OFFICE OF MANAGEMENT AND BUDGET

Privacy Act of 1974; Guidance on the Privacy Act Implications of "Call Detail" Programs to Manage Employees' Use of the Government's Telecommunications Systems

AGENCY: Office of Management and Budget.

ACTION: Publication in final form of guidance on the Privacy Act implications of "call detail" programs.

SUMMARY: Pursuant to its responsibilities under section 6 of the Privacy Act of 1974 (Pub. L. 93-579), the Office of Management and Budget (OMB) developed guidance on how, the recordkeeping provisions of that Act affect agencies' programs (so-called "call detail programs") to collect and use information relating to their employees use of long distance telephone systems. This proposal was published for public comment in the Federal Register on May 23, 1986 (51 FR 18982). Four comments were received, all from Federal agencies. The commentators generally supported the issuance of the guidance and suggested technical clarifications of certain points. Their suggestions have been incorporated into the final guidance below. This guidance:

- Describes the purposes of call detail programs and explains how they work.
- Notes that call detail records that contain only telephone numbers are not Privacy Act records, but that when linked with a name, they become Privacy Act records.
- Notes that when agencies start retrieving by reference to a linked number or name, they are operating a Privacy Act system of records.
- Urges agencies not to create artificial filing and retrieval schemes to avoid the Act.
- Suggests agencies establish a Privacy Act system of records in which to maintain these records, and provides a model notice for them to use.
- Discusses the disclosure provisions of the Act as they would pertain to such a call detail system, especially emphasizing that intra-agency disclosures for improper employee surveillance purposes or to identify and harass whistleblowers are not sanctioned under Section (b)(1) of the Privacy Act.

FOR FURTHER INFORMATION CONTACT: Robert N. Veeder, Information Policy Branch, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, telephone 202-395-4814.

Guidance on the Privacy Act Implications of Call Detail Programs

1. Purpose

This guidance is being offered in conjunction with guidance on call detailing published by the General Services Administration. Whereas GSA's guidance focuses on how to create and operate such programs, this document explains the ways in which the Privacy Act of 1974 affects any records generated during the course of call detail programs.

Nothing in this guidance should be construed to (a) authorize activities that are not permitted by law; or (b) prohibit activities expressly required to be performed by law. Complying with these Guidelines, moreover, does not relieve a Federal agency of the obligation to comply with the provisions of the Privacy Act, including any provisions not cited herein.

2. Scope

These Guidelines apply to all agencies subject to the Privacy Act of 1974 (5 U.S.C. 552a).

3. Effective Date

These Guidelines are effective on the date of their publication.

4. Definitions

For the purposes of these Guidelines:

- All the terms defined in the Privacy Act of 1974 apply.
- "Call Detail Report"—This is the initial report of long-distance calls made during a specified period. A call detail report may be provided by a telephone company, the General Services Administration, or it may originate from a PBX (Private Branch Exchange) on an agency's premises. No monitoring of conversations takes place during or after the collection of data for this report. The report may contain such technical information as the originating number, destination number, destination city and State, date and time of day a call was made, the duration of the call, and actual or estimated cost of the call. At this stage, a call detail report contains no information directly identifying the individuals making or receiving calls.
- "Call Detail Information" or "Call Detail Records"—These are records generated from call detail reports through administrative, technical or investigative follow-up. In some cases call detail information or records will contain no individually identifiable information and therefore no Privacy Act considerations will apply. In other cases, the information and records will

be linked with individuals and the Privacy Act must be taken into consideration.

5. Background

Rapid growth in automated data processing and telecommunications technologies has created new and special problems relating to the Federal Government's creation and maintenance of information about individuals. At times, the capabilities of these technologies have appeared to run ahead of statutes designed to manage this kind of information, particularly the Privacy Act. An example is the establishment of call detail programs to help agencies control the costs of operating their long distance telephone systems. Call detail programs develop information about how an agency's telecommunications system is being used. The information may come from a number of sources, e.g., from agency installed or utilized devices to record usage information (pen registers or agency switching equipment); from central agency managers such as the General Services Administration or the Defense Communications Agency; or directly from the providers of telecommunications services.

There are many different purposes for call detail programs. Agency managers may use call detail information to help them choose more efficient and cost-effective ways of communicating. The information may be used to make decisions about acquiring hardware, software, or services, and to develop management strategies for using existing telecommunications capacity more efficiently. One aspect of this latter use may be the development of programs to identify unofficial use of the agency's telephone system. To this end, call detail programs work by collecting information about the use of agency telephone systems and then attempting to assign responsibility for particular calls to individual employees. Their two-fold purpose is to deter use of the system for unofficial purposes and to recoup for the government the cost of unofficial calls.

Soon, the establishment of call detail programs will become a government-wide priority, as part of a management initiative on reducing the government s administrative costs.

6. Privacy Act Implications

a. *Call Detail Records as Privacy Act Records.* The Privacy, Act of 1974 is the primary statute controlling the government's use of information about individuals. Not all individually identifiable information, however, qualifies for the Act's protections. With but few exceptions, only information that consists of "records" as defined by the Act, and which is maintained by an agency in a "system of records," triggers the Act's provisions. The Privacy Act defines a "record" as

> • • • any item, collection or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph • • •.

A "system of records" is

> A group of any such records from which information is retrieved by the name of the individual or other identifying particular.

As we have indicated in our original Privacy Act implementing Guidelines (40 FR 28949, July 9, 1975), the mere capability of retrieving records by an identifying particular is not enough to create a system of records; the agency must actually be doing so.

The threshold question for call detail information, then, is whether a telephone number is a record within the meaning of the Privacy Act. The answer to this question depends upon how the telephone number is maintained.

Standing alone, a telephone number, is not a Privacy Act record. To achieve the status of a Privacy Act record, a telephone number must be maintained in a way that links it to an individual's name or some other identifying particular such as a Social Security Account Number.

When an agency assigns a specific phone number to an employee and maintains that information in a way that the name and number are inseparably connected, there is sufficient identification linkage that a Privacy Act record is created. (It should be noted that the Privacy Act does not require that the record be unique to the individual, only that it be "about" him or her and include his or her name or other identifying particular. Thus, a telephone number could be shared by several individuals and still meet the Privacy Act "record" definition.)

The initial call detail reports which contain only technical information about telephone usage do not consist of records within the meaning of the Privacy Act and they will therefore never reach the level of a system of records. For many areas of telecommunications management, the information in call detail reports will never become systems of records and the Privacy Act will have no application.

When, however, call detail records are used in management programs designed to control costs and determine individual accountability for telephone calls, Privacy Act considerations must be addressed. In order to carry out these kinds of call detail programs, agencies will have to link numbers and names so that they can determine who is responsible for what call. It is at this point, that the telephone number meets the Privacy Act definition of a "record."

b. *Call Detail Records in Privacy Act Systems of Records.* The next question, then, is when do files consisting of Privacy Act records, created by linking a telephone number and an individual's name become a system of records? This occurs when agencies use the Privacy Act record as a key to retrieve information from these files.

While it is important to remember that not every collection of data containing call detail records will be a Privacy Act system of records, agencies are cautioned against creating artificial filing schemes merely to avoid the effect of the Act when the establishment of a Privacy Act system of records would be appropriate. Since these records are clearly intended to establish individual responsibility for long distance telephone use, their use by the agency could have serious financial or disciplinary consequences for individual employees. By maintaining these records in conformance with the provisions of the Privacy Act, agencies can make certain that legitimate concerns about the implementation of call detail programs (e.g., improper use of the records for surveillance or employee harassment, unfairness, and record accuracy) are dealt with in a procedural framework that was designed to deal with such concerns.

Therefore, we recommend strongly that agencies create a Privacy Act system of records (or more than one system if that is appropriate) in which to maintain call detail records that contain information about individuals and are used to determine accountability for telephone usage.

Such a Privacy Act system of records might contain the following kinds of data:

- The initial call detail monthly listing (in whatever form it is kept, e.g., on paper, magnetic tape or diskettes);
- Locator information showing where in the agency specific telephones are located;
- Records relating to the identification of individual employees, and (1) linking them with specific calling numbers; (2) linking them with specific called numbers.

Note that not all Privacy Act records generated as a result of call detail programs would become a part of this system of records. Thus, investigative records of the Office of the Inspector General, personnel records reflecting administrative or disciplinary actions, finance and accounting records relating to cost attribution and recoveries, and the like, that are generated from call detail programs might be filed in appropriate existing systems and subjected to their particular disclosure/safeguarding provisions. In other instances, records (name and telephone number, for example) may be common to the call detail system and other systems.

To help the agencies construct their Privacy Act systems of records, we offer a model system notice in Appendix I.

c. *Disclosing from Call Detail Records Systems under Section (b) of the Privacy Act.* The Privacy Act provides 12 exceptions to its basic requirement that agencies must obtain the written consent of the record subject before disclosing information from a system of records. The following exceptions are the ones most relevant to the proposed Call Detail system of records:

• Section (b)(1). "To those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." This exception does not contemplate unrestricted disclosures within the agency. Intra-agency disclosures of call detail records may be made only when there is an official need to know the information. The following are examples of disclosures that (b)(1) would permit:

—To individual supervisors to determine responsibility for specific telephone calls.

—To employees of the agency to review the call detail lists and identify calls made by the employee. Note that the other option for this kind of disclosure is a routine use (Section (b)(3)). Agencies that are concerned about establishing that employee A has an official need to know about the calls made from employee B's telephone may wish to adopt a routine use authorizing the disclosures.

—To the employees of the Office of the Inspector General who are conducting investigations into abuse of the long distance telephone system;

—To employees of the Office of Finance and Accounting for processing of reimbursements for personal calls or for processing of administrative offsets of pay pursuant to the provisions of the Debt Collection Act;

—To Freedom of Information Act (FOIA) officers and legal advisers.

Some examples of disclosures that (b)(1) would not authorize are:

—To agency personnel to identify and harass whistleblowers;

—To agency personnel who are merely curious to know who is calling whom.

• Section (b)(2). "Required under section 552 of this title." Information may be disclosed both inside and outside the agency to the extent that the disclosure would be required by the Freedom of Information Act. Prior to the ruling of the Court of Appeals for the D.C. Circuit in *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), longstanding agency practices and OMB interpretation treated this section as permitting agencies to initiate disclosure of material that they would be "required" to release under the FOIA. Disclosure under this interpretation did not depend on the existence of a FOIA request for the records; the mere finding that no FOIA exemption could apply and that the agency would therefore have no choice but to disclose, was sufficient. In fact, agencies relied upon this interpretation of the requirements of section (b)(2) to make routine disclosures of many documents, especially those traditionally thought to be in the public domain such as press releases, final orders, telephone books, and the like.

In Bartel, however, the court held that an agency must have received an actual FOIA request before disclosing pursuant to section (b)(2). In that case, the plaintiff, Bartel, brought a Privacy Act action asserting that his supervisor had gratuitously disclosed to three former colleagues the fact that Bartel had improperly obtained copies of their personnel records. The court interpreted the standard for (b)(2) disclosures to be other than a conditional one, i.e., not merely that the agency would have to disclose if such a request were received, but that the agency must have to do so because an actual FOIA request for the records has been made. Under this ruling, agency-initiated requests of FOIA releasable material would be improper.

The court noted, however, that material traditionally held to be in the public domain might constitute an exception to its FOIA-request-in-hand interpretation. In guidance issued in May 1985 (Memorandum from Robert P. Bedell to Senior Agency Officials for Information Resources Management, Subject: Privacy Act Guidance—Update, dated May 24, 1985) OMB suggested (without agreeing with the ruling) that agencies continue to make disclosures of these kinds of records without having received a FOIA request. We cautioned, however, that agencies should be careful about making gratuitous releases of sensitive classes of Privacy Act records without having received a request for them.

Applying the Bartel ruling to call detail information, there appear to be three distinct categories of records which could be considered for release under section (b)(2):

—Records which clearly fall into the "public domain" category. We suggest that these would be releasable either at the agency's initiation or in response to a FOIA request: the former because they are of the "traditionally released" class; the latter, because no FOIA exemption would prevent their disclosure. An example would be the names and office telephone numbers of agency employees. These are generally considered public information (obviously there may be exceptions for investigative and intelligence organizations), and the only applicable FOIA exemption, (b)(6), the personal privacy exemption, would not apply. Thus, disclosures of an employee's name and office telephone number would be appropriate under Privacy Act section (b)(2).

—Records which could be withheld under an applicable FOIA exemption and which, therefore, would not be required to be released. These could be, for example, records which contain sensitive information relating to on-going investigative or personnel matters such as records relating to the investigation of an employee for abuse of the agency's long distance telephone system. Such records could reasonably be withheld under FOIA exemption (b)(7) and, therefore, would not be releasable under section (b)(2) of the Privacy Act. An agency would not release these kinds of records either at its own initiative or in response to a FOIA request. It should be noted, however, that such records might be released under other sections of the Privacy Act, such as (b)(3), "for a routine use," or (b)(7) at the request of the head of an agency for an authorized civil or criminal law enforcement activity.

—Records for which no FOIA exemption applies but which contain sensitive information, e.g., records which reflect the results of official actions taken as a consequence of investigations of abuses of the telephone system. We suggest that agencies should be very cautious about initiating disclosure of these records without receiving a FOIA request since they appear to be of the category of records that concerned the Bartel court. Even with

a request, agencies will have to determine that the interest of the public in having the record clearly outweighs the privacy interest of the record subject in order to overcome the applicability of FOIA exemption (b)(6).

• Section (b)(3). "For a routine use." See the routine use section of the model system notice at Appendix I. A routine use is a disclosure of information that will be used for a purpose that is compatible with the purpose for which the information was originally collected.

The concept of compatibility comprises both functionally equivalent uses:

—For example, routine use (5) in the model notice would authorize disclosure to the Department of Justice to prosecute an egregious abuser of an agency's long distance telecommunications system. This disclosure is functionally compatible since one of the purposes of the system is to identify abusers and subject them to administrative or legal consequences.

As well as other uses that are necessary and proper:

—For example, routine use (2) in the model notice authorizes disclosure to representatives of the General Services Administration or the National Archives and Records Administration who are conducting records management inspections pursuant to a specific statutory charter. Their purpose is in no way functionally equivalent to the purpose for which the system was established; it is, however, clearly necessary and proper.

• Section (b)(12). "To a consumer reporting agency." This disclosure exception was added to the original 11 by the Debt Collection Act of 1982. It authorizes agencies to disclose bad debt information to credit bureaus. Before doing so, however, agencies must complete a series of due process steps designed to validate the debt and to offer the individual the chance to repay it (see OMB Guidelines on the Debt Collection Act, published in the Federal Register on April 11, 1983 (48 FR 15556). It is possible that agencies will wish to disclose information, from call detail systems of records documenting an individual's responsibility for unofficial long distance calls as part of the bad debt disclosure. For this reason, the model system notice at Appendix I contains a statement identifying the system as one from which such disclosures can be made.

7. Contact Point for Guidance

Refer any questions about this guidance to Robert N. Veeder, Office of Management and Budget, Office of Information and Regulatory Affairs, 395–4814.

Appendix I—Proposed Model System Notice for Call Detail Records

This is a proposed notice; agencies should modify it as appropriate.

System Name: Telephone Call Detail Records.

System Location: Records are stored at (name of Headquarters Office containing central files) and at (insert component locations).

Categories of Individuals Covered by the System: Individuals (generally agency employees and contractor personnel) who make long distance calls and individuals who received telephone calls placed from or charged to agency telephones.

Categories of Records in the System: Records relating to use of the agency telephones to place long distance calls; records indicating assignment of telephone numbers to employees; records relating to location of telephones. (Note that while few if any agencies will attempt to establish programs to control unofficial local calls, some telecommunications equipment will automatically record local as well as long distance call information. If local calling records are included in this system, they should be cited in the "categories of records" section of the notice.)

Authority for Maintenance of the System: (Cite appropriate agency "housekeeping" statute authorizing the agency head to create, collect and keep such records as are necessary to manage the agency.)

Routine Uses of Records Maintained in the System: Records and data may be disclosed, as is necessary, (1) to Members of Congress to respond to inquiries made on behalf of individual constituents that are record subjects; (2) to representatives of the General Services Administration or the National Archives and Records Administration who are conducting records management inspections under the authority of 44 U.S.C. 2904 and 2906; (3) in response to a request for discovery or for the appearance of a witness, to the extent that what is disclosed is relevant to the subject matter involved in a pending judicial or administrative proceeding; (4) in a proceeding before a court or adjudicative body to the extent that they are relevant and necessary to the proceeding; (5) in the event that material in this system indicates a violation of law, whether civil or criminal or regulatory in nature, and whether arising by general statute, or by regulation, rule or order issued pursuant thereto, the relevant records may be disclosed to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order, issued pursuant thereto; (6) to employees of the agency to determine their individual responsibility for telephone calls; (7) to respond to a Federal agency's request made in connection with the hiring or retention of an employee, the letting of a contract or issuance of a grant, license or other benefit by the requesting agency, but only to the extent that the information disclosed is relevant and necessary to the requesting agency's decision on the matter; (8) to a telecommunications company providing telecommunications support to permit servicing the account. (Agencies should refrain from automatically applying all of their blanket routine uses to this system.)

Disclosures to consumer reporting agencies:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)).

Policies and Practices for Storing, Retrieving, Accessing, Retaining, and Disposing of Records in System:

Storage: (Describe agency methods of storage.)

Retrievability: Records are retrieved by employee name or identification number, by name of recipient of telephone call, by telephone number.

Safeguards: (Describe methods for safeguarding.)

Retention and Disposal: Records are disposed of as provided in National Archives and Records Administration General Records Schedule 12.

System Manager(s) and Address(es): (List central system manager and component subsystem managers, if appropriate.)

Notification Procedures: (Explain notification procedures.)

Record Access Procedures: (Explain how individuals may obtain access to their records.)

Record Source Categories: Telephone assignment records; call detail listings; results of administrative inquiries relating to assignment of responsibility for placement of specific long distance calls.

Systems Exempted From Certain Provisions of the Act: None.

James C. Miller III,

Director.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–15682; 811–1331]

Bank Stock Fund, Inc.; Order for Deregistration

April 15, 1986.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 ("1940 Act").

Applicant: Bank Stock Fund, Inc.