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Memorandum to Donald L. Eirich, Associate Director, Logistics and Communications Div.; by Geraldine M. Rubar, Senior Attorney, Office of the General Counsel.

Contact: Office of the General Counsel: Special Studies and Analysis.

Organization Concerned: Office of Management and Budget.

Authority: Privacy Act of 1974. Freedom of Information Act. 40 Fed. Reg. 28949. OMB Circular A-108.

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Memorandum

October 18, 1978

TO : Associate Director, LCD/CIMIS - Donald L. Eirich

FROM : Senior Attorney, OGC - Geraldine M. Rubar *Geraldine M. Rubar*SUBJECT: Comments on Supplemental Guidance for Agency
Matching Programs (File B-130441)ADP LIBRARY
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The proposed Office of Management and Budget (OMB) Supplemental Guidance for agency matching programs is an important step toward limiting and controlling the use of the matching of computer files on individuals by Federal agencies. Among other things, the Guidance provides that every matching program should be identified and reported to OMB and that both the agency conducting the program and those asked to provide records for matching should publish notices in the Federal Register explaining why the matching program is needed and describing the disclosures of records which will be made to or from the system, including the legal justification for any routine use involved.

Since OMB is primarily an oversight agency rather than a regulatory body, and since final responsibility for compliance with the Privacy Act of 1974 rests with the agencies, the proposed Supplemental Guidance is advisory rather than mandatory. Thus, it basically supplements the OMB Guidelines for implementing section 3 of the Privacy Act (40 Fed. Reg. 28949-28978 (July 1975)) and establishes procedures rather than requirements for the conduct of matching programs carried out by Federal agencies to reduce fraud or unauthorized payments in a Federal program or to collect debts owed to the Federal Government.

Computer matching programs carried out by Federal agencies for purposes other than reduction of fraud or collection of debts and certain disclosures to non-Federal entities for purposes of matching are not within the definition of "matching program" provided in the Supplemental Guidance, although the latter does attempt to establish certain reporting requirements for these matches.

Comments on certain sections follow:

Section 1. SCOPE

The Supplemental Guidance basically limits its scope to those matching programs carried out by Federal agencies that attempt to reduce fraud in Federal programs or to collect debts owed to the Federal Government. The Supplemental Guidance also establishes reporting requirements for matching programs carried out by Federal agencies for other purposes. Specifically excluded from the definition of matching programs are computer checks made in response to an application for a benefit to determine a specific individual's eligibility for the benefit. The rationale for eliminating this kind of procedure from the purview of the Supplemental Guidance is not clear. On one hand, the lack of guidelines for these kinds of computerized checks may simply mean that they may occur without any limiting procedures from GMB. The other rationale may be that such checks are not an appropriate use of computer matching and should not occur without a statutory mandate. The rationale for their omission from the scope of the Supplemental Guidance should be clarified.

Section 2. DEFINITIONS

A "matching program" is defined as a procedure carried out by a Federal agency whereby the records maintained by one Federal agency are compared by computer with the records of another entity, such as another Federal agency, a State or local unit of Government, or a person. A matching program, however, by definition does not include checks on specific individuals in response to an application for a benefit or as a result of the acquisition of information that raises questions about a specific individual's eligibility that are reasonably contemporaneous with the application or acquisition.

The Supplemental Guidance does not clarify whether computer matches to verify accuracy of information are to be avoided by agencies since they are not even considered to be a "matching program" or whether such matches were omitted from the definition of matching program so that they could occur without limitations or additional requirements.

Section 3. REQUIREMENTS FOR MATCHING PROGRAMS--MATCHING AGENCY

One of the main criticisms of the Project Match, a Department of Health, Education and Welfare (HEW) program designed to identify individuals who were wrongfully receiving welfare by comparing HEW welfare roll computer tapes with tapes of the employees of various agencies such as the Civil Service Commission (CSC) or the Department of Defense (DOD), was that Privacy Act restrictions only seemed to apply to the entity or agency maintaining the other tape needed by HEW for the matching. For example, DOD and CSC had to meet a Privacy Act condition before disclosing their respective computer tapes of employees to HEW. Criticism of Project Match focused on the alleged improper transfer of information by CSC and DOD. Section 3 of the Supplemental Guidance attempts to balance the responsibilities for matching programs so that the Federal agency seeking to carry out a matching program must share responsibility for the match with the entity or agency that is supplying the necessary records.

The Supplemental Guidance also provides, among other things, that the matching agency may carry out the program only "if the matching program will be fair and equitable and minimize any chilling effect on the exercise of individual rights" and "only if there will be a demonstrable financial benefit to the Federal Government from the matching program" that significantly outweighs any harm to individuals. The "fair and equitable" standard is vague and relatively easy to justify. The standard for a demonstration of financial benefit is also unclear since the financial benefit of the match may not be apparent until the match has already occurred. We assume that a reasonable estimate of the financial benefit can be made in advance, but this should be clarified.

The provision in section 3(e) that matching programs should be carried out by officials of the matching agency and not by contractors or grantees seems to be appropriate since the officials of the matching agency are more accountable to the Office of Management and Budget (OMB) than a private contractor of the matching agency. Since OMB's authority with respect to the Privacy Act is advisory rather than mandatory and since the final decision for agency actions is with the agency itself, OMB's advisory influence would be lessened

even more if private contractors or grantees could conduct the matches.

Section 5. REQUIREMENTS FOR MATCHING PROGRAMS--
MATCHING SOURCES

Perhaps the most important provision in the Supplemental Guidance is contained in section 5(b)(2), which provides that all disclosures of records by a Federal matching source to a matching agency should be made in accordance with the "routine use" provisions of the Privacy Act. This provision would eliminate inconsistencies that occurred in Project Match when CSC released its computer tape to HEW under the Freedom of Information Act and DOD released its tape pursuant to the routine use provision of the Privacy Act.

In addition to the six limitations in the section (4) (d) of the Supplemental Guidance concerning disclosures pursuant to a routine use, the Office of Management and Budget has issued a transmittal memorandum that requires a 60 day prenotification to the Congress and a public notice of a proposed routine use in the Federal Register. (OMB Circular No. A-108, September 30, 1975.) These notice requirements help to insure the fair and equitable quality of the proposed match through public accountability. Nevertheless, the Supplemental Guidance does not give any specific guidance on the definition of the term "compatible" even though section 5(b)(3) provide that no disclosure shall be made by a matching source unless specifically provided by law or unless the compatibility purpose test is met.

SUMMARY

The OMB Supplemental Guidance provides a framework for the use of computer matches. One of its main contributions is that both the agency conducting the matching program and the entity or agency asked to provide information share the responsibility for determining the appropriateness of releasing information for conducting the match. When other Federal agencies supply information, they must transfer such information pursuant to the routine use exemption of the Privacy Act with all its public notice requirements.

Nevertheless, the scope of matching programs is generally limited to the establishment of procedures and

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limitations as an aid for curtailing fraud or unauthorized payments under Federal programs, for collecting debts, and for establishing reporting requirements for matching programs carried out by Federal agencies.

Finally, the fact that the Supplemental Guidance is advisory rather than mandatory may be the primary factor in determining the degree of its effectiveness.

If you have any additional questions concerning these comments, please contact Suzanne Fishel of my staff.

cc: Mr. Gutmann, LCD
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