

Richard Purcell
Chair, DHS Data Privacy and Integrity Advisory Committee

March 25, 2010
Via Hand Delivery

Hon. Janet Napolitano
Secretary, Department of Homeland Security
Washington, DC 20528

Ms. Mary Ellen Callahan
Chief Privacy Officer
Department of Homeland Security
Washington, DC 20528

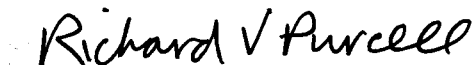
Re: DHS Data Privacy and Integrity Advisory Committee Recommendations on the
Elements of Effective Redress Programs

Dear Secretary Napolitano and Ms. Callahan:

I have the honor to convey to you the enclosed Report, which sets forth recommendations on enhancing the effectiveness of Department redress programs and public outreach about those programs. Our recommendations are grounded in the Department's Fair Information Practice Principles policy framework. We believe that implementation of these recommendations would both strengthen the Department's redress efforts and further the DHS mission while protecting privacy.

If I may be of any assistance to you concerning these recommendations, please do not hesitate to contact me.

Sincerely,



Richard V. Purcell
Chair
DHS Data Privacy and Integrity Advisory Committee

Enclosure

cc: Members, DHS Data Privacy and Integrity Advisory Committee (via e-mail)

The Elements of Effective Redress Programs

A Report by the Data Privacy and Integrity Advisory Committee

Report No. 2010-01

This report reflects the consensus recommendations provided by the Data Privacy and Integrity Advisory Committee to the Secretary and the Chief Privacy Officer of the Department of Homeland Security (DHS). The Committee's charter under the Federal Advisory Committee Act is to provide advice on programmatic, policy, operational, administrative, and technological issues within the DHS that relate to personally identifiable information (PII), as well as data integrity and other privacy-related issues. The Committee deliberated on and adopted these recommendations during a public meeting on March 18, 2010, in Washington, DC.

The President's January 2009 Memorandum to the heads of federal executive agencies adjures them "to ensure the public trust and establish a system of transparency, public participation, and collaboration." The Memorandum goes on to support a policy of government openness in order to "strengthen our democracy and promote efficiency and effectiveness in Government."¹ In that spirit, and as requested by the Chief Privacy Officer, the Department of Homeland Security's Data Privacy and Integrity Advisory Committee offers this report to assist the Department in providing effective redress to individuals who believe they have been wronged by the Department's actions, including education and communications programs to support redress programs.

In this document, we provide a general description of redress and an overview of the constituent elements of effective programs for providing redress to individuals. We also discuss some of the strategies we believe are necessary to publicize redress policies and procedures, promoting broad understanding, access, and utilization.

The elements we present here are appropriate for most organizations that make decisions or take actions that affect individuals, including stores selling products, service providers and government agencies. We reserve the final section of this document for a discussion of considerations we believe are important for public institutions, particularly the Department of Homeland Security, in providing redress and we make recommendations for meeting these challenges.

Definition of "Redress"

The first definition of "redress" given in most dictionaries is to set right, rectify or remedy a wrong.² There is a rough hierarchy of wrongs that might be corrected by a redress program: 1) casual wrongs

¹ Available at www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

² See Merriam-Webster's Dictionary of Law, Webster's New World College Dictionary, American Heritage Dictionary of the American Language, for example.

such as minor inconvenience, rudeness, or other perceived maltreatment; 2) substantive wrongs like mistaken decisions or decisions made under inappropriate policies; and 3) concrete wrongs that deny someone a right or entitlement. The public correctly desires fair treatment in all circumstances and many laws (up to and including the procedural due process guaranteed by the U.S. Constitution's Fifth and Fourteenth Amendments) require fair treatment where a fundamental right is at stake.

But how are "wrongs" made right? Fairness and due process prevent both the state and federal governments from depriving any person of life, liberty, or property. This does not require a perfect outcome, but it does mean that the government may not act arbitrarily or unfairly, particularly where a liberty interest is being negatively affected. Where such an interest is at stake, procedural due process tests the process in which the law is administered. It guarantees the right to be heard in a full and fair decision-making process before the government takes an action directly affecting a person's life, liberty or property. The appropriate procedure is determined by the amount of information needed to ensure that incorrect deprivations will not occur.

Depending on the liberty interests affected, fairness may simply require the opportunity to have a complaint acknowledged; it may require an explanation of the policy, decision, or the factual circumstances; it may require a correction or reversal of a decision; and sometimes due process and fairness require a hearing or trial. The term "redress" should not obscure what is at stake in some cases: When the government interferes with constitutionally protected rights or liberty interests, constitutional due process is required.

Elements of Effective Redress Programs

Clear Ownership and Accountability

A redress process should have an owner, responsible for ensuring that complaints and problems are addressed by the appropriate organizational component. Where possible, the owner should be the same public-facing entity encountered by the redress seeker. Organizations should design a process that does not require individuals to determine which component of the organization is the root source of a problem or to contact multiple entities to request a correction. The process owner should also regularly glean lessons from the complaints received and the efforts to redress them, and should report to policy makers with suggestions for improvements in general operations and policies to reduce incidents requiring redress processes.

Visibility

The means of filing complaints and seeking redress should be readily accessible to potential complainants. Wherever possible, individuals should be able at least to begin the redress process at or near the locations where problems might arise. An organization should provide information to the public that explains the redress seeker's rights, the process for complaining or seeking redress, a general timeline for the process, and the privacy policy regarding the personal information they provide for the redress process.

Ease of Use

Individuals have a right to be heard. It is important for all organization to provide clients and customers with information and services that are easy to use. Usability is particularly critical for redress procedures, since users of them are likely to be anxious. A process that is not easy to understand only adds to their difficulties. Making the process usable includes providing descriptive information in plain language, in an easy-to-read format, in languages appropriate for the people seeking redress, and

making it available both online and offline. Redress seekers should also be provided an accessible, secure way to view the status of their submissions throughout the process.

Timeliness

Redress delayed is redress denied. An organization must provide closure for each redress request received in a timely manner.

Effectiveness

The result of a request for redress should be certainty: Individuals should not repeatedly be affected negatively by the same inaccurate information. It may not be enough, however, simply to correct erroneous information. This will require ensuring that corrections are propagated throughout all the data systems that use them and that measures are taken to ensure that the inaccurate information does not re-enter the system.

Right of Appeal

Organizations should provide an appeals process for redress seekers who are not satisfied with a determination. The appeals body should be sufficiently independent of operations to ensure objectivity and to provide appeals seekers with confidence in its impartiality.

Integrated Infrastructure for Redress

All redress policies and procedures must be supported by an integrated business process and technical infrastructure to enable effective management of redress cases, provide unified and timely management information and reporting, ensure case transfer across entities involved, and achieve a quality level of service. This includes training those charged with handling redress requests to be patient, helpful, and sensitive to cultural and linguistic differences.

Privacy Redress

The internationally recognized Fair Information Practice Principles³ provide a firm foundation for redress of privacy wrongs. Not only does the Individual Participation principle call for giving individuals the ability to access and correct their own personal information held by an organizations, but every one of the principles is intended to recognize the rights of individuals to exercise some degree of control over the collection and use of their personal information. Further, the Accountability principle underlines the obligation of an organization to comply with these principles.

Public Education

Public education is essential to the success of any redress program. It enables an effective redress system and is a key concept implicit in both the definition and the elements of redress. Simply put, it is critical that the public know about their redress rights in order to exercise them.

Public education is implied in the various elements of redress detailed previously. Fair treatment requires setting clear expectations for clients of any redress program; public education is necessary to set those expectations. Additionally, the right to be heard, another key definitional concept, assumes

³ See the Organisation for Economic Cooperation and Development's *Guidelines on the Protection of Privacy and Transborder Flows of Data*, available at www.oecd.org.

that there is sufficient publicly available information for an aggrieved party to know where to take a grievance. Without public education, such information would be neither available nor known.

Clear ownership means that an entity must organize itself appropriately to provide redress and, equally important, must educate the public about how it is organized. Also, by definition, a process is neither visible nor easy to use if the public requiring it does not know that it is available, how to access it, what to expect from it, and when to expect it to provide a decision or action. Thus, setting reasonable expectations is a critical success factor and the only way to do so is to have an effective program of education and awareness.

The availability of the redress process should be clearly communicated both in locations where problems are likely to arise and also on an organization's web site and perhaps through a customer service center created especially for the purpose of answering questions, facilitating the handling of complaints, and providing other information. On-site information should be provided through signage, information sheets, brochures and other media. Employees who come into contact with the public should be well informed and trained about the redress program and should be able to provide complainants with general information on how to use it.

Because some individuals seeking redress are likely to be foreign nationals or to have limited English, information on the redress process should be available in other languages. This might be done through the use of telephone language line services, the availability of which could be communicated in major languages on organizational web sites.

Above all, a redress program should make use of business processes and a knowledge base to provide clear and consistent standard answers to frequently asked questions, and should also have the ability to learn from complainants and improve the information provided and the program itself.

Redress in the Department of Homeland Security

Given the nature of the Department of Homeland Security's mission, there are special considerations when determining how best to provide the elements of redress discussed above. Some believe that a fully "independent" body is essential to provide redress for individuals, following the axiom that the fox should not guard the hen house. Complete independence, however, would deprive redress seekers of the benefits of privacy officials embedded within the organizations that are processing personal data and the many elements of impartial redress that are currently in place for DHS.

Existing Redress Mechanisms

The legislative and regulatory landscape in the U.S. provides several redress mechanisms that have "impartial" and "transparent" features. For example, both the Privacy Act of 1974 and the Freedom of Information Act provide an opportunity for individuals to request records held by government agencies. If the individual is not satisfied with the government's response, the individual may start a challenge in an administrative appeals process. If the outcome of the appeals process is not satisfactory to the individual, then there is an opportunity to bring a civil action in an Article III court to compel the government to permit access to or amend the records.⁴ Another DHS redress mechanism is the Traveler

⁴ The Privacy Act of 1974 and other statutes (including the Freedom of Information Act and the Consumer Fraud and Abuse Act) allow individuals to bring claims to U.S. Article III tribunals. There are, however, several reasons why this Judicial Redress may be limited. For example, the Privacy Act requires that an individual suffer an "adverse effect" in order to maintain a suit based on an agency's failure to comply with any provision of the Act

Redress Inquiry Program, which provides an opportunity for redress of problems experienced during travel screening.

The Computer Fraud and Abuse Act (CFAA) provides an additional redress mechanism for those individuals who believe they have suffered injury, damage or loss from intentional unauthorized access to a computer system. Under the CFAA, individuals can initiate a civil action in an Article III court to obtain compensatory damages and/or injunctive relief.

As well, the DHS Privacy Office has certain legislative requirements that promote impartiality in handling redress requests. The DHS Chief Privacy Officer is required to report to Congress on the activities of the Department, and is required to have a Director of Incidents and Inquiries to handle complaints and questions. Like other federal agencies, the DHS is subject to oversight by the Office of the Inspector General, the White House Office of Management and Budget, various Congressional committees, and the investigative arm of Congress, the General Accountability Office.

The result is a mix of redress mechanisms within the specific DHS components that process the data (administrative redress), redress with the DHS Privacy Office (Privacy Office redress), and, in some cases, opportunities to go to federal court (judicial redress).

Even with these redress mechanisms, there are specific DHS issues that make it difficult for the current system to provide full transparency and impartiality. Some of these difficulties were called out in the DHS Office of Inspector General's September 2009 report on the Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program.

Challenges to Impartiality

The report showed the difficulty in making certain that the staff reviewing redress cases are both knowledgeable and impartial at the same time. A fully independent body may have great difficulty being knowledgeable enough to provide effective redress, and a fully integrated organization and process will have difficulty in providing the requisite impartiality to satisfy redress seekers that their request was dealt with fairly. Noting these issues, DHS agreed in its response to the Inspector General's report to "develop and implement a process for the independent review and adjudication of redress cases related to DHS criminal investigations." Individuals should be required to exhaust the organization's administrative process prior to having the right to appeal to some independent appeals resolution entity.

other than those regarding amendment, access and the accuracy and relevance of records. Sec. 552a(g)(1)(D). The courts have upheld this requirement of adverse effect to be able to bring a claim. See Bassiouni v. FBI, 436 F.2d 712 (7th Cir. 2006). For example, if individuals want to contest whether DHS should have collected information that affected their ability to exercise their First Amendment right, such as practicing the free exercise of their religion (as prohibited by Sec. 552(e)(7) of the Privacy Act), it is unclear in many cases how they would show that they had suffered sufficient "adverse effect" to bring a claim. From a practical perspective, it may also be difficult for an individual to even know of the adverse effect. Even if the "adverse effect" is shown, the courts are currently divided as to whether expungement of the record is a proper remedy. See Wabun-Inini, 900 F.2d 1234, 1235 (8th Cir. 1990).

Challenges to Transparency

In attempting to provide adequate transparency in its privacy redress procedures, DHS must face the challenge of not communicating so much information as to expose the redress system to manipulation by those who would circumvent security measures. The OIG report concluded that DHS should do more to communicate the nature of a traveler's difficulties in order to assist the traveler in correcting problems, and this Committee agrees with that goal. It seems reasonable, however, to believe that even if DHS does provide more information to individuals seeking redress, there will be instances where DHS does not believe a full degree of transparency is warranted given the security risks.

The inherent challenges mentioned above only increase the importance of DHS being able to provide a redress process that gives individuals confidence that their inquiry was handled fairly. This need is increased because access to federal courts for civil actions may not be available in many situations, and may not be practically feasible in others.

It may be difficult for many plaintiffs to obtain standing to proceed with a civil claim. Generally, standing requires an actual injury to show the existence of a case of controversy. In many situations where an individual may seek privacy redress, they either may not have yet suffered "actual injury" or they may not have access to information to know whether they have suffered that injury. Indeed, it should be the goal of DHS to provide redress before an individual has to suffer substantial harm.

Recommendations

The Committee has several recommendations for the DHS Privacy Office in developing, deploying and monitoring an effective redress program.

- Assign accountability for the privacy redress process to a single owner with responsibility for developing and managing policies and processes that make the program accessible, understandable and fair.
- Provide information to the public that explains redress seekers rights, the process for complaining or seeking redress, a general timeline for the process, and the privacy policy regarding the personal information used in the process.
- Provide descriptive information on the process in plain language, in an easy-to-read format, in languages appropriate for the people seeking redress, at points of contact with individuals, on organization websites, and in other available venues.
- Develop and deploy a training program that educates employees, contractors, vendors and others as appropriate about the redress policies, procedures, standards, and access points. Train staff handling redress cases to be patient, helpful, and sensitive to cultural and linguistic differences.
- Ensure that corrections or annotations are propagated throughout all primary and secondary systems, to prevent the same information from producing an adverse impact in the future.
- Set service standards for logging redress complaints and providing timely responses, and promote transparency and accountability by including the standards in publicly available documents, including the complaint intake forms.

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- Develop administrative and technical support for the redress process to integrate it into the regular workings of the organization.
- Establish, administer and monitor an appeals process designed for transparency and fairness.
- Develop and implement an effective redress appeals process that provides individuals with confidence that the ultimate reviewer is appropriately impartial and separate from the entity that is the subject of the appeal.