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May 14, 2012

The Honorable Daniel Akaka
 Chairman
 Subcommittee on Oversight of Government Management,
 the Federal Workforce, and the District of Columbia
 340 Dirksen Senate Office Building
 Washington, DC 20510

Dear Senator Akaka,

In light of the recent Supreme Court decision in *FAA v. Cooper*, the Electronic Privacy Information Center (“EPIC”) hereby supplements our March 27, 2012 letter sent in response to your request for comments regarding S. 1732, the Privacy Act Modernization for the Information Age Act of 2011 (“Privacy Act Modernization bill”).¹

On March 28, 2012, the Supreme Court issued a decision in *FAA v. Cooper*, 132 S. Ct. 1441 (2012). In the 5-3 opinion delivered by Justice Alito, the Court held that “the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress.”² In *Cooper*, Stanmore Cooper, a pilot, sought actual damages pursuant to 552a(g)(4)(A) of the Privacy Act, for nonpecuniary injuries, including humiliation, mental anguish, and emotional distress, which he sustained as “the result of an interagency exchange of information performed as part of a joint criminal investigation.”³ The investigation involved the Federal Aviation Administration (“FAA”), Social Security Administration (“SSA”), and the Department of Transportation (“DOT”). The investigators determined that Cooper withheld his HIV status from the FAA over an 8-year period, and as a result he lost his pilot’s license and was indicted on three counts of making false statements to a government agency. Cooper filed suit against the government for willfully and intentionally violating the Privacy Act and causing him severe emotional distress by disclosing his HIV status. Cooper did not claim any pecuniary loss.

¹ Letter from Marc Rotenberg and Khaliah Barnes, EPIC, to Senator Daniel Akaka, Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia (Mar. 27, 2012), available at <http://epic.org/privacy/1974act/EPIC-on-S-1732-Privacy-Act-Modernization.pdf>.

² *FAA v. Cooper*, 132 S. Ct. 1441, 1456 (2012).

³ *Cooper v. FAA*, 622 F.3d 1016, 1024 (9th Cir. 2010).

Justice Sotomayor, joined by Justices Ginsburg and Breyer, wrote the dissenting opinion in *Cooper*, emphasizing the need to allow recovery in Privacy Act cases.⁴ The dissent noted that the majority opinion was contrary to Supreme Court precedent and “common sense understand[ing]” that “the primary, and often only, damages sustained as a result of an invasion of privacy [are non-pecuniary harms such as] mental or emotional distress.”⁵ The dissent recognized that the Privacy Act’s “core purpose [is] redressing and deterring violations of privacy interests,” and that permitting recovery “for any injury established by competent evidence in the record—pecuniary or not—best effectuates the statute’s basic purpose.”⁶ The dissent focused on previous Supreme Court decisions⁷ and historical analysis of the Privacy Act to underscore that mental anguish and emotional distress are the primary injuries arising from privacy violations, and that the Privacy Act must enable compensation for these injuries when they are caused by a willful and intentional violation of the Act.⁸

EPIC filed an *amicus curiae* brief in *Cooper*, arguing that Congress intended the Privacy Act to provide robust and comprehensive protections for individual privacy.⁹ EPIC argued that given congressional intent and the likelihood of mental and emotional harms arising from privacy violations, it would be unreasonable to find that Congress intended “actual damages” to be limited to pecuniary harm. EPIC’s brief discussed numerous statutes – the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Electronic Communications Privacy Act of 1986, the Equal Credit Opportunity Act, and the Employee Polygraph Protection Act – all of which protect the privacy of personal information and provide civil remedies for mental and emotional damages.¹⁰ The Court did not dispute that certain statutes provide relief for nonpecuniary harms; it simply held that that the Privacy Act as currently drafted does not provide such relief.¹¹

EPIC’s brief also discussed the consensus among legal experts that allowing recovery of a broad range of damages is critical to deterring violations of privacy laws. EPIC quoted what many consider the cornerstone of the modern understanding of privacy in American law—Samuel D. Warren and Louis D. Brandeis’s 1890 Harvard Law Review article *The Right to Privacy*. The article begins, “That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extend of such protection.”¹² Warren and Brandeis

⁴ *Cooper*, 132 S. Ct. at 1456 (Sotomayor, J., dissenting).

⁵ *Id.*

⁶ *Id.* at 1456, 1462.

⁷ See *Time, Inc. v. Hill*, 385 U.S. 374, 385, n.9 (1967) (“In the ‘right of privacy’ cases the primary damage is the mental distress”). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (“[A]ctual injury” in defamatory falsehood cases “is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering”).

⁸ *Cooper*, 132 S. Ct. at 1457, 1460, 1462.

⁹ Br. *Amicus Curiae* Electronic Privacy Information Center (EPIC) Supp. Resp’t, *Cooper*, 132 S. Ct. 1441 (No. 10-1024), available at <http://epic.org/amicus/cooper/Cooper-EPIC-Brief.pdf>.

¹⁰ *Id.* at 6-9.

¹¹ *Cooper*, 132 S. Ct. at 1449, 1454-55.

¹² Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

made clear that mental and emotional distress is just as real, and compensation for the distress just as necessary, as any economic or bodily injury:

The intensity and complexity of life, attendant upon advancing civilizations, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.¹³

Warren and Brandeis also understood that privacy laws are critical in deterring violations that cause mental and emotional distress, and stressed that “even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.”¹⁴ A Fordham University law review article, published just ten years after the enactment of the Privacy Act, echoed Warren and Brandeis’s argument by underscoring the importance of compensation for mental and emotional harms: “a restrictive view of actual damages, limiting such damages to pecuniary loss, would render the remedial provisions of the Act ineffective by excluding the type of damages most likely to occur from the recovery available under the Act.”¹⁵

EPIC’s brief in *Cooper* noted that a narrow interpretation of damages provision in Privacy Act cases would lead federal agencies to be less responsible in the collection and use of personal information.¹⁶ As the privacy risks to the American public arising from government record systems are significantly greater today than they were at the time of the Act’s passage, the damage provision should be revised so that the original intent of the Act’s drafters is preserved.¹⁷

The Supreme Court’s Analysis

The Supreme Court held that the civil damages provision of the Privacy Act, as currently codified, was too ambiguous to waive the Government’s sovereign immunity with respect to mental and emotional damages for intentional violations.¹⁸ Such a waiver must be “unequivocally expressed in the statutory text.”¹⁹ The Court made clear that it must construe “any ambiguities in the [statutory text] in favor of the sovereign.”²⁰ Still, the court insisted that

¹³ *Id.* at 219.

¹⁴ *Id.*

¹⁵ Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 *FORDHAM L. REV.* 611 (1984).

¹⁶ Br. of EPIC, *supra* note 9, at 24.

¹⁷ It is worth noting that the Privacy Act of 1974 had broad bipartisan support. Senator Kennedy (D-MA) and Senator Goldwater (R-AZ) were the original cosponsors. *See generally* EPIC, *The Privacy Act of 1974*, <http://epic.org/privacy/1974act/> (last visited May 14, 2012).

¹⁸ *Cooper*, 132 S.Ct. at 1448.

¹⁹ *Id.*

²⁰ *Id.*

Congress need not “use magic words” to express its intent.²¹ Congress has the power to enable recovery of nonpecuniary harms for willful and intentional violations of the Privacy Act, but that intent must be expressed clearly and unambiguously in the statutory text.

The Court found that the current statutory text contained an ambiguous term, “actual damages,” which is a legal term of art that the Court described as a “chameleon.”²² The Court interpreted “actual damages” in the Privacy Act context in light of the Act’s parallel structure to the “remedial scheme for the common-law torts of libel per quod and slander,” which require proof of “special damages” before a plaintiff can recover “general damages.”²³ Even though Congress chose to use a different term, actual damages, in the Privacy Act, the Court found it “likely that Congress intended ‘actual damages’ in the Privacy Act to mean special damages for proven pecuniary loss.”²⁴ Importantly, the Court did not find Cooper’s reading of the statute “inconceivable,” but rather, it found that Congress had not spoken “unequivocally” on the matter.²⁵

EPIC’s Recommendations

In light of the *Cooper* decision, it is imperative that the Privacy Act Modernization bill makes clear that individuals may be compensated for provable, nonpecuniary harms arising from a government agent’s intentional or willful violation of the Act. By not compensating for serious harms arising from Privacy Act violations, government agencies have little incentive to thwart willful and intentional violations that lead to mental and emotional distress. As Justice Sotomayor noted in *Cooper*, under the Court’s interpretation government agencies need only concern themselves with “individual[s] who successfully establish [] some pecuniary loss from a violation of the Act—presumably as trivial as the cost of a bottle of Tylenol” and not the more common emotional and mental anguishes arising from Privacy Act violations.²⁶

Currently, the Privacy Act Modernization bill utilizes the term “actual damages” to calculate the government’s civil liability under the Privacy Act Modernization bill:

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful and in which the complainant has substantially prevailed, the United States shall be liable to the individual in an amount equal to the sum of—
(A) *actual damages* sustained by the individual as a result of the refusal or failure, or the sum of \$1,000, whichever is greater, except that in a class action

²¹ *Id.*

²² *Id.* at 1449-50.

²³ *Id.* at 1451.

²⁴ *Id.* at 1452.

²⁵ *Id.*

²⁶ *Cooper*, 132 S. Ct. 1441, 1460, n.7 (Sotomayor, J., dissenting).

the minimum for each individual shall be reduced as necessary to ensure that the total recovery in any class action or series of class actions arising out of the same refusal or failure to comply by the same agency shall not be greater than \$10,000,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court.²⁷

(emphasis added)

Pursuant to the Supreme Court decision in *Cooper*, “actual damages” does not unequivocally and unambiguously provide compensation to individuals suffering nonpecuniary harms arising from Privacy Act violations. EPIC therefore recommends that the following definition of actual damages be added to the statute

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

(1) the term “actual damages” means compensatory damages for both pecuniary and provable nonpecuniary harms, including provable mental and emotional distress

Explicitly defining “actual damages” to encompass provable nonpecuniary harms will ensure that all individuals that sustain injury, both pecuniary and otherwise, from prohibited government agency behavior are rightfully compensated.

In the alternative, the term “actual damages” could be replaced by “provable damages, including nonpecuniary”:

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful and in which the complainant has substantially prevailed, the United States shall be liable to the individual in an amount equal to the sum of— (A) provable damages, including nonpecuniary, sustained by the individual as a result of the refusal or failure, or the sum of \$1,000, whichever is greater, except that in a class action the minimum for each individual shall be reduced as necessary to ensure that the total recovery in any class action or series of class actions arising out of the same refusal or failure to comply by the same agency shall not be greater than \$10,000,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court.

Either change—explicitly defining “actual damages” to include provable, nonpecuniary harms, or replacing “actual damages” with “provable damages, including nonpecuniary damages”—would resolve any ambiguity regarding individuals’ rights to compensatory

²⁷ Privacy Act Modernization for the Information Age Act of 2011, S. 1732, 112th Cong. § 552a(g)(4).

damages under the Privacy Act Modernization bill. Moreover, these changes would work to deter the most common harms arising from privacy violations.

Sincerely,

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