. The use of these data is to be expected in the operation of the government. In the absence of an operational need, this information would not be useful for administration purposes and the government would, therefore, not likely even collect it. The very collection of administrative data, by definition, means the government perceives the information to be valuable for administering programs.

The government also needs high-quality data to analyze whether programs achieve their intended objectives beyond an individual's case. A statistical analysis that focuses on a group of individuals can provide feedback that informs program administration decisions. Increasingly, the same data collected for operational decisions about individuals are also used to analyze an entire group of individuals, generating summary information and evidence about how programs operate. This information is then useful for future decisions about those programs.

When the government collects data to make administrative decisions about an individual's benefits or rights, those activities are described as non-statistical and must be used in a manner consistent with the laws governing program administration. Non-statistical activities could pose a direct risk or benefit to an individual because the data could potentially affect how an individual receives direct benefits or services from the government. In contrast, analyses that involve a group of individuals are considered statistical activities that yield summary analyses of the group. Some statistical analyses that study groups of individuals can use data without personal identifiers (de-identified data), but some analyses require additional details to improve the analytical quality and the usefulness of the resulting information (identifiable data), even when individual identities are not disclosed after the analysis is complete. In either case, these types of statistical activities are low risk to individuals because the resulting analysis is not about an individual and, therefore, cannot directly impact a particular individual's rights or benefits.

To what extent do individuals consent to statistical analyses of groups by the government? How and when does the concept of consent apply to the government's uses of data to manage programs and to generate analyses for statistical purposes used to improve operations? And within this context, what is the role of transparent notice and accountability in providing knowledge about uses? When the American public receives notice or when individuals provide consent for the government to use confidential, identifiable data for program administration, those data should also be available for use in statistical analyses. This is because these types of evidence-building activities are inherent to evaluating program effectiveness, which is an expected function of program administration.^a

In addition to recognizing that statistical and evidence-building activities that support program operations are part of program administration, this technical paper briefly discusses issues related to transparency, accountability, and consent for the government's data uses. The paper also explains the concepts of consent and notification, the role of oversight as a form of accountability, the legal framework, and then how the government can legally and ethically use data for evidence-building activities. The concluding sections examine movement in the government to interpret the complex web of laws to ethically and legally use government-collected data for statistical purposes.

^a Note that the scope of this technical paper is limited to the use of government-collected data for evidence-building activities, defined as "statistical activities" conducted for "statistical purposes," consistent with the definitions in the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) and the definitions used by the U.S. Commission on Evidence-Based Policymaking in its final report. This paper does not address analyses conducted for non-statistical purposes under the Computer Matching and Privacy Protection Act of 1988. This paper also does not address consent to use privately collected data, such as data collected by individual firms or social media applications.

Consent, Notification, and Oversight

Consent is defined as the provision of permission for an action to occur. There are many different perspectives on precisely what form consent may be offered, suggesting a variety of types of consent, such as informed, direct, or implied. Ethics, laws, and practices have generally determined what form consent should take, how it should be obtained (e.g., written or verbal), and under what conditions individual, direct consent is necessary.

The idea of a well-informed individual being able to make reasonable and responsible choices is the centerpiece of accepted practice in medicine. Medical professionals are responsible for providing patients with information about the benefits and risks of treatment options, which provides the basis for individuals to choose how to proceed. The standard in medicine of informed consent, which is one of several different forms of consent, ensures that physicians provide adequate information about treatment to patients; not doing so is considered negligent under physicians' professional ethics.¹

A similar concept of informed consent applies to research on human subjects that could pose direct and measurable harm to an individual, even when there are anticipated benefits, such as for developmental or mental health treatment services.² Because of potential for harm, individuals who participate in research should be aware of the anticipated benefits and risks to determine their willingness to participate. In the 1970s, the U.S. government developed a set of ethical principles to guide research with human subjects.³ Over subsequent decades, more than a dozen federal agencies have promulgated regulations that provide requirements for, among other things, informed consent for government-funded research involving human subjects.⁴

The government routinely collects information about individuals in the American public through the course of its operations, referred to as administrative data. Individuals provide tax payments and supporting details to determine applicable tax rates, as well as eligibility for deductions and credits. Beneficiaries of government services provide confidential information to satisfy eligibility criteria. These types of activities suggest other approaches to the concept of consent based on the mandatory or voluntary provision of information, with the acknowledgement that the government will use the information provided for purposes described at the time of the collection.

Amid all the ways the government collects data about individuals, approaches to gaining and maintaining consent from individuals and society to use those data vary. For the U.S. government's executive branch, consent for data use occurs through a range of mechanisms and processes. Whether individual consent applies to a given type of data also varies. Since the 1970s, Congress has recognized that transparency and accountability mechanisms can also contribute to a form of societal consent. These mechanisms materialize as legal exceptions that enable certain uses when notification processes are fulfilled and oversight is available. Importantly, however, before agencies can use the confidential data collected by the executive branch for statistical analyses, consent, notification, or oversight may be required to use those data for stated purposes.



Legal Framework for the Use of Government-Collected Data

A consistent ethical framework for the government's use of data emerged in the 1970s through the Fair Information Practice Principles, which recognize the value of information and the important role of privacy protections for the American public.⁵ The principles encourage notification of individuals about data collection and use, participation from individuals that includes consent for collection and use, identification of the purpose for which information will be used, and limits on specified uses. In 2017, the U.S. Commission on Evidence-Based Policymaking suggested that the ethical framework applies to evidence-building activities.⁶

The U.S. government's legal framework for data collection, disclosure, and use that emerged since the 1970s derives from the Fair Information Practice Principles. The legal framework, built on this ethic, involves numerous laws that interweave to address the issues of notification and consent. The Paperwork Reduction Act of 1995 (PRA) was designed, among other things, to “ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the federal government” and to “improve the quality and use of federal information to strengthen decision-making, accountability, and openness in government.”⁷ The PRA outlines the process by which data collections are reviewed to ensure compliance with program authorizations, regulations, and direction to maximize data quality and minimize the burden on the American public in the provision of information to the government. The Privacy Act of 1974, as amended, governs most systems that store government-collected data and the disclosure of data from those systems. The PRA and the Privacy Act—together with the Confidential Information Protection and Statistical Efficiency Act and various program-specific statutes—address the use of data.

PAPERWORK REDUCTION ACT DATA-COLLECTION PROCESS

While the PRA does not provide authority for the government to collect data, it does outline the process by which agencies must ensure their data collections are consistent with applicable laws and serve a benefit to society with quality data. By enacting the PRA, Congress and the president acknowledged a need for broader societal review of government data-collection activities. One of the goals of the PRA is for data coordination to reduce the burden on the public, such as by reducing the likelihood that the government could collect similar data more than once from the same individuals and thus impose an undue burden. The PRA, for example, specifically directs government agencies to make data available to federal statistical agencies, thereby acknowledging the benefits of pursuing statistical analysis of government-collected data.⁸

As part of the process for gaining approval from the U.S. Office of Management and Budget (OMB) to collect data from the public, agencies must submit Information Collection Requests (ICRs) under the PRA to justify the data collection and to describe the value and use of the proposed collection. The PRA specifically requires the government to make ICRs available for public comment, which includes transparent notification each time the government proposes to collect data. These opportunities for individuals to provide comments on the purpose and use of data collections also include the ability to provide input directly on forms that are approved for use under the PRA.

These formal comment processes offer opportunities for individuals in the American public and their elected officials to influence what data the government collects, the purposes for collecting the data, and how data can be used for program administration. Informal opportunities for comment are also available through advisory committees and other agency public-feedback mechanisms. When an individual provides information and the government has followed these procedures and processes, consent for statistical use of the data is implied.

PRIVACY ACT NOTIFICATIONS AND PROTECTIONS FOR DATA DISCLOSURE

The Privacy Act of 1974 governs the disclosure of information, including sharing data within and between government agencies, in conjunction with other relevant authorities. The Privacy Act requires public disclosure about government data systems that store collected data. The law also provides additional restrictions on data disclosure from these systems.

The Privacy Act requires agencies to develop System of Record Notices (SORNs), published in the Federal Register, any time a data collection results in a new data system with identifiable information. The publication requirement for SORNs in the Privacy Act serves as a transparent notification requirement and a form of indirect societal consent regarding uses described in the SORNs. SORNs represent a major element of the government's transparent notification and consent process for the use of administrative records in evidence-building activities. The very mechanism serves as a key vehicle for ensuring continued opportunities for feedback on the government's data uses, after data collection, to encourage ethical practices.

The existence of SORNs themselves, however, are not a guarantee that the government can use confidential data for evidence-building activities. The Privacy Act requires that SORNs contain specific information to enable disclosure and subsequent use of data. Through relevant exceptions to the Privacy Act, some data can be redisclosed across agencies without explicit individual consent: (1) when for a "routine use," (2) when provided to the U.S. Census Bureau under Title 13 of the U.S. Code, or (3) when records are both not individually identifiable and are used exclusively for statistical research.

The Privacy Act recognizes that rules affecting the use of government data may need to change periodically. In enacting the Privacy Act, Congress and the president embedded authority for agencies to retroactively modify the uses of data once in a government system and to do so with a revision to the SORNs. Because of the potential privacy implications for changing the use of government-collected data after those data are already possessed by the government, a provision was built into the Privacy Act to require all updated SORNs to be provided to Congress for review through oversight committees and reviewed centrally in the executive branch by the OMB.⁹ In addition, the public has an opportunity to review and comment on revised SORNs through the Federal Register, and the statements are made available on agency websites.

Agencies frequently make changes to SORNs, consistent with this process, to clarify that they will disclose data for "routine uses," meaning for purposes that are compatible with those for which the government originally collected the data. According to the OMB's implementation guidance for the Privacy Act:

The concept of routine use was developed to permit other than intra-agency disclosures after it became apparent that a substantial unnecessary workload would result from having to seek the consent of the subject of a record each time a transfer was made for a purpose. . . "compatible with the purpose for which [the record] was collected. (5 U.S.C. 552a(a)(7). To deter promiscuous use of this concept, a further provision was added requiring that routine uses be subject to public notice. (5 U.S.C. 552a(e)(11))."^{10, 11}

The application of routine uses is one approach agencies use to clarify that they will be using data for program administration, including evidence-building activities.

The executive branch has recognized that good program administration requires relevant research and evaluation. For example, the U.S. Department of Education issued clarifying guidance in 2017 that specifically noted it interprets "administration of aid" to include evaluations necessary for effective administration of programs.¹² Also, OMB guidance issued in 2014 elaborated on a government-wide interpretation of similar language regarding program administration. (These concepts will be discussed in greater detail later in this paper.)

The use of data to understand the effects of policy activities, trends, or other statistical uses is increasingly recognized as a routine use under the Privacy Act. When the government collects data and either consent or appropriate notification has been provided to indicate that data will be used to administer a program, those uses implicitly include statistical analyses for policy research or evaluation about the program that can be used to ensure effective administration. However, as a routine use, such activities should be clearly indicated in Privacy Act notices with relevant oversight mechanisms.



USE OF SOCIAL SECURITY DISABILITY INSURANCE INFORMATION FOR PROGRAM ADMINISTRATION

The Social Security Administration (SSA) considers the provision of information in an application for disability insurance to be voluntary. For applicants who apply online, a statement that says “your privacy is important” is prominently displayed on the application along with hyperlinks to additional details about how the SSA uses the information. The summary provided to applicants includes relevant portions of the Social Security Act (Title 42 of the U.S. Code) indicating the SSA’s authority to collect data, and it cautions that the result of incomplete information could delay a determination of whether an individual qualifies for insurance. Among the stated uses listed by the SSA is a routine use for “Federal, state and local agencies for administering. . .programs.”¹³ The SSA also provides clear access to other active SORNs through a direct link from the website, which also provides further details.

USE OF THE HOUSING CHOICE VOUCHER PROGRAM DATA FOR EVIDENCE-BUILDING ACTIVITIES

The Department of Housing and Urban Development’s (HUD) applications for benefits through the Housing Choice Voucher program clearly state the legal authority to collect information, through Section 8 of the U.S. Housing Act.¹⁴ The form denotes that the collection is mandatory to determine eligibility for government benefits. While the paper form does not provide direct links to statements required by the Privacy Act, the collection includes a statement that information may be disclosed to “Federal, State, and local agencies when relevant [to] civil, criminal, or regulatory investigations and prosecutions” and in other circumstances when “permitted or required by law.”¹⁵ The HUD SORNs can be separately identified on the department’s public website for the voucher program, including a notice that routine uses may include disclosure to researchers generally with de-identified data or that identifiable records may be used for “studies and statistical reports directly related to the management of HUD’s rental assistance programs” and “for statistical analysis to advance the goals of the nation’s federal strategic plan to prevent and end homelessness.”¹⁶ The same website provides other SORNs that articulate the intended uses of data that are permissible under the Privacy Act and the program statute.

E-GOVERNMENT ACT AND PRIVACY IMPACT ASSESSMENTS

The E-Government Act of 2002 requires agencies to develop Privacy Impact Assessments (PIAs) before initiating systems procurements or new data collections under the PRA when personally identifiable information is included.¹⁷ The PIAs provide an analysis of how the government will handle data, both to ensure applicable privacy safeguards are in place and to review potential privacy risks. PIAs are typically issued in parallel to SORNs, and both must be updated when SORNs are modified, though many agencies review them annually. Importantly, the government makes PIAs available to the public to encourage transparency about government data systems that contain identifiable data and the uses of those data.

There are exceptions to the development of PIAs. For example, OMB has acknowledged that it does not require PIAs when the government collects data for statistical purposes under the Confidential Information Protection and Statistical Efficiency Act (CIPSEA).¹⁸ However, most of the administrative data collected by the government through the course of running programs does not fall under this exception.

CONFIDENTIAL INFORMATION PROTECTION AND STATISTICAL EFFICIENCY ACT

In 2002, Congress enacted CIPSEA, which applies to data collected by government with a pledge of confidentiality and limited to data use for statistical activities. Data collected under such a pledge can be shared without informed consent when used for statistical activities, and Congress intended this application given the strong privacy protections enabled for CIPSEA-eligible agencies.¹⁹ According to OMB, the “use limitations, data protections, and penalties of CIPSEA and other principal statistical agencies’ laws are the basis for the strong framework that underpins not only partnership with administrative agencies and researchers to support evaluation and research, but also the dissemination of public data products.”²⁰

In practice, the authority is itself somewhat limited in that it applies to “statistical data” and not directly to administrative data collected by the government’s many programs outside statistical agencies. In 2004, shortly following enactment of CIPSEA, Katherine Wallman and Brian Harris-Kojetin from OMB posed a question about whether “statistical purpose” is a sufficient explanation for obtaining consent for a range of statistical activities for data collected under CIPSEA’s confidentiality pledge.²¹ While the question was raised to suggest the continued need for research about how the American public understands the term “statistical purpose”—which the Census Bureau conducted in recent years^{22,23}—CIPSEA is itself quite clear that such purposes are allowable.

CIPSEA authorities rely on a foundation of strong accountability procedures—that is, civil and criminal penalties associated with the misuse of data.²⁴ Congress intended this strong form of oversight to be a means for ensuring that with greater access to government-collected data, there are also greater responsibilities for protecting those data and maintaining the public’s trust.

TITLE 13 OF THE U.S. CODE: CENSUS BUREAU

Other laws provide important authorities relevant to targeted agencies and affect how notification and consent issues are addressed for data specific to those programs. The Census Bureau’s statute, Title 13 of the U.S. Code, provides strong criminal and civil penalties that help ensure the confidentiality of the data collected by the Census Bureau. In surveys conducted by the Census, the agency discloses that the law limits the agency to using data collected for statistical purposes, and violations of those uses carry strong penalties.²⁵ The Census Bureau also advertises at the point of collection that it may link survey data with other records, but that those data are also restricted to statistical purposes once linked. Notably, Title 13 does not require the Census Bureau to obtain direct consent for linkage activities. This is also consistent with the Privacy Act, which provides an exception for data shared with the Census Bureau using data consistent with the agency’s mission.²⁶

Because of the strong privacy protections in place for linkages and the use of administrative records at the Census Bureau for statistical activities, the U.S. Department of Commerce is considering strategies to use administrative records in the 2020 Census to improve the completeness of responses.²⁷ Independent organizations have also suggested improved use of administrative records by the Census Bureau for statistical activities to reduce the costs and to improve the quality of responses for the 2030 Census.²⁸ In these cases, the use of administrative records by the Census Bureau would be subject to limitations on how data can be used—strictly for evidence-building activities—and any violations could result in the criminal or civil penalties authorized under Title 13.



INTERACTION WITH OTHER LAWS

Several other U.S. laws include specific disclosure limitations and use restrictions across the federal government. Title 26 of the U.S. Code limits access and use of tax information. Title 42 of the U.S. Code limits use and disclosure of administrative records collected for the National Directory of New Hires. The Family Educational Rights and Privacy Act (FERPA) limits the access and use of student education data. The Health Insurance Portability and Accountability Act protects health data with use and disclosure limitations.

Importantly, when the government does collect data with the acknowledgement of a broad set of intended uses at the outset, there is minimal concern from an ethical and legal perspective about the sharing of data across agencies or programs when the stated purpose of use is consistent with actual use. But in some cases, the government collects data with narrow statements that require additional action before data can be shared or used. For example, if the government initially says that the collection will be used only to “pay a check,” then other program administration uses would likely be precluded, and additional actions would likely be required to enable other uses. Modifications to those statements require public notice and comment processes for ICRs, SORNs, and PIAs. In addition, congressional and OMB review help ensure privacy harms are not introduced through the course of new or ongoing statistical uses.

LIMITATIONS IN THE CURRENT LEGAL FRAMEWORK

What has yet to clearly emerge in the legal framework is the “right of access” to information for approved entities to engage in statistical activities that meet strict confidentiality guidelines and practices. While Title 13 of the U.S. Code provides such a right for the Census Bureau for activities that meet the agency’s mission, reinforced in the Privacy Act, activities elsewhere in the government do not fall within this authority. A right of access to administrative data that aligns with the Fair Information Practice Principles is one in which statutorily clear authority exists, in conjunction with standards that protect confidentiality of information as well as the ability to assess notification and consent provided for accessed data, or to obtain direct or implied consent for additional uses.

The presumption of the right of access for evidence-building activities, consistent with the need to use data to evaluate government programs and policies, is a precondition for the use of data in this context. While consent and notice may be necessary prior to actual access to data, a right of access enables those who intend to conduct analyses and corresponding lawyers to make assessments about whether sufficient notice or consent was provided about the intended uses. The absence of such a right means that opportunities to use the data, which would otherwise be productive and may be beneficial to individuals through program improvements, may never begin.

An emerging issue in the use of administrative records for research as part of program administration occurs when programs want or need to use another program’s data. Over the past decade, this issue has gained increased attention as data collected by one program are recognized as valuable for understanding outputs, outcomes, and impacts for other government policies and programs. The Government Accountability Office has noted that individuals sometimes directly consent to linkages, while in other cases individuals may be unaware of specific instances, because of Privacy Act exceptions.²⁹

In 2017, the U.S. Commission on Evidence-Based Policymaking recognized that the government’s data infrastructure and aspects of existing laws could be clearer to better accommodate the cross-program data sharing that experts need to generate the types of evidence policymakers are increasingly requesting.³⁰ Specifically, the commission described that “the existing legal environment limits the government’s ability to steward data responsibly as a valuable resource for the American people and for policymakers.”³¹ To the extent any aspect of the legal privacy framework is unclear, the commission suggested that opportunities to ensure consistent implementation and review of confidentiality protections can also improve privacy safeguards.

Current Federal Government Practice and Direction

The Commission on Evidence-Based Policymaking concluded that “the evidence-building landscape has evolved significantly since the enactment of the Privacy Act.”³² As the landscape evolved, agencies have continued to experience difficulty accessing and using government-collected data, even when permissible under current law. One major challenge has been clarifying consent and use agreements across agencies given the matrix of laws related to notice and consent.

The obstacles exist despite the numerous statutory authorities that direct agencies to share data with each other to reduce burdens on the public and for evidence-building activities. For example, the PRA indicates the OMB director will “promote the sharing of information collected for statistical purposes consistent with privacy rights and confidentiality pledges.”³³ Another section of the PRA provides the OMB director the authority to direct agencies to share data with each other when permissible under law, though in practice there are no known uses of the authority.³⁴

OMB sent a strong signal across the federal government in 2010 when it issued a memorandum encouraging agencies to share data “responsibly and appropriately” in accordance with the Privacy Act and other applicable laws and regulations, though it offered no other new guidance about consent.³⁵ Following OMB’s encouragement, and recognizing the changing landscape of data uses, the Federal Committee on Statistical Methodology convened a special working group in 2011 to consider challenges posed in achieving legal and ethical standards for use of administrative data, including linking data across programs for research purposes. Since the working group completed its draft report and recommendations, OMB has taken numerous steps to clarify government practice and to improve consistent implementation across agencies.

In 2013, OMB directed agencies to increasingly design systems that enable data sharing and to deploy strong confidentiality and data-management practices.³⁶ This guidance sent a clear message that the government recognized data as an asset that has potential value to improve government services and operational efficiencies. However, OMB’s 2013 guidance stopped short of offering additional strategies on addressing consent and noted that the guidance was intended to be consistent with the PRA, Privacy Act, E-Government, and CIPSEA, among other laws.

In 2014, building directly on the recommendations of the Federal Committee on Statistical Methodology working group, OMB issued extensive guidance to federal agencies about providing and using administrative data in evidence-building activities.³⁷ Unlike earlier memos from OMB, the 2014 guidance specifically clarified the role of consent in using data for statistical purposes. OMB reiterated that under the Privacy Act, in addition to an exception for intra-departmental uses, the three previously identified exceptions were directly relevant for encouraging data sharing and sufficient to permit data sharing and linkage activities in the absence of prior written consent.

Hoping to clarify the interpretation of the routine use exception in the Privacy Act, OMB specifically offered three examples of how the routine use exception should be interpreted. The first two examples do not require updating direct consent. In the first example offered, routine use could be considered without additional notice when agencies conclude data can be shared with statistical agencies under existing legal authority and when covered by SORNs as a routine use. In the second example, when the provision of administrative data to a statistical agency is authorized by law and consistent with the purpose of the data collection but not previously identified as a routine use, agencies can take steps to modify Privacy Act routine use statements for future collections. Agencies must then revise the SORNs, which enable retroactive application of consent.

The third example offered by OMB describes when the routine use exception of the Privacy Act cannot be used retroactively without updated written consent. This example could apply when the new purpose for the data collection is not consistent with the original purpose of the data collection. In such cases, in addition to revising the SORN and Privacy Act statements, agencies must contact individuals to receive written consent for the modified purpose and cannot retroactively apply the SORN and Privacy Act statement. These types of cases impose substantial costs and burdens on government agencies in updating consent, but they distinctly ensure that when individuals provide information to the government, the purpose is consistent with what they were told when the data were provided.



Beyond OMB guidance, the federal government has also taken steps to clarify through the Common Rule the intent of the government to distinguish between informed consent for medical activities and human subject research, compared with the re-use of existing administrative data for statistical, evidence-building activities. In 2017, the U.S. Department of Health and Human Services along with 15 other Common Rule agencies proposed an update to the regulations for how institutional review boards consider the secondary re-use of government data. While such reviews will still fall within the purview of review boards, the regulation establishes a procedure for limited review that would direct the boards to look at privacy and confidentiality protections, including procedures for waiving consent when a broad consent for the use of data has already been provided.

Together, these activities—from OMB and federal agencies administratively interpreting privacy laws around the issues of notification and consent to data use—suggest careful but important changes that enable the government to transparently use data, while maintaining strong privacy and confidentiality measures.

Implications of Potential Legal Revisions Under Consideration

In October 2017, Speaker Paul Ryan (R-WI) and Senator Patty Murray (D-WA) separately filed legislation titled the Foundations for Evidence-Based Policymaking Act. The draft legislation includes several proposed modifications to CIPSEA, intended to implement portions of the 2017 recommendations of the U.S. Commission on Evidence-Based Policymaking Act. In particular, Section 302 of Title III in the draft legislation includes a presumption for statistical agencies and units to access administrative records for evidence-building activities, when data are otherwise available under current law.³⁸ In addition to alignment with the commission's recommendations, the provision reflects existing government guidance issued by OMB in 2014, noting that the absence of express authority for sharing administrative data for statistical activities should not be interpreted as a prohibition on the use of such data.³⁹

The proposed provision establishes the presumption of a right of access for agencies regulated by CIPSEA's protections for confidential information, which, as noted above, does not exist in current law. Because the provision that encourages enabling statistical agencies to use administrative data for statistical purposes is embedded within CIPSEA, it is narrowly applied to agencies and units that meet CIPSEA eligibility criteria. Eligibility for CIPSEA is determined by OMB and is granted exclusively to agencies that meet strict confidentiality protection requirements.

The presumption of availability in the proposed legislation to amend CIPSEA would remain conditional on the provision of appropriate notification, consent, and oversight, with adequate language required in SORNs under the Privacy Act to enable uses for the described purposes. Even with a right of access for evidence-building activities, if consent to use data for such a purpose was not provided or exceptions were not available elsewhere in law, as determined by the collecting agency, the information would not be available for use. Consent and notification would continue to be requirements for the use of government data under this proposed provision, consistent with applicable law and current government practice.

OMB could clarify this practice and interpretation in corresponding regulation, to the extent additional clarification would be necessary. OMB could also encourage agencies, as it has done in the past, to update SORNs to increasingly make data available retroactively for evidence-building activities. Under the provision, if an agency creates a new data system because of a linkage, for example, agencies would still be obligated to develop new SORNs under the Privacy Act. Such activities are subject to public, executive, and congressional notification to ensure the intended purposes are consistent with law and ethical practice.

Neither current government practice nor the Commission on Evidence-Based Policymaking's recommendations were intended to limit the expectation that individuals receive notifications or are provided opportunity to consent to the use of information about them. But the variety of mechanisms that exist for accountability, notification, and consent must be acknowledged for evidence-building activities, consistent with the direction of existing ethical and legal frameworks in the United States that have created procedures for enabling some statistical activities within privacy-protective environments.

Conclusion

Consent, notification for transparency, and oversight for accountability are important concepts and practices for the ethical use of administrative data. Understanding the intersection of the Privacy Act, CIPSEA, the PRA, and other laws is central to responsibly ensuring the government applies these concepts in an appropriate manner, prior to conducting evidence-building activities. Ultimately, agencies are responsible for understanding how the legal matrix applies and for making appropriate determinations about notification and consent to share, link, and use data. But individuals also have substantial opportunities to learn and provide feedback directly to the government about what data are collected and how they are used.

The government has robust processes in place to:

- seek direct consent from individuals at the point of data collection, when necessary;
- enable notice and public comment on proposed and revised data collections;
- provide public and congressional notice when establishing data systems and routine uses of data;
- provide public and congressional notice when retroactively modifying systems of records to enable new routine uses of data; and
- provide accountability mechanisms for oversight of data uses.

In practice, even when consent is provided for such purpose or notifications have been provided, uses have been challenging. When exceptions exist under the Privacy Act and sufficient notice has been provided, agencies have struggled to use data for evidence-building activities. Moving forward, the government must take steps to better articulate the relationships between consent and notification, and how to apply these concepts in practice for the use of administrative data in evidence building.

The government does not yet, however, have a clear and established presumption of access to administrative data to support program administration through evidence-building activities. Some laws have recognized the value of this approach for using administrative data, such as at the Census Bureau, and the PRA's direction for agencies to make data available to statistical agencies. An important step in ensuring data are available for statistical purposes is to declare the right of access for certain entities to use data for evidence building, recognizing that strong mechanisms are in place to review consent, protect confidentiality, and make notifications about use. A clear declaration of this approach is a natural extension of the approaches Congress has already articulated are necessary in some law and in the direction of executive branch activities to use data as a strategic asset in government operations.

At the same time, the government must also do more to ensure that information about how it will use data is easy for the American public to access and understand. This will require promoting transparency in the use of government-collected data in a manner that allows routine consideration of the risks and the benefits of access provided to effectively administer government programs and policies.



Endnotes

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Notes



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