

**BEFORE THE EUROPEAN COMMITTEE ON LEGAL COOPERATION OF
THE COUNCIL OF EUROPE
PLENARY MEETING – OCTOBER 11-14, 2010**

**Draft Recommendation on the Protection of Individuals
with regard to Automatic Processing Personal Data
in the Context of Profiling
adopted on June 1-4, 2010**

**COMMENTS OF THE
ELECTRONIC PRIVACY INFORMATION CENTER
WASHINGTON, DC**

September 14, 2010

Pursuant to the notice published by the European Committee on Legal Cooperation (CDCJ) of the Council of Europe published on August 17, 2010 regarding the Draft Recommendation on the Protection of Individuals with regard to Automatic Processing Personal Data in the Context of Profiling adopted on June 1-4, 2010 by the Consultative Committee of the Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) the Electronic Privacy Information Center (EPIC) submits the following comments.

About EPIC

EPIC is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC is a leading civil liberties organization that has reported on developments in privacy and human rights around the world for many years.¹

EPIC strongly supports Council of Europe Convention 108 and has launched a campaign urging the US Government to support the Council of Europe Privacy Convention by proposing a resolution for the U.S. Senate.² Also, on January 28, 2010, twenty-nine members of the EPIC Advisory Board wrote to Secretary of State Hillary Rodham Clinton to urge that the United States begin the process of ratification of Council of Europe Convention 108.³

¹ See, e.g., PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS (EPIC 2004) (A 775 page report on recent developments in over sixty countries around the world), available online at <http://www.privacyinternational.org/survey/phr2004/>.

² Resolution for the United States Senate, January 29, 2009 available at http://privacycoalition.org/resolution-privacy_day.pdf

³ EPIC Letter to Secretary of State Hillary Rodham Clinton, January 28, 2010 available at http://epic.org/privacy/intl/EPIC_Clinton_ltr_1-10.pdf

EPIC appreciates this opportunity to comment on the Draft Recommendation on the Protection of Individuals with regard to Automatic Processing Personal Data in the Context of Profiling, as it is an issue of increasing public importance and affects a fundamental human right: privacy.

Importance of Privacy in Context of Automated Profiling

The Committee has the objective of securing in the territory of each nation for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data. To protect individuals right to privacy and to prevent illegal collection and processing of personal data, the Committee has recommended a legal framework of specific principles setting standards for profiling and personal data protection. Profiling brings both benefits and risks to the society. Through the collection of public records and the increasing use of automated processing of personal data, private sector companies and governments are amassing troves of personal information on citizens. This action poses serious problems regarding, citizen access to profiles, their accuracy, and the potential for misuse of personal information.

In evaluating the reasonableness of processing personal data in the profiling context the Committee must weight in favor how profiling interferes with the privacy interest of individuals against the significance of the public interests served by such profiling. The private and public sector must prove that they are able to regulate or wisely use the vast storage of information they collect regarding individuals. The approval of profiling carries with it all of the dangers inherent in allowing others to record and classify behaviors about individuals in a democratic society.

United States privacy law anticipated this problem. In enacting the Privacy Act of 1974, Congress sought to restrict the amount of personal information that federal agencies could collect and required agencies to be transparent in their information practices. The Privacy Act is intended "to promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government[.]"⁴ The US federal Privacy Act specifically notes that the exceptions for statistical research are for "a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making determinations about an identifiable individual , . . ." ⁵ In this regard, the US Privacy Act anticipated that profiling, when it had effects on identifiable individuals, should be subject to legal frameworks.

Suggested Changes to the Appendix

EPIC urges the Committee to strengthen the legal protection of individuals with

⁴ S. Rep. No. 93-1183, at 1 (1974).

⁵ 5 U.S.C. §552a(6).

regard to automatic processing of personal information in the context of profiling. EPIC has addressed the following issues as raising most concern on the Draft Recommendation:

Appendix Should Include Definition of "Privacy Enhancing Technology"

Since the beginning of the online privacy debate, EPIC has urged the wide adoption of privacy-enhancing technologies to protect individuals. Without legal guarantees that data is collected for limited specific purposes, privacy technologies can currently do little to help individuals utilize their rights. Only when existing law provides those rights will technologies develop to help individuals take advantage of them.

There is however, one area in which technology can address privacy in the absence of laws. That is in the promotion of anonymity and elimination of the need to collect personal data. Most of the activities conducted online such as reading news, shopping for products, searching for information, can be done without the collection of information from individuals. However, the current trend towards "personalization" results in the increased storage and analysis of these basic online activities. Info media companies that seek to provide information according to user preferences do not provide this anonymity. Rather than reinforcing that the dispersal of information should not be the norm, they seek to encourage more information collection by making it easier than ever for personal data to be disclosed.

It is necessary a definition of "privacy enhancing technologies" in order for member states set up appropriate measures against the inaccurate development and use of technologies aimed at the illicit circumvention of technological measures protecting privacy.

"Privacy Enhancing Technology" - "Techniques that minimize or eliminate the collection of Personally Identifiable Information"

"Sex" as part of the definition of "Sensitive Data"

The users of new technologies have employed personal data to violate autonomy and human dignity of others. Personal Data refers to any information relating to an identified or identified individual. Individuals can use privacy invasive technologies and behaviors against men or women in order to degrade or control. However, users of some of these behaviors and technologies disproportionately or entirely target women. These behaviors sexually objectify women. "Sex life" as defined in "Sensitive Data" does not refer to the identification of an individual's sex.

Implementation of a Research Framework to monitor Profiling from the Private and Public Sector

Private companies and Governments are at liberty to gather, process, and share individual's data without obtaining consent to specific data aggregation, archival,

and sharing policies and procedures. With profiling the reconstruction of a person's movements or transactions over a specific period of time, usually to ascertain something about the individual's habits, tastes, or predilections is necessary.

The Madrid Declaration

Our communication to Secretary of State Hillary Rodham Clinton also calls attention to the Madrid Privacy Declaration, in which civil society groups have urged countries that have not yet ratified the Council of Europe Convention to do so as soon as possible.⁶ The signatories state, "privacy is a fundamental human right. In the 21st century, it may become one of the most critical human rights of all."

As an advocate for the Madrid Privacy Declaration, EPIC acknowledges that States must establish a comprehensive legal framework for privacy protection and an independent data protection authority that aids in assessing any adverse effect in individual privacy. The Madrid Declaration reminds the European Union member countries and Organization for Economic Co-operation and Development member countries of their obligations to protect the civil rights of their citizens under national constitutions and laws. Noting the increase in secret surveillance and lack of independent oversight in corporation's data collection practices, the Madrid Declaration sets forth warnings and urges action on the part of the members' countries.

The Madrid Declaration warns, "privacy law and privacy institutions have failed to take full account of new surveillance practices." Such failures to protect the privacy interests of citizens "jeopardize[]associated freedoms . . . and ultimately the stability of constitutional democracies." The Madrid Privacy Declaration also urges countries to develop means of properly implementing and enforcing such legal frameworks, and ensure that individuals are notified after a data breach has occurred. Furthermore, the Declaration encourages research into the effectiveness of data anonymous techniques, in an effort to determine whether such practices properly safeguard personal information.

Civil society groups and experts recommend a "moratorium on the development or implementation of new systems of mass surveillance." Finally, the Declaration calls for the "establishment of a new international framework for privacy protection, with the full participation of civil society, that is based on the rule of law, respect for fundamental human rights, and support for democratic institutions." The COE 108 must incorporate the essentials on which the Madrid Declaration lays foundations.

Conclusion

The free flow of information is a principle of fundamental importance for individuals as well as nations. The Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data must ensure that

⁶ The Madrid Privacy Declaration, adopted November 3, 2009, available at <http://www.thepublicvoice.org/Madrid-declaration/>

individuals are able to freely exchange information without risk that improper profiles will be established. Failure to protect the fundamental right of privacy thus adversely impacts the free flow of information. Thus the work of the Committee on this issue is vitally important. Those in charge of data must also guard against unauthorized disclosure or misuse of the information, and protect the data, hardware and software against physical hazards.

We hope that prior adopting the Recommendation on Profiling the Council of Europe takes in consideration our view and proposals in respect to profiling. EPIC urges the Council of Europe to adopt a comprehensive privacy legislation based in this standard.

Respectfully submitted,

Marc Rotenberg, EPIC President
Leslie J. Rivera Pagan, EPIC Fellow

Electronic Privacy Information Center (EPIC)
1718 Connecticut Ave., NW Suite 200
Washington, DC 20008
1 202 483 1140 (tel)
1 202 483 1248 (fax)

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