TESTIMONY

OF

JANLORI GOLDMAN

STAFF ATTORNEY

ON BEHALF OF THE

AMERICAN CIVIL LIBERTIES UNION

ON

THE FAIR CREDIT REPORTING ACT OF 1970

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS AND COINAGE

HOUSE BANKING, FINANCE, AND URBAN AFFAIRS COMMITTEE

SEPTEMBER 13, 1989

Has chronology of privacy legislation

Mr. Chairman and Members of the Subcommittee:

INTRODUCTION

I appreciate the opportunity to appear today on behalf of the American Civil Liberties Union (ACLU) to testify on the Fair Credit Reporting Act of 1970. The ACLU is a nationwide, nonpartisan organization with 275,000 members dedicated to preserving citizens' constitutional rights.

We are pleased that this Subcommittee is holding this much-needed oversight hearing on the Act. The law not only needs to be strengthened to give consumers' greater control over personal, sensitive information collected and disseminated by consumer reporting agencies, but it must also be updated to address new industry practices that have developed as a result of advances in information technology.

Congress took an important step forward in enacting the Fair Credit Reporting Act in 1970, but the inherent weaknesses in that law, coupled with the changes in the industry, have resulted in a loss to consumers of control over their information and decisions affecting important areas of their lives. Most consumers are not even aware of how the credit reporting industry operates, what information is collected, how it is used, and to whom it may be made available. A number of commentators have noted that we now live in a credit-based society, a society in which there is an ever-increasing demand for detailed, personal information. (Linowes, Privacy in America, 1989). A number of industries service this demand, including, consumer reporting

agencies, often without comprehensive government regulation or oversight.

All of these issues need to be addressed. It is our hope that this oversight hearing will be the first in a series of steps to create a solid base for rewriting the Act.

## THE FAIR CREDIT REPORTING ACT

In passing the Fair Credit Reporting Act of 1970, Congress intended to grant consumers some measure of confidentiality protection in the records maintained by consumer reporting agencies. The Act was intended to insure that the agencies "exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." (15 U.S.C. 1681 (a)(4)). Under the Act, agencies are required to adopt procedures that are "fair and equitable to the consumer, with regard to confidentiality, accuracy [and] relevancy" of the information collected. (15 U.S.C. 1681 (b)). The Act, one of the first federal privacy protection statutes to be passed, is Congress' first attempt to regulate the credit reporting industry.

It is important to note that at the first oversight hearing held on the Act in 1973, there was substantial agreement that the Act did not go far enough and that its provisions were already becoming outdated. Both Senator Proxmire, the original sponsor, and the Federal Trade Commission (FTC), charged with enforcement of the Act, testified to this effect, joined by a number of

consumer and privacy advocates. (Hearings before the Subcommittee on Consumer Credit, Committee on Banking, Housing and Urban Affairs, 93rd con. 1973, pp. 1-2). Similar Senate hearings in 1975 and 1980 created a record for strengthening and updating the Act, but vigorous opposition from the consumer reporting industry hampered meaningful change. Most of the early recommendations for amending the Act -- including strengthening and updating the sections on access, disclosure, data quality and enforcement -- are still necessary. We hope that this Subcommittee will endorse these needed changes to the Act.

WHAT THE ACT DOES PROVIDE AND WHAT THE ACT SHOULD PROVIDE

The following is a brief summary of some of the most important provisions of the Fair Credit Reporting Act and proposals for change. This is not intended to be a definitive description or a complete "wish list." We recognize that the Subcommittee is engaged in gathering information about the Act's strengths and weaknesses, and changes in industry practices. It is through this process that a more comprehensive recommendation for change will emerge.

Consumer Access -- Currently, the Act gives individuals the right to find out the "nature and substance" of the information maintained on him/her by a consumer reporting agency. (15 U.S.C. 1681g). The agency must provide the information free of charge if the consumer makes the request within 30 days of receiving an adverse credit decision based on an agency's report. Otherwise,

the agency may charge a fee for responding to a request for information. Under no circumstances may an individual know about medical information contained in his/her file. Consumers may also receive a list of those who have received their credit report in the past six months.

The Act should be amended to give consumers the right to receive a copy of their complete credit report from consumer reporting agencies at any time, at no charge. Individuals should be automatically provided with a copy of their records, including medical information, whenever information on them is disclosed to a requester. In addition, credit grantors should not be prohibited from informing consumers about the contents of a report received on them, but should be required to provide consumers with whatever information they have received and used as the basis for making a credit (or employment or insurance) decision. Granting consumers access to their records before an adverse decision is made would be a preventive measure, allowing individuals to know what information on them may be disclosed, and providing them with an opportunity to make any necessary corrections.

Access to one's records is a cornerstone of information privacy legislation, and is a key element of fair information practices. Access is essential to put individuals on notice that a record about them exists, that these records are being disclosed to others, and to give individuals the opportunity to correct, complete, update or object to the information. Without

meaningful access, individuals are unable to exercise any control over information about them held by others. As the Privacy Protection Study Commission's 1977 report concluded:

> [R]ecord-keeping problems continue to plague individuals in their consumer-credit relationships. One reason is that many of the legal requirements imposed on credit grantors and credit bureaus do not apply until the individual makes certain specific requests. To protect only those who are fully aware of their rights in the credit relationship leaves a great many individuals at a disadvantage.

Disclosure to Third Parties -- Under the Act, consumer reporting agencies may disclose a consumer report to anyone "which it has reason to believe" intends to use the information for credit, employment, insurance or licensing purposes, or if the requester has a "legitimate business need for the information in connection with a business transaction involving the consumer." (15 U.S.C. 1681b(3)(E)).

These categories under the Act are so broad as to provide almost no guarantee of confidentiality for consumers. Further, there is no requirement that agencies first verify the identity and purpose of a requestor before disclosing information. In fact, as reported in a recent article in Business Week, some agencies make their entire databases of credit reports available on-line to subscribers. In this way, a reporter, posing as a potential employer, delved into Vice-President Quayle's credit report. (Business Week, 9/4/89).

The Act should be amended to require that consumer reporting agencies first obtain an individual's actual consent before disclosing information to a third party. The consent could

be obtained by either the agency or the third party at the time of application for credit or other benefits. Consent is another central element of fair information practices policy that gives individuals some degree of control over their information. Consent, like access, also provides individuals with notice of a particular activity.

Further, consumer reporting agencies should be prohibited from providing information on an individual for purposes unrelated to granting credit, without first soliciting explicit authorization from the individual. In addition, credit grantors should be barred from receiving information from the agencies without informed consent from the applicant. (Recommendation of the Privacy Protection Study Commission, 1977).

Data Quality -- The Act requires agencies to adopt "reasonable procedures" to assure the accuracy of information they provide to subscribers. (15 U.S.C 1681e). After a period of time, certain types of information, such as bankruptcies, judgments, liens criminal histories, are considered "obsolete" and may not be disclosed. (15 U.S.C. 1681c). If an individual is unsuccessful in getting an agency to correct or purge information in his/her credit report, the individual may file an explanatory note of the dispute with the agency. The agency is only required to notify subscribers that such a note exists. The obligation to provide the note arises when the subscriber actually requests it. (15 U.S.C. 1681i).

In the area of data quality, the Act is sorely in need of

strengthening. The term "reasonable procedures" is too vague and the interpretation of it has always favored the industry. The Act should mandate the periodic auditing and purging of records. Information should not be disclosed until it has been verified. Corrected errors should be reported to those who have received the inaccurate information. Notices of disputes filed by consumers must be made a part of the consumer's report. An example of a disclaimer that has appeared on credit reports for subscribers highlights the shortcomings in this area:

> "This information... has been obtained from sources deemed reliable, the accuracy of which this organization does not guarantee. The inquirer has agreed to indemnify the reporting bureau for any damage arising from misuse of this information and this report is furnished in reliance on that indemnity. It must be held in strict confidence, it must not be revealed to the subject reported on, except by a reporting agency in accordance with the Fair Credit Reporting Act."

The disclosure of inaccurate records can result in serious consequences for consumers. They can be denied employment, insurance, credit and other opportunities. It is very difficult to battle the perceptions created by damaging information once it is disclosed. As reported in Privacy in America, written by the former Chair of the Privacy Protection Study Commission, one-third of all consumers who examine their files find mistakes.

In sum, the burden of maintaining accurate and complete records should be removed from the individual, who is in the worst position to see and correct records, and placed on those who collect, hold and disseminate information for profit. In addition, the collection of certain types of highly personal,

sensitive information should be limited.

Enforcement and Oversight -- The Act charges the Federal Trade Commission (FTC) with enforcement of the Act. (15 U.S.C. 1681s). While the FTC receives and responds to consumer complaints on an ad hoc basis, no formal mechanism exists for the FTC to regularly engage in enforcement or oversight activities. We believe that the Act should require the FTC to maintain and index consumer complaints in an electronic form. In addition, consumer reporting agencies should be mandated to file with the FTC information regarding industry practices and services. The FTC should be given broader enforcement powers, and the agency should play a more active role in mediating disputes between consumers and consumer reporting agencies. Finally, the FTC should report annually to the relevant oversight committees in Congress as to the effectiveness of the Act and any new developments.

## THE NEED FOR PRIVACY PROTECTION

The ACLU believes, as does the majority of the American public, that privacy is an enduring and cherished value and that legislation is necessary to protect personal, sensitive information. A number of Harris surveys have documented the growing public demand for privacy legislation. In a 1983 analysis of their survey results, Louis Harris & Associates concluded:

> Particularly striking is the pervasiveness of support for tough new ground rules governing computers and other

> information technology. Americans are not willing to endure abuse or misuse of information, and they overwhelmingly support action to do something about it. This support permeates all subgroups in society and represents a mandate for initiatives in public policy.1/

More recently, a Trends and Forecasts survey released in May, 1989, documented that 7 out of 10 consumers feel that personal privacy is very important to them, with many stating that they fear their privacy is in jeopardy. Half of the people surveyed believe new laws are needed to protect privacy. Consumers gave credit bureaus and market researchers the lowest ratings for protecting the confidentiality of information about individuals. (See attached survey).

The right to privacy protection for personal information has grown increasingly vulnerable with the growth of advanced information technology. The new technologies not only foster more intrusive data collection, but make possible increased demands for personal, sensitive information. Private commercial interests, such as consumer reporting agencies, are expanding the collection and use of personal information to diversify services, most notably in the sale of information for marketing purposes.

New technologies enable people to receive and exchange ideas differently than they did at the time the Bill of Rights was drafted. Personal papers once stored in our homes are now held by others with whom we do business. Transactional information may be easily stored and accessed. Consumer reporting agencies

---

1 (Louis Harris, The Road after 1984: A Nationwide Survey of the Public and its Leaders on the New Technology and its Consequences for American Life, December, 1983).

not only collect information, but often have instant access to other private and public databases. The computer now makes possible the instant assembly of this information.

The ACLU is concerned about the danger posed by the aggregation of separately compiled lists to create profiles on individuals. As Arthur Miller, author of Assault on Privacy, testified in 1971:

> Whenever an American travels on a commercial airline, reserves a room at one of the national hotel chains, rents a car, he [or she] is likely to leave distinctive electronic tracks in the memory of a computer that can tell a great deal about his [or her] activities, movements, habits and associations. Unfortunately, few people seem to appreciate the fact that modern technology is capable of monitoring, centralizing, and evaluating these electronic entries, no matter how numerous they may be, making credible the fear that many Americans have of a womb-to-tomb dossier on each of us. [2]

That same year, Alan Westin, in his book Data Banks in a Free Society, argued: "We have seen that most large-scale record systems in this country are not yet operating with rules about privacy, confidentiality, and due process that reflect the updated constitutional ideals and new social values that have been developing over the past decade."

The United States Supreme Court, however, has been reluctant to expand its interpretation of the constitutional right to privacy to include one's right to maintain some protectible privacy interest in personal information held by others. U.S. v. Miller, 425 U.S. 435 (1976).

---

2 Federal Data Banks, Computers and the Bill of Rights, Hearings Before the Subcommittee on Constitutional Rights, Committee on the Judiciary, 2/23/71, p. 9.

PROTECTING PERSONAL RECORDS HELD BY PRIVATE INSTITUTIONS

Fortunately, Congress has responded to this pressing need, often acting quickly to establish assertible privacy interests. In the last nineteen years, Congress has made substantial progress in the area of federal information privacy legislation, regulating Government and private access to privately-held personal information. Most of these laws incorporate the central principle of the Privacy Act of 1974, which regulates personal information held by government agencies -- information collected for one purpose may not be used for a different purpose without the individual's consent.

-- In 1970, Congress passed the Fair Credit Reporting Act to regulate credit and investigation reporting agencies that collect, store and sell information on consumers' credit worthiness. The Act limits disclosure of records and requires the agencies to allow consumers to know, upon request, the nature and substance of their records and to correct inaccurate information. The legislation was passed in response to the public's growing awareness and concern about personal information maintained by credit reporting bureaus.

-- Four years later, in 1974, the Family Educational Rights and Privacy Act was passed, limiting disclosure of educational records to third parties. The law requires schools and colleges to let students see their records and to challenge and correct information in their records.

-- In 1978, Congress passed the Right to Financial Privacy Act, in response to the Supreme Court's devastating decision in Miller and in direct response to the Privacy Protection Study Commission's recommendation that Miller be superceded by remedial legislation. Congress strengthened the Privacy Act's "consent" principle by creating a statutory Fourth Amendment protection for bank records. The Right to Financial Privacy Act includes a minimum due process standard, and a court order provision that requires law enforcement to meet a standard of relevance before records can be released. The Act is the result of a hard-won compromise between the civil liberties community, bankers, the Department of Justice, and Congress.

-- In 1980, Congress passed the Privacy Protection Act to prohibit the government from searching press offices without a warrant if no one in the office is suspected of committing a crime.

-- In 1982, Congress passed the Debt Collection Act requiring federal agencies to provide individuals with due process protections before an individual's federal debt information may be referred to a private credit bureau.

-- In 1984, Congress enacted the Cable Privacy Protection Act to safeguard the confidentiality of interactive cable subscription records. Due to the newness of the industry and the concern for first-amendment protected material, the Act includes the highest court order standard ever enacted that must be met by law enforcement before records can be disclosed. The Act

requires that cable subscription records may only be disclosed pursuant to a court order that shows by "clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case." Further, the individual must have the opportunity to challenge the court order before the records are disclosed.

-- In 1986, the Electronic Communications Privacy Act (ECPA) was passed, amending the Wiretap Law to cover the interception of non-aural communications. Law enforcement officials may not obtain information held by a data communication company, such as MCI, without a warrant that meets the probable cause standard. ECPA also overturns the Supreme Court's ruling in Smith v. Maryland that telephone toll records are not private. Under ECPA, law enforcement officials must show there is "reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry," before obtaining access to transactional data such as telephone toll records. ECPA represents a recognition of the need to protect information regardless of the technological advances that have shaped its use.

-- The Video Privacy Protection Act of 1988, passed at the end of the 100th Congress, includes a strong court order standard modelled on the Cable Act. Video records, like cable subscriber records, contain information about individual personality and

political beliefs. Congress has been quick to create strong protections in such areas where First and Fourth amendments concerns intersect.

These recent laws reflect Congress' willingness to fashion strict disclosure standards for sensitive information held by private institutions. Implicit in these new laws is a legislative recognition that expectations of privacy can be created and enforced-- a particularly crucial recognition in an age in which information practices continue to erode our constitutionally-protected "reasonable" expectations.

Clearly, if video rental lists and cable subscription lists have been granted enforceable privacy protections, then it is time for Congress to take a fresh look at the Fair Credit Reporting Act, particularly in light of its inherent weaknesses and the changes in industry practice.

## CONCLUSION

The ACLU commends this Subcommittee for holding this much-needed oversight hearing on the Fair Credit Reporting Act. Both the Act's original shortcomings and the dramatic changes in industry practice have created a call to action. Over 15 years ago, in The Assault on Privacy, Arthur Miller imagined the future of the credit information industry with stunning accuracy:

> [T]he capabilities of the new technology will encourage credit bureaus to acquire more information of a sensitive nature about individual and institutional borrowers than they have in the past. Concomitantly, given the massive investment required to

computerize a large credit data base and a bureau's ability to use the technology to manipulate information in unique ways, the temptation to use the data for non-credit granting purposes will be difficult to resist. . . [T]here is a risk that enormous quantities of financial and surveillance data garnered from a variety of sources will be made available to anyone who wishes to reconstruct an individual's associations, movements, habits, and lifestyle.

We urge Congress to take the necessary steps forward to shed light on industry practices and re-write the Act to fulfill Congress' initial goal -- to strike a balance between the needs of the industry for accurate credit information and the privacy rights of the consumer.

CAMBRIDGE REPORTS

# TRENDS & FORECASTS

1989 MAY

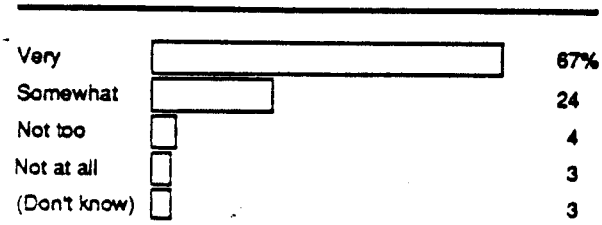
Overview ..... 1
Business performance ..... 2
Product and service quality ..... 3
Technology and employment ..... 3
Technology and education ..... 4
Computers ..... 5
Personal privacy ..... 6
The information age ..... 7
Energy ..... 8



## MAJORITY SUPPORT NEW LAWS TO PROTECT PRIVACY

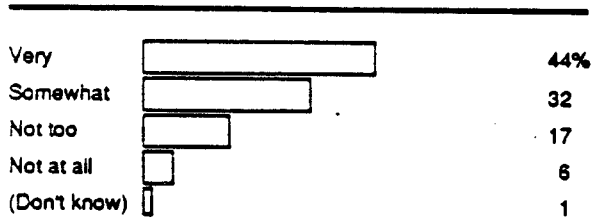
Americans are virtually unanimous in their conviction that personal privacy is at least a somewhat important issue in their lives. Almost seven out of ten people say personal privacy is very important compared to other things they think about, and nearly another quarter of the population say it is a somewhat important concern. Altogether, more than nine out of ten people attach some importance to their personal privacy.

**[2694:146] Compared with other subjects on your mind, how important is personal privacy: is it very important, somewhat important, not too important, or not important at all?**



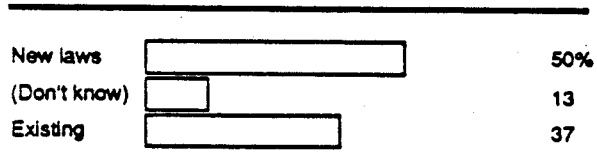

Less than half the population—44% —say they are very concerned about their personal privacy actually being invaded, far fewer than said their personal privacy is very important compared to other personal issues. Roughly another third of the population say they are somewhat concerned about their privacy being invaded. This means that a total of just over three-quarters of the population express some degree of concern that their personal privacy is actually threatened in today's society.

**[2694:147] How concerned are you about the invasion of your personal privacy in the United States today: Are you very concerned, somewhat concerned, not too concerned, or not concerned at all?**




Another measure of concern about loss of personal privacy is the degree to which people are willing to support tougher legislation to protect it. Exactly half the population think laws protecting privacy should be strengthened, while nearly two out of five people—37%—say existing laws are adequate.

**[2694:148] Do you think we need new laws to protect personal privacy, or are existing laws adequate?**




◆*These results make it clear that any business involved even indirectly in handling information on individuals must be very sensitive to people's need to feel their privacy is being both respected and protected. In some cases, a company or organization could even use its willingness to protect privacy as an effective way of differentiating itself from competitors.*

# MARKETERS AND CREDIT BUREAUS RATE LOWEST FOR CONFIDENTIALITY

To check the public's fears about specific threats to personal privacy, we gave our respondents a list of industries and organizations and asked them to rate each of them, first, according to how much information they think the industry or organization has about them, and second, according to how good a job they think the industry or organization in doing in safeguarding that information.

The IRS far and away leads the list as the organization perceived as having the most information about individuals: Almost seven-tenths of the population say they think the IRS holds a great deal of information about them on its computers. Notably, though, the IRS also places near the top for protecting privacy, with a 53% majority saying the tax bureau does a good or excellent job of safeguarding information about individuals.

Credit bureaus stand out for having the biggest discrepancy between the "has information" and "protects information" responses: 55% say credit bureaus have a lot of information about them, but only 34% say credit bureaus do a good job of safeguarding it. Local telephone companies are seen as the least threatening of the industries and organizations we ask about: Only 20% say telephone companies have a lot of information on individuals, but 57% give them positive marks for protecting that information. Market research companies are at the bottom of both lists, though many people are unable to rate the job they do in protecting privacy.

**[2694:156-163] Now, I'm going to read you a list of organizations and industries. As I read each one, please tell me how much information you think that organization and industry has about you in its computers: Do you think it has a great deal of information, a moderate amount of information, a small amount of information, or no information at all?**

| | Great deal | Moderate amount | Small amount | No information | (DK) |
|---|---|---|---|---|---|
| The Internal Revenue Service (IRS) | 69% | 19 | 8 | 2 | 2 |
| Credit bureaus | 55% | 27 | 11 | 5 | 2 |
| Financial institutions like banks and savings and loans | 43% | 37 | 16 | 3 | 2 |
| Credit card companies, like VISA, MasterCard, and American Express | 40% | 33 | 15 | 9 | 2 |
| Federal government agencies other than the IRS | 39% | 30 | 18 | 7 | 7 |
| Insurance companies | 34% | 39 | 21 | 4 | 2 |
| The local telephone company | 20% | 39 | 33 | 5 | 3 |
| Market research companies | 16% | 23 | 28 | 18 | 14 |

**[2694:164-171] Now, I'm going to read you the same list of organizations and industries. As I read each one, please tell me how good a job you think that organization and industry is doing of safeguarding information about you: Do you think it is doing an excellent, good, only fair, or poor job of safeguarding information about you?**

| | Excellent | Good | Only fair | Poor | (DK) |
|---|---|---|---|---|---|
| The local telephone company | 12% | 45 | 26 | 8 | 8 |
| Financial institutions like banks and savings and loans | 11% | 44 | 29 | 9 | 7 |
| The Internal Revenue Service (IRS) | 14% | 39 | 27 | 12 | 8 |
| Insurance companies | 7% | 38 | 32 | 14 | 10 |
| Federal government agencies other than the IRS | 8% | 35 | 30 | 12 | 15 |
| Credit card companies, like VISA, MasterCard, and American Express | 6% | 30 | 35 | 17 | 11 |
| Credit bureaus | 6% | 28 | 33 | 23 | 10 |
| Market research companies | 6% | 26 | 26 | 15 | 27 |