

OFFICE OF MANAGEMENT AND BUDGET

Order Providing for the Confidentiality of Statistical Information

AGENCY: Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

ACTION: Notice of proposed order.

SUMMARY: The proposed order is intended to clarify, and make consistent, government policy protecting the privacy and confidentiality interests of individuals or organizations who furnish data for Federal statistical programs. It is intended to assure respondents who supply statistical information needed to develop or evaluate Federal policy that their responses will be held in confidence and would not be used against them in any government action. In effect, it clarifies and amplifies the privileged status afforded "confidential statistical data" about businesses and organizations as set forth in the Trade Secrets Act, 18 U.S.C. 1905, as well as the principles of the Privacy Act, 5 U.S.C. 552a, concerning information about individuals. It establishes policies to assure "fair information practices" (as advocated by the Privacy Protection Study Commission and the Commission on Federal Paperwork) for respondents and subjects of statistical inquiries, based on the concept of "functional separation" developed by the Privacy Protection Study Commission. The proposed order permits functional separation to be achieved by two means—1) identifying an agency or unit that is purely statistical, or 2) distinguishing statistical from nonstatistical functions within a single agency or unit.

DATES: Comments must be received on or before March 29, 1996.

ADDRESSES: Please address all written comments to Katherine K. Wallman, Office of Information and Regulatory Affairs, OMB, Washington, D.C. 20503. Comments may be submitted via facsimile to 202/395-7245. Electronic mail comments may be submitted via SMTP to Wallman_K@a1.eop.gov or via X.400 to G=Katherine, S=Wallman, PRMD=gov+eop, ADMD+telemail, C=us. Comments submitted via electronic mail should include the commenter's name, affiliation, postal address, and email address in the text of the message.

FOR FURTHER INFORMATION CONTACT: Jerry L. Coffey, Office of Information and Regulatory Affairs, OMB, Washington, D.C. 20503. Inquiries may be submitted via facsimile to 202/395-7245.

Electronic mail inquiries may be submitted via SMTP to Coffey_J@a1.eop.gov or via X.400 to G=Jerry, S=Coffey, PRMD=gov+eop, ADMD+telemail, C=us. Electronic mail inquiries should include the commenter's name, affiliation, postal address, and email address in the text of the message.

SUPPLEMENTARY INFORMATION:

A. Background

Statistical policy authority within the executive branch was established explicitly in section 103 of the Budget and Accounting Procedures Act of 1950, which stated, in its original language—

The President, through the Director of the Bureau of the Budget, is authorized and directed to develop programs and to issue regulations and orders for the improved gathering, compiling, analyzing, publishing, and disseminating of statistical information for any purpose by the various agencies in the executive branch of the Government. Such regulations and orders shall be adhered to by such agencies.

64 Stat. 834 (codified at 31 U.S.C. 18b). In 1982, this provision was recodified, without substantive change, at 31 U.S.C. 1104(d):

The President shall develop programs and prescribe regulations to improve the compilation, analysis, publication, and dissemination of statistical information by executive agencies. The President shall carry out this subsection through the Administrator for the Office of Information and Regulatory Affairs in the Office of Management and Budget.

See also Section 3(a) of the Paperwork Reduction Act of 1980 (94 Stat. 2825) and Executive Order No. 10253 (31 U.S.C. 1104 note, and Codification of Presidential Proclamations and Executive Orders (1945-89), p. 687). Previous orders issued pursuant to this authority have been in the form of OMB Circulars, Transmittals and attached Exhibits (prior to 1977), Statistical Policy Directives (1978-1980), and Statistical Standards (since 1980).

The Paperwork Reduction Act of 1980 (as amended in 1986 and 1995) also requires OIRA to develop policies, principles, standards, and guidelines for privacy and confidentiality generally; the integrity of confidentiality pledges; and the confidentiality of information collected for statistical purposes (subsections 3504(e)(1), 3504(e)(5), and 3504(g)(1) of title 44). In addition the Act tasks OIRA to oversee agency compliance with related requirements of the Act and with the policies referenced above (subsections 3506(b)(1)(C), 3506(e) (2)-(4), and 3506(g)(1)).

The decentralized Federal statistical system consists of more than seventy

agencies and units, including a dozen agencies that have statistical activities as their principal function. While this decentralized structure provides substantial benefits in making statistical units responsive to specific program needs, public confidence in nondisclosure pledges made by statistical agencies or units is sometimes affected by perceptions of the programs those statistics support.

By establishing a uniform policy for the principal statistical agencies, this order will reduce public confusion, uncertainty, and concern about the treatment of confidential statistical information by different agencies. By establishing consistent rational principles and processes to buttress confidentiality pledges, the order will eliminate unsupportable confidentiality claims and agency decision processes that have created uncertainties. Such consistent protection of confidential statistical information will, in turn, reduce the perceived risks of more efficient working relationships among statistical agencies, relationships that can reduce both the cost and reporting burden imposed by statistical programs.

B. Proposed Section 1

This section provides definitions for purposes of this order. Most of these definitions are self-explanatory.

One of the central definitions is "statistical agency or unit," which refers to the class of organizations that are principally subject to the order. As noted above, the statistical policy authority in 31 U.S.C. 1104(d) is defined in terms of an enumerated set of statistical activities performed by any executive agency for any purpose. The definition of "statistical agency or unit" narrows the coverage of this order, except where otherwise specified, to agencies where statistical activities are predominant. For clarity, OMB has listed in Appendix A specific statistical agencies or units that have been initially determined to be subject to this order. OMB may revise this list from time to time.

Another central definition in Section 1 is "statistical purpose", which definition also includes examples of other (non-statistical) purposes. These terms are used in Sections 2 and 3 of the order. Many governmental and private sector activities use statistical information in summary, aggregate, or other anonymous forms. Most of them, however, also use information in identifiable form for making decisions about entities that are the subjects of that information. The definition of "statistical purpose" distinguishes Federal activities that produce statistical

information in anonymous form from all other Federal activities.

The definition of “identifiable form” is based on the standard in 26 U.S.C. 6103(b)(2) (defining tax return information as not including “data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer”) and 26 U.S.C. 6103(j)(4) (regarding “statistical use” of “anonymous” return information), as well as on privacy principles applied by courts in cases under the Freedom of Information Act, see, e.g., *Carter v. Commerce*, 830 F.2d 388, 390–92 (D.C. Cir. 1987); *Marzen v. HHS*, 825 F.2d 1148, 1152 (7th Cir. 1987); *Alirez v. NLRB*, 676 F.2d 423, 427–28 (10th Cir. 1982). Statistical projects have as their objective the publication of estimates (with measurable error) of summary information or aggregate characteristics of some target population (which may be people or things). Such objectives do not require the disclosure of information that can be associated directly or indirectly with the identity of individuals, or their specific organizations or activities, that are the subject of the information. When the underlying information is collected under a pledge of confidentiality, statistical agencies and units apply a variety of techniques to assure that the published information cannot be “mined” for the component details about individual participants.

C. Proposed Section 2

This section states a general prohibition against the disclosure, or use, in identifiable form of information collected for exclusively statistical purposes, and the policy applies only to such information. It is intended to implement, in its simplest form, the organizational concept of functional separation—where an agency has a clear mandate to collect information for exclusively statistical purposes—and to establish the specific obligation that is communicated by a confidentiality pledge. The policy is stated in terms of “disclosure”—it is not intended to prevent access to information by the respondents who provided the information or their agents (including heirs or successors) explicitly defined by law, nor is it intended to cast a veil of secrecy over information that is already in the public domain. The requirement to provide notice to respondents is consistent with the general requirement of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(e)(2)) and must also be consistent with the guidelines in Appendix B.

D. Proposed Section 3

This exception language applies only to agencies that are subject to the general policy in section 2 and only in the case where they also have “authority” to collect data to be used in identifiable form for nonstatistical purposes. The notice requirements are referenced to the paperwork review process.

The procedure called for by this section provides an additional means to implement functional separation and a means for the public and OMB to review data collections conducted by a statistical agency that are to be used for nonstatistical purposes. Its purpose is to identify all nonstatistical data collections carried out by statistical agencies (including collections carried out for other agencies) and to assure that proper notice to respondents is provided.

E. Proposed Section 4

This section states that the provisions of the order are to be applied to the maximum extent legally permissible. Thus section 4 requires that statutes (including, but not limited to, statutes regarding the collection, use, disclosure, and confidentiality of information) be construed to give the maximum force to confidentiality pledges that is legally permissible. For example, this requirement affects the interpretation of the Trade Secrets Act, where it strengthens the prohibition of disclosures of “confidential statistical data”.

F. Proposed Section 5

Section 5 establishes a procedure for identifying and resolving any potential conflicts with this order. The procedure requires an agency review of all pertinent issues, a report and subsequent review by OMB, and, if necessary, appropriate review by the Department of Justice.

G. Proposed Section 6

Section 6 requires covered agencies to take all steps necessary to comply with this order. In most cases, such steps will include revision of formal and informal agency policies that can be made consistent with this order without statutory amendment. OMB and affected agencies will also consider seeking changes in statutes if necessary.

H. Proposed Section 7

Section 7 states that the act of providing data to a statistical agency or unit does not alter obligations under any other statute, including the Privacy Act and the Freedom of Information Act, for

the same or similar information that is retained.

I. Proposed Section 8

Section 8 emphasizes that this order is intended to supplement, and not to restrict or diminish, any confidentiality protections that otherwise apply to statistical information. Examples of such protections include data encryption and other security measures as well as disclosure avoidance procedures used in statistical publications.

J. Proposed Section 9

Section 9 commits the Office of Information and Regulatory Affairs to provide guidance for implementing this order. OIRA will take steps to assure consistent policies in the rules adopted by affected agencies, and otherwise consult with agencies to assure the full and prompt implementation of this order. Any agency may also request OIRA to interpret any aspect of this order or to provide advice on any action proposed to give full effect to the policies of this order. OMB will also review the accuracy and adequacy of confidentiality pledges as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3504(e)(5), 3506(e)(2)–(4), 3506(g)(1) and 5 C.F.R. 1320.5(d)(2)(vii)–(viii)).

K. Proposed Section 10

This section establishes the effective date of the order.

L. Proposed Appendix A

Appendix A contains the list of “statistical agencies and units” determined by OMB to be principally subject to this order. Comment is particularly solicited on the list of agencies proposed for inclusion or on other agencies or units that should be considered for inclusion.

M. Proposed Appendix B

Appendix B provides guidelines for including comparable language in confidentiality pledges that cover data collected for exclusively statistical purposes. This is intended to provide the public with a clear notice when the uniform policies of this order are in effect. It is also anticipated that OMB clearance review will be used to eliminate similar and potentially confusing pledge language in cases where the standards of this order are not

met. See 5 C.F.R. 1320.5(d)(vii)–(viii) (60 FR 44988; August 29, 1995).

Sally Katzen,

Administrator, Office of Information and Regulatory Affairs.

Order Providing for the Confidentiality of Statistical Information

Consistent government policy protecting the privacy and confidentiality interests of persons who provide information for Federal statistical programs serves both the interests of the public and the needs of the government and society. The integrity and credibility of confidentiality pledges provides assurance to the public that information about persons or provided by persons for exclusively statistical purposes will be held in confidence and will not be used against them in any government action. Public confidence and willingness to cooperate in statistical programs substantially affects both the accuracy and completeness of statistical information and the efficiency of statistical programs. Fair information practices and functional separation of purely statistical activities from other government activities are both essential to continued public cooperation in statistical programs.

Therefore, pursuant to 31 U.S.C. 1104(d), section 3(a) of the Paperwork Reduction Act of 1980 (94 Stat. 2825), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), and Executive Order 10253 (as amended), and in order to improve the compilation, analysis, publication, dissemination, and confidentiality of statistical information, it is hereby ordered as follows:

Section 1. Definitions. For the purposes of this order:

(a) *Disclose* means to release information to anyone other than the respondent who provided, or is the subject of, such information (or the agent of such respondent);

(b) *Executive agency* is defined as in 31 U.S.C. 102;

(c) *Identifiable form* means any representation of information that permits information concerning a specific respondent to be reasonably inferred by either direct or indirect means;

(d) *Information* means information of any kind that is not generally available to the public, and includes data;

(e) *Person* means individuals, organized groups of individuals, societies, associations, firms, partnerships, business trusts, legal representatives, companies, joint stock companies, and corporations, and refers to both the singular and the plural;

(f) *Respondent* means a person who is requested to provide information, or is the subject of that information, or who provides that information;

(g) *Rule* means the whole or part of a statement by an Executive agency of general or particular applicability and future effect, and includes regulations, directives, orders, guidance, and policy statements;

(h) *Statistical agency or unit* means an agency or organizational unit of the Executive Branch whose activities are predominantly the collection, compilation, processing, or analysis of information for statistical purposes (Appendix A contains a list of "statistical agencies or units" as defined herein, which have been determined by the Office of Management and Budget to be subject to this order);

(i) *Statistical purpose* means the description, estimation, or analysis by the Federal Government of information concerning persons, the economy, society, or the natural environment (or relevant groups or components thereof) without regard to the identities of specific persons, as well as the development, implementation, or maintenance of methods, procedures, or information resources that support such purposes; "statistical purpose" specifically excludes many other activities or functions for which information is used in identifiable form, such as determining whether a person is eligible for a license, privilege, right, grant, or benefit (including whether such should be revoked) or whether a person's conduct was or is in accordance with law (including whether a fine, other punishment, monetary damages, or equitable relief should be imposed);

(j) *Use of information* means use by a statistical agency or unit, by officers or employees of that agency or unit, or by other agents (including contractors) acting as employees under the supervision and control of that agency or unit.

Section 2. Prohibitions regarding the disclosure and use of information collected for exclusively statistical purposes.

(a) Information acquired by a statistical agency or unit for exclusively statistical purposes may be used only for statistical purposes, and shall not be disclosed, or used, in identifiable form for any other purpose unless otherwise compelled by law.

(b) When a statistical agency or unit is collecting information for exclusively statistical purposes, it shall, at the time of collection, inform the respondents from whom the information is collected that such information may be used only

for statistical purposes and may not be disclosed, or used, in identifiable form for any other purpose, unless otherwise compelled by law. If the statistical agency or unit has determined that it is not otherwise compelled by law, the confidentiality pledge shall be in the form as set forth in Appendix B.

Section 3. Prohibition on collecting information to be disclosed, or used, in identifiable form for non-statistical purposes.

(a) Unless a statistical agency or unit is specifically authorized by statute to acquire information to be disclosed, or used, in identifiable form for purposes other than statistical purposes, such agency or unit shall not collect information for any such (non-statistical) purposes.

(b) If a statistical agency or unit is specifically authorized by statute to acquire information to be disclosed, or used, in identifiable form for non-statistical purposes, and is collecting information for such non-statistical purposes, such agency or unit shall clearly identify such non-statistical purposes in both the Federal Register notices and submissions to Office of Management and Budget required by the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). In such cases when information is collected to be disclosed, or used, in identifiable form for purposes other than statistical purposes, a statistical agency or unit may not make a confidentiality pledge that includes any language that might reasonably be confused with the language contained in confidentiality pledges for information that is collected for exclusively statistical purposes (see Section 2(b) and Appendix B). Information collected to be disclosed, or used, in identifiable form for non-statistical purposes may be disclosed, or used, only for those non-statistical purposes approved under the Paperwork Reduction Act.

Section 4. The provisions of this order shall be applied to the maximum extent legally permissible. Accordingly, with respect to matters involving statistical information and activities of statistical agencies or units, Executive agencies shall, to the maximum extent legally permissible, construe and apply pertinent statutes (including, but not limited to, statutes regarding the collection, use, disclosure, and confidentiality of information) in a manner that enables full compliance with this order (or, where a statute precludes full compliance, in a manner that enables compliance with this order to the maximum extent not precluded by statute).

Section 5. Each statistical agency or unit subject to this order shall conduct a review of its activities to ensure that they are in full compliance with this order (or, if full compliance is precluded by statute, that they comply to the maximum extent not precluded by statute). The agency or unit shall complete the review no later than 60 days after this order takes effect for that agency or unit. The review shall include, among other things:

(a) an identification of any statutes that, the agency or unit believes, preclude full compliance with this order,

(b) an identification of any rules that, the agency or unit believes, are inconsistent with any provisions of this order (including an identification of which such rules are compelled by statute and, conversely, which ones may be revised without a statutory amendment), and

(c) the development of a plan for ensuring that the activities of the agency or unit fully comply with this order (or, if full compliance is precluded by statute, that such activities comply with this order to the maximum extent not precluded by statute).

The results of this review shall be submitted in a report to the Administrator of the Office of Information and Regulatory Affairs no later than 90 days after this order takes effect for that agency or unit. The Office of Management and Budget shall review such reports and, after consultation with the statistical agencies or units in question, may request that the Department of Justice review and provide its opinion regarding any statutes identified as precluding full compliance with this order, or any rules that have been identified as being inconsistent with any provisions of this order and as being compelled by statute.

Section 6. Statistical agencies or units shall implement this order through issuance of appropriate rules, in accordance with applicable procedures.

To the extent that it is determined that there are any existing rules which are inconsistent with any provisions of this order and which an Executive agency may revise to be consistent (without statutory amendment), such Executive agency shall promptly undertake to revise such rules, in accordance with applicable procedures, so that they are consistent. OMB and affected statistical agencies or units shall consider, in accordance with the legislative clearance process under OMB Circular A-19, the appropriateness of any statutory amendments that would enable full compliance with this order.

Section 7. The disclosure of information to a statistical agency or unit shall in no way alter obligations under statutes, including the Freedom of Information Act and the Privacy Act, for the same or similar information that was retained.

Section 8. This order is intended to supplement, and not to restrict or diminish, any confidentiality protections that otherwise apply to statistical information.

Section 9. The Office of Information and Regulatory Affairs of the Office of Management and Budget will provide appropriate guidance regarding this order.

Section 10. This order is effective 30 days after final publication in the Federal Register.

Appendix A—Designated Statistical Agencies or Units

The following agencies or units have been determined by OMB to be "statistical agencies or units" for purposes of this order (this list may be revised from time to time):

Department of Agriculture—
Economic Research Service
National Agricultural Statistics Service
Department of Commerce—
Bureau of the Census
Bureau of Economic Analysis
Department of Education—

National Center for Education Statistics
Department of Energy—
Energy End Use and Integrated Statistics Division of the Energy Information Administration
Department of Health and Human Services—
National Center for Health Statistics
Department of Justice—
Bureau of Justice Statistics
Department of Labor—
Bureau of Labor Statistics
Department of Transportation—
Bureau of Transportation Statistics
Department of the Treasury—
Statistics of Income Division of the Internal Revenue Service
National Science Foundation—
Division of Science Resources Studies
Appendix B—Confidentiality Pledges

Statistical agencies or units subject to this order shall, whenever they collect information for exclusively statistical purposes and have determined that they may fully comply with the disclosure and use prohibitions in this order, incorporate the following or equivalent language into confidentiality pledges made to respondents:

This information collection complies with the Federal Statistical Confidentiality Order. Therefore, by law, your responses may be used only for statistical purposes and may not be disclosed, or used, in identifiable form for any other purpose.

When a confidentiality pledge is made by a statistical agency or unit for any information collection that does not satisfy the disclosure and use standards of this order that apply to information collected for exclusively statistical purposes (e.g., when the purposes of the collection are not exclusively statistical), such pledge may not include any language that might reasonably be confused with the language specified above.

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