Internal Revenue Service
Memorandum

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Br2:JAClark

date: September 27, 1995

to: National Director of Appeals CC:AP

from: Chief, Branch 2 (Disclosure Litigation) CC:EL:D

subject: Employee Sign-In/Sign-Out Logs and Locator Boards

This responds to your memorandum to the Assistant Chief Counsel (General Legal Services) (GLS), dated July 14, 1995, in which you requested a legal opinion regarding the possible disclosure and privacy implications of the implementation of employee attendance logs and locator boards. Since your memorandum raised disclosure and privacy issues, GLS referred the matter to our office for direct reply. Our opinion is limited to whether the employee attendance logs and/or locator boards trigger the provisions of the Privacy Act of 1974, 5 U.S.C. § 552a, and, if so, whether disclosure of the information contained therein would be required under Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Background

Your office is considering the implementation of attendance logs in which employees would be required to document their arrivals at and departures from the office, and possibly the nature of their arrivals and departures, i.e., whether they are earning or using credit hours, etc. Your office is also considering the implementation of locator boards on which employees would indicate their duty status, i.e., on duty, on annual leave, etc. You would like us to comment generally on the proposal and answer specific questions in order to address generalized, nonspecific, privacy concerns raised by a union representative.

Questions Presented

1. "Are employee tours of duty public information?"

2. "Are time and attendance records for individual employee's public information (i.e. actual days and hours worked and leave records)?"

3. "If items 1 and 2 are public information, is it available to anyone who inquires or is there a need to show relevance to the inquiring party -- a 'need to know' – in order to obtain information on the schedule, time and attendance of an individual employee."

4. "If access to time, attendance, and leave information is not restricted by law, is it restricted by policy? For example, is it not the policy of the government to keep this information confidential between individual employees and the management officials involved with that employee? Please refer to the IRM on Time and Attendance, especially section 175 concerning 'Disclosure.'"[1]

Conclusions

In our opinion, the Privacy Act of 1974 does not pose a bar to the use of sign-in/sign-out logs or locator boards in general.

1. Employee tours of duty in general are not public information, per se. Whether tour of duty information would be released in response to a request under the FOIA is dependent upon the facts and circumstances attendant to the particular request.

2. Time and attendance records in general are not public information, per se. Whether time and attendance records would be released in response to a request under the FOIA is dependent upon the facts and circumstances attendant to the particular request.

3. As indicated above, tours of duty and time and attendance records are not public information per se. In general, a person who requests access to records under the FOIA need not make a showing of a "need to know." Moreover, the FOIA does not take into consideration the needs or reasons of a particular FOIA requester; "a release to one is a release to all." A decision on the question of whether to release or withhold this information in response to a FOIA request would turn on a balancing of two competing interests: an employee's right to privacy versus the public's right to know.

4. Time and attendance data, as reflected in individually identifiable and retrievable records, is restricted by the Privacy Act. However, since log sheets and/or locator boards are neither retrievable by individual employee's names or other unique identifier, nor are they maintained as input information to the Service's General Personnel and Payroll system of records (Treasury/IRS 36.003, 57 Fed. Reg. 14,058), they are not covered by the Privacy Act. Nonetheless, your office can take steps to assuage privacy concerns, as a policy matter, when implementing these devices.

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[1] IRM 1273, Text 175, accompanies this memorandum as Attachment 1.

Legal Analysis

Obligations Under the Privacy Act

The Privacy Act of 1974, 5 U.S.C. § 552a, provides that the right to privacy is a personal and fundamental right protected by the Constitution of the United States. The Act grants individuals a right of access to their own records and provides safeguards for individuals against invasions of personal privacy. The Act requires federal agencies to maintain accurate, complete, relevant, and up-to-date records; inform individuals who are subjects of those records about the agency's authority for collection of information and its uses; protect those records from unauthorized access; and afford individuals a right of access to records, a right to correct records, and a right to receive an accounting of disclosures of those records.

However, the Privacy Act does not apply to all records that are maintained by federal agencies. Section 552a(b) places limitations on the disclosure of "any record which is contained in a system of records. . . ." Section 552a(a)(5) defines "system of records" as "a group of any records . . 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." Thus, the Privacy Act is generally inapplicable to any record which is not maintained in a "system of records" (i.e., information that is retrieved by name or other identifier of an individual).[2]

The sign-in/sign-out logs and locator boards that you contemplate do not appear to provide the ability to retrieve information by reference to an identifier assigned to an individual. Rather, retrievability appears to be based upon date. Thus, the sign-in/sign-out logs and locator boards that you contemplate would not constitute a system of records to which the Privacy Act of 1974 is applicable, and their creation would not incur any obligations under that Act. Assuming, arguendo, that sign-in/sign-out logs and locator boards constituted systems of records, disclosure could be authorized under the FOIA exemption to the Privacy Act, 5 U.S.C. § 552a(b)(2).[3] We turn now to the FOIA.

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[2] 5 U.S.C. § 552a(e)(7) uniquely has been held by courts to limit agency collection and retention of records reflecting individuals' exercise of First Amendments rights, regardless of whether the records are maintained in "systems of records" as defined under the Act. Clarkson v. IRS, No. C79-642A (N.D. Ga. Dec. 27, 1984), aff'd per curiam, 811 F.2d 1396 (11th Cir. Jan. 15, 1987), cert. denied, 481 U.S. 1031 (1987); Albright v. U.S., 631 F.2d 915 (D.C. Cir. 1980). However, it does not appear to us that any First Amendment rights are implicated by your proposed use of log sheets or locator boards.

[3] We do not believe that a colorable argument can be made that disclosures within the agency from sign-in/sign-out logs and/or locator boards is based upon a "need to know" within that exemption, 5 U.S.C. § 552a(b)(1).

Availability of Sign-in/Sign-Out
Logs as "Public Records"

The term "public record" in the context you describe is normally taken to refer to personnel records available under the FOIA as provided by 5 C.F.R. § 293.311 (copy attached). That regulation provides that certain employee information from files that constitute agency "records" (including systems of records) is "available to the public." The regulation provides for the routine release of names, position titles, occupational series, grade, salary rates, duty stations, position descriptions, job elements, and performance standards-- with certain restrictions.[4] This regulation does not mandate the release of tours of duty, time of arrival and departure, leave, and similar information. Thus, the sign-in/sign-out logs and locator boards that you contemplate are not "public records" within the meaning of 5 C.F.R. § 293.311.

Availability of Sign-in/Sign-out
Logs Under the FOIA

The FOIA generally provides that any person has a right, enforceable in court, of access to agency records, unless those records or portions of those records are protected from disclosure by an exemption contained in the FOIA.

The records that you contemplate producing would be records within the meaning of the FOIA, and would thus be subject to release if requested under the FOIA, unless an exemption or exclusion applies.

Exemption 6 under the FOIA, 5 U.S.C. § 552(b)(6), provides an exemption for matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." To determine whether this exemption applies requires a two step analysis. The first step is to determine whether the records sought are "personnel and medical files and similar files." Here, the records contemplated are clearly personnel files. The second step is to determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." There are two stages in the analysis. First, it must be ascertained whether a protectable privacy interest exists that would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary, and the information at issue must be disclosed.[5] If a privacy interest is found to exist, the second stage is to weigh the public interest in

[4] 5 C.F.R. § 293.311(b) authorizes agencies to withhold these items if disclosure would constitute a clearly unwarranted invasion of personal privacy, given the manner in which the information was requested.

[5] Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984); Holland v. CIA, No. 91-1233, slip op. at 32 (D.D.C. Aug. 31, 1992) (information must be disclosed when there is no significant privacy interest, even if the public interest is de minimis).

disclosure, if any, against the privacy interest in nondisclosure.[6] If no public interest exists, the information may be protected.[7] This weighing of the interests is often referred to as a "balancing test."

In weighing the public interest, the "identity of the requesting party has no bearing on the merits of [the] FOIA request.[8] The requester's purpose, circumstances, and proposed use are immaterial; determinations "must turn on the nature of the requested documents and its relationship to" the public interest generally.[9] The scope of the public interest to be considered is "the kind of public interest for which Congress enacted the FOIA,[10] which is to "[shed] light on an agency's performance of its statutory duties.[11]

A request for the tour of duty information from the sign-in/sign-out logs that you contemplate, limited to a particular person, would, therefore, engender a balancing of that person's privacy interest against the public interest to be served by any release.

A log or locator board that reflected the names of employees, times of their arrivals at and departures from the office, destinations or purposes of official business, and/or leave generally (but not the nature of that leave) would appear not to trigger any privacy interests and would thus be available to any member of the public under the FOIA, including other employees. In contrast, a log or locator board that reflected the nature of leave would carry a privacy interest; whether there would be any public interest and, if so, whether it outweighs the privacy interest, would depend upon the particular facts and circumstances.

We have searched, without result, for a reported court decision in which sign-in/sign-out logs were considered.

In Jafari v. Dep't of the Navy, 728 F.2d 247 (4th Cir. 1984), the court held that Disclosure of information reflecting a Navy reservist's presence or absence from duty

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[6] Ripskis, 746 F.2d at 3.

[7] National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) ("[s]omething, even a modest privacy interest, outweighs nothing every time"), cert. denied, 494 U.S. 1078 (1990); see also International Bhd. of Elec. Workers Local No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988) (no public interest in disclosure of employees' social-security numbers).

[8] U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 771 (1989). The obvious exception occurs when one seeks one's own information.

[9] Id. at 772.

[10] Id. at 774.

[11] Id. at 773.

status at reserve unit drills and training programs, requested by his civilian employer (which was required by law to provide leaves of absence to employees who were attending reserve duty training), without the reason given for the absence from reserve duty, was required by the FOIA and thus did not violate the Privacy Act. The court found that under the specific facts of that case, "disclosure of the information requested, though from 'personnel files' . . . would not constitute a 'clearly unwarranted invasion of personal privacy.'" Id. at 249.

In Dobronski v. FCC, 17 F.3d 275 (9th Cir. 1994), a case apparently contrary to the weight of authority, the court found a nominal privacy interest in sick leave slips, which did not disclose the particular reason for sick leave, where the individual held a position of relative influence (assistant bureau chief) and was not a "low-level government official deserving of a heightened level of privacy." Id. at 280. The Court found a significant public interest served by disclosure of the information sought, where a tip provided to the publisher of a monthly newsletter covering the FCC alleged that the employee was improperly taking unaccrued sick leave and improperly using sick leave to take paid vacations, and found a strong public interest in uncovering corruption in a government agency. Thus, the court that, "given the staff person's position in the FCC and the nature of the records sought, the public interesting in uncovering alleged abuse of public monies and public office outweighs the 'minimal' privacy interests involved.

Thus, a log or locator board that does not reveal the nature of leave, even if covered by the Privacy Act, could be viewed by employees and other visitors to an office without violating the Privacy Act, since its disclosure would be required by the FOIA. 5 U.S.C. § 552a(b)(2).

Policy Considerations

[redacted]

[redacted]

Inquiries concerning this opinion may be directed to attorney James Clark at 622-4570.

MARGO L. STEVENS

Attachments:
1. IRM 1273, Text 175.
2. 5 C.F.R. § 293.311.

cc: Assistant Chief Counsel (General Legal Services) CC:GLS
Director, HQ Human Resources HQ:HR
Office of Disclosure CP:EX:D