

ATTACHMENT TO C& G OPERATING GUIDANCE MEMO 04- 01

Federal Privacy Act of 1974 (P.L. 93-579) [<http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=840569364517+0+0+0&WAISaction=retrieve>]

The Privacy Act, 5USC552a, establishes standards for federal agencies in maintaining records on individuals. 5USC section 552a, states:

(a) Definitions. --For purposes of this section --

.....

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency,

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

.....

(e) Agency Requirements.--Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

.....

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

.....
(i) (1) Criminal Penalties.--
.....

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirement of subsection (e) (4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.

USCIS Regulations

Documentation establishing eligibility to work in the United States required under Immigration Reform and Control Act of 1986, is implemented in Immigration and Naturalization Service (INS) [now U.S. Citizenship and Immigration Services (USCIS)] regulations. The requirement to control the "employment of aliens" is codified at 8 CFR Part 274a. This implementing regulation has sections regarding employment eligibility, documentation requirements, retention of documentation, use of such records, prohibited uses of such records, and record access requirements. [8CFR part 274a.2.http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/cfr_2002/jan_qtr/pdf/8cfr274a.2.pdf] Section 274a.2, "Verification of Employment Eligibility," establishes the requirements and procedures persons or entities must comply with when hiring individuals in the United States, pursuant to the Form I-9, "Employment Eligibility Verification Form." [<http://uscis.gov/graphics/formsfee/forms/files/i-9.pdf>] Although revisions to the I-9 are currently under consideration, the Form has not changed in the last ten years, nor has the *Handbook for Employers*, "Instructions for Completing Form I-9." The Office of Management and Budget (OMB) last approved version of the I-9 form is dated 11-21-91 and is marked OMB No. 1115-0136.

The law and the regulations state:

8CFR Part 274a.2.(b) (3) *Copying of documentation.* An employer, or a recruiter or referrer for a fee may, but is not required to, copy a document presented by an individual **solely for the purpose of complying with the verification requirements of this section.** [Emphasis added.] If such a copy is made, it must be retained with the Form I-9.

8CFR Part 274a.2.(b) (4) *Limitation on use of Form I-9.* Any information contained in or appended to the Form I-9, including copies of documents listed in paragraph (c) of this section used to verify an individual's identity or employment eligibility, **may be used only for enforcement of the Act** and Sections 1001, 1028, 1546, or 1621 of Title 18, United States Code. [Emphasis added.]

The I-9 form is completed and signed by both the individual person being employed and an authorized representative of the employer. The USCIS law and regulation merely require that the employer inspect the employment eligibility verification documentation. The signature of the employer's representative on the I-9 form is a simple certification that the documents were inspected, appear to be genuine, and relate to the employee named. The employer must maintain I-9 records in its own files. However, there are limitations and restrictions on use of such documents. In addition to having

columns where the employer cites the eligibility document inspected, there is an Anti-Discrimination Notice on the form, as well as a Privacy Act Notice in the instructions for completing the form.

The I-9 form contains personal information, including the individual's name, maiden name, address, date of birth, and Social Security number, as well as the name and title of the employer's Authorized Representative. The documents listed to establish identity and eligibility to work contain additional information, including issuing authority, document number, and expiration date (if any). To the extent that the employer duplicates the documents presented in the employment eligibility verification process and appends them to the I-9, such documents as a driver's license or passport contain additional personal information, such as height, weight, and photograph.

The OMB approved I-9 form Employment Eligibility Verification, issued by the U.S. Department of Justice, Immigration and Naturalization Service, (now USCIS) "Instructions", states:

Employers must sign and date the certification. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. These photocopies may only be used for the verification process and must be retained with the I-9. (Section 2, I-9, Instructions)

The I-9 Instructions also contain a Privacy Act Notice, as follows:

Privacy Act Notice. The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by officials of the U.S. Immigration and Naturalization Service, the Department of Labor and the Office of Special Counsel for Immigration Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless the form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986."

The Anti-Discrimination Notice is printed on the I-9 form in two places: in the instructions and on the form itself. It states:

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate

against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

The *Handbook for Employers*, "Instructions for Completing Form I-9," (Publication M-274), issued by the Department of Justice, INS, provides additional guidance on the permitted use and disclosure of the I-9, and any documents copied and attached to the I-9. Part Four, "Unlawful Discrimination," states:

The Immigration and Nationality Act, as amended, and Title VII of the Civil Rights Act of 1964, as amended, prohibit employment discrimination. Employers with 4 or more employees are prohibited from discriminating against any person (other than an unauthorized alien) in hiring, discharging, or recruiting or referring for a fee because of a person's national origin, or in the case of a citizen or protected individual, because of a person's citizenship status. In practice, this means that employers must treat all employees the same when completing the Form I-9. Employers cannot set different employment eligibility verification standards or require that different documents be presented by different groups of employees.

Part Seven, Question 22, states:

Question: When I review an employee's identity and employment eligibility documents, should I make copies of them?

Answer: The law does not require you to photocopy documents. However, if you wish to make photocopies, you should do so for **all** employees, and you should retain each photocopy with the I-9. Photocopies must not be used for any other purpose."

State Information Practices Act and Public Records Act [Excerpts in RMP -8, Section VII - <http://www.ucop.edu/ucophome/policies/bfb/rmp8.html>]

The Information Practices Act of 1977 (Civil Code Section 1798-1798.78) was adopted by the California Legislature in order to protect the privacy rights of individuals and to limit the amount of personal information that is collected or disseminated by a government agency, as stated in Section 1798.1 of the Act:

"The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them. The Legislature further makes the following findings:

- (a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.
- (b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.
- (c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

Under the California Information Practices Act, (Civil Code Section 1798-1798.78), there are similar requirements to those of the federal Privacy Act that must be followed when personal information about an individual is to be collected and released under State law. The following are some pertinent sections of the statute:

“Each agency shall maintain in its records only personal information which is relevant and necessary to accomplish a purpose of the agency required or authorized by the California Constitution or statute or mandated by the federal government.” (Section 2798.14)

“Each agency shall provide on or with any form used to collect personal information from individuals the notice specified in this section. . . . The notice shall include all of the following:

- (a) The name of the agency and the division within the agency that is requesting the information.
- (b) The title, business address, and telephone number of the agency official who is responsible for the system of records and who shall, upon request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records.
- (c) The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information.
- (d) With respect to each item of information, whether submission of such information is mandatory or voluntary.
- (e) The consequences, if any, of not providing all or any part of the requested information.
- (f) The principal purpose or purposes within the agency for which the information is to be used.
- (g) Any known or foreseeable disclosures which may be made of the information pursuant to subdivision (e) or (f) of Section 1798.24.
- (h) The individual’s right of access to records containing personal information which are maintained by the agency. (Section 1798.17)

“No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is:

- (a) To the individual to whom the information pertains.
- (b) With the prior written voluntary consent of the individual to whom the record pertains, but only if such consent has been obtained not more than 30 days before the disclosure, or in the time limit agreed to by the individual in the written consent.
- (c) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use or transfer is accounted for in accordance with Section 1798.25. . .
- (f) To a governmental entity when required by state or federal law. (Section 1798.24)

“Each agency shall keep an accurate accounting of the date, nature, and purpose of each disclosure of a record made pursuant to subdivision (i), (k), (l), (o), or (p) of Section 1798.24. The account shall also be required for disclosures made pursuant to subdivision (e) or (f) of Section 1798.24 unless notice of the type of disclosure has been provided pursuant to Sections 1798.9 and 1798.10.” (Section 1798.25)

State Privacy Act Notice: The University of California utilizes the form issued by the Immigration and Naturalization Service, Form I-9, Employment Eligibility Verification. UC has published a State Privacy Notice on the cover page of the I-9 form. The State Privacy Notice states:

“The State of California Information Practices Act of 1977 (effective July 1, 1978) requires the University to provide the following information to individuals who are asked to supply information about themselves:

The principal purpose for requesting the information on this form is to verify the individual’s eligibility for employment in the United States. University policy and federal statute authorize the maintenance of this information.

Furnishing all information requested on this form is mandatory—failure to provide such information may result in a determination that the applicant is ineligible for employment. Information furnished on this form will be made available for inspection for United States Immigration and Naturalization Service or Department of Labor Officers.

Individuals have the right to review their own records in accordance with University personnel policy and collective bargaining agreements. Information on applicable policies or agreements can be obtained from campus or Office of the President Human Resources and Academic Personnel Offices.

The officials responsible for maintaining the information contained on this form are: campus or Office of the President Human Resources and Academic Personnel Offices or Campus Accounting Officers.”

University Policy Regarding Release of “Personal” Information:

State Information Practices Act section 1798.3 (a) defines "Personal Information" as: “The term “personal information” means any information that is maintained by an agency that identifies or describes an individual, including but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statement made by, or attributed to, the individual.”

Under UC Business and Finance Bulletin RMP-8, Legal Requirement on Privacy of and Access to Information, <http://www.ucop.edu/ucophome/policies/bfb/rmp8.html> UC describes its implementation of the Federal Privacy Act, the California Public Records Act, and the California Information Practices Act. For the purposes of UC policy implementation of the California Information Practices Act in Section VII of RMP-8, UC has identified four categories of records containing personal information about an individual: Confidential Information, Confidential Academic Review Records, Nonpersonal Information, and Personal Information. Personal Information is defined in RMP-8, Section VII, B. 4. as:

.....all information that identifies or describes an individual except that information which is determined to be confidential, confidential academic, or nonpersonal as discussed in Subsections 1, 2, 3 above, and the disclosure of which would constitute an unwarranted

invasion of personal privacy. Thus, much information about individuals will fall under the personal category. Some examples of the most common types of personal information are:

- a. Birth date
- b. Citizenship
- c. Social security number
- d. Home address and home telephone number
- e. Income tax withholding
- f. Staff performance evaluations or letters of corrective actions
- g. Spouse's or other relatives' names

University policy, as established in Section VII.G., Disclosure of Information, of RMP-8, states in Section 4 that the University will not disclosure any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information meets one of the allowable disclosures established in the California Information Practices Act as cited above.

While the Information Practices Act of 1977 is directly relevant to the legal restrictions on and requirements for the collection of personal information, it should be noted that the California Records Act also touches on the subject of access to records containing personal information. The California Public Records Act (Government code Section 6250 et seq.) establishes that access to information concerning the conduct of the people's business is a fundamental and necessary right, that public records are open to inspection, and are subject to copying, except as provided in the Act. Certain records are exempt from disclosure under Section 6254 of the Act, including "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." In addition, Section 6255 of the California Public Records Act states: "In addition to the types of records listed above, the University may withhold any records for which it can be demonstrated that the public interest served by not making the records public clearly, not minimally, outweighs the public interest served by disclosure of the record. The interest of the public and not just the interest of the University is to be considered."

California Constitution and Code of Civil Procedure:

The privacy clause of the California Constitution (Article 1, Section 1) has been construed to provide employees with a reasonable expectation of privacy in their employment records and a party seeking disclosure must show a compelling need for the information and demonstrate that there is no less intrusive means of obtaining relevant information. (El Dorado Savings & Loan v. Superior Court, 190 Cal. App. 3d 342) Also, section 1985.6 of the Code of Civil Procedure imposes certain requirements when a party to litigation seeks to subpoena the employment records of an individual from his or her employer, including providing advance written notice to the employee that the records are being subpoenaed along with instructions to the employee of how they can ask the court to quash the subpoena.