

FEDERAL BUREAU OF INVESTIGATION

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Precedence: ROUTINE

Date: 09/17/2001

To: National Security

Attn: [REDACTED]

Counterterrorism

Attn: [REDACTED]

Information Resources

Attn: [REDACTED]

From: Office of the General Counsel
National Security Law Unit/Rm. 7975
Contact: [REDACTED]

Approved By: [REDACTED]

Drafted By: [REDACTED]

Case ID #: 66F-HQ-A1247863-02

Title: GUIDANCE REGARDING THE USE OF CHOICEPOINT
FOR FOREIGN INTELLIGENCE COLLECTION OR
FOREIGN COUNTERTERRORISM INVESTIGATIONS

8/30/02
CLASSIFIED BY SP5JCK/SB
REASON: 1.5
DECLASSIFY ON: C1
3/21/03 SP1 CLK/JS
CA# 62-0063

Synopsis: (U) This responds to a request from the Training Unit, National Security Division (NSD) for advice concerning legal restrictions on the use of ChoicePoint for foreign intelligence collection or foreign counterintelligence investigations.

Administrative: (U) This communication contains one or more footnotes. To read the footnotes, download and print the document in WordPerfect 6.1.

Details: (U) After receiving various e-mail announcements concerning the FBI's Public Source Information Program¹ -- one of which stated in pertinent part:

¹ (U) See, e.g., e-mail dated 2/23/00 from [REDACTED] Special Case Support Unit, Field & Headquarters Support Section, Information Resources Division, to Public Source [Points of Contact], titled "New Pub Source Info Program"; e-mail dated 1/19/00 from [REDACTED] SCSU, FHSS, IRD, to All Public Source Customers[:] All Public Source POC, titled "ChoicePoint."

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Section 552

Section 552a

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1 Page(s) withheld for the following reason(s): CHOICEPOINT DOCUMENTS/FBI DOCUMENTS CONTAINING CHOICEPOINT INFORMATION

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resources for criminal law enforcement purposes.⁵ The result of that work was the promulgation of the DOJ Online Principles in November of 1999. While these principles state that they are intended to apply only to federal law enforcement agents enforcing criminal laws⁶ -- and, thus, are not controlling authority with regard to the methods use to conduct FCI investigations -- they nevertheless provide guidance and useful analogies with regard to the parameters of the Attorney General Guidelines.⁷ Pending the promulgation of similar guidance by the Department of Justice (DOJ) concerning the use of the Internet in the conduct of FCI investigations, our advice here is based, in part, on the concepts reflected in the DOJ Online Principles. Additionally, as discussed below, with regard to the Training Unit's specific questions concerning the use of ChoicePoint in conjunction with foreign intelligence and foreign counter-intelligence investigations, we have obtained the opinion of the Deputy Counsel for Intelligence Operations, Office of

⁵ (U) See Overview, Department of Justice (DOJ) Online Investigative Principles for Federal Law Enforcement Agents (November 1999) (hereinafter cited as the "DOJ Online Principles"); see also Office of the General Counsel (OGC) electronic communication (EC) to All Divisions, dated 5/25/99 and titled "FBI Principles and Policies for Online Criminal Investigations, 'FBI Principles'."

⁶ (U) The Overview to the DOJ Online Principles states on page 2 that "[w]hile other agencies may find these Guidelines useful, they are intended to apply only to federal law enforcement agents enforcing criminal laws." In a similar manner, the FBI Principles state that "[t]hese Principles do not apply to FBI Foreign Counter Intelligence (FCI) or International Terrorism (IT) investigations."

⁷ (U) It almost goes without saying that there are many important legal distinctions that can be drawn between investigations conducted principally for national security purposes -- i.e., investigations undertaken to gather foreign intelligence information -- and investigations conducted to develop evidence for criminal prosecution. An exhaustive discussion of the national security caselaw in this area is beyond the scope of this opinion. Suffice it to say that the courts have long recognized that the "executive branch not only has superior expertise in the area of foreign intelligence [collection], it is also constitutionally designated as the pre-eminent authority in [the conduct] of foreign affairs." United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1982). See also United States v. United States District Court (Keith), 407 U.S. 297 (1972). Consistent with his authority to prescribe regulations governing intelligence activities, the President has promulgated Executive Order 12333 which vests the Intelligence Community with legal authority to use "all reasonable and lawful means . . . to ensure that the United States will receive the best intelligence available." Executive Order 12333 is the legal basis for the Department's promulgation of the FCIG.

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Intelligence Policy and Review (OIPR), DOJ, concerning the restrictions set forth in Section III.B of the Attorney General Guidelines.⁹

(U) X With respect to FCI investigations, the fundamental legal authority for the FBI to conduct counterintelligence activities and collect foreign intelligence information within the United States (and abroad) is Executive Order (EO) 12333.⁹ The Order specifically provides that the Attorney General may establish procedures that permit the collection, retention and dissemination of "[i]nformation that is publicly available or collected with the consent of the person concerned."¹⁰ The Attorney General Guidelines set forth those procedures, and "govern all foreign intelligence, foreign counterintelligence, foreign intelligence support activities and intelligence investigations of international terrorism conducted by the FBI."¹¹

(U) X The Attorney General Guidelines provide that intelligence collection must be conducted using the least intrusive means that will provide information of the quality, scope and timeliness required.¹² Such investigations, of course, must also be conducted in a manner that is consistent with the Constitution and laws of the United States and Executive orders.¹³ With respect to the use of the Internet to conduct intelligence investigations, this Office has previously opined that "[FBI personnel] who are collecting information in support of the FBI's FCI/counterintelligence mission [are permitted] to use the Internet and collect publicly available information

⁸ (U) Memorandum from Deputy Counsel for Intelligence Operations, Office of Intelligence Policy and Review, Department of Justice, to Associate General Counsel, Federal Bureau of Investigation, dated 01/22/01 and titled "The FBI's Use of 'ChoicePoint' for Foreign Intelligence Collection or Foreign Counterintelligence Investigations Prior to [REDACTED]" (Cited hereinafter as "OIPR Memorandum.") (S) b1

⁹ (U) Part 2, Sec. 2.3, EO 12333.
¹⁰ (U) Id.
¹¹ (U) Part 1, Sec. A, FCIG.
¹² (U) Sec. III.a.1, FCIG.
¹³ (U) Id.

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. . . so long as [the collection of that information] conforms to the requirements of the Privacy Act and relevant Attorney General Guidelines."¹⁴ Our opinion with regard to these issues has not changed. To the extent that there is any potential for conflict between the resources available to FBI personnel to conduct online investigations and the limitations set forth in the Attorney General Guidelines, the latter are controlling and must be followed.

(U) Concerning the ability of federal law enforcement agents to obtain information from "unrestricted sources," the DOJ Online Guidelines provide that:

Law enforcement agents may obtain information from publicly accessible online sources and facilities under the same conditions as they may obtain information from other sources generally available to the public.¹⁵

In the Commentary explaining this Principle, the DOJ Online Guidelines indicate that:

Obtaining information from online facilities configured for public access is a minimally intrusive law enforcement activity. For Fourth Amendment purposes, an individual does not have a reasonable expectation of privacy in information he or she has made available to the general public Similarly, an individual does not have a reasonable expectation of privacy in personal information that is made publicly available by others (such as publicly available Internet telephone directories).¹⁶

b7c

¹⁴ (U) Memorandum from [redacted] NSLU, OGC, to Division 5 personnel, dated 7/1/98 and titled "Internet Access for Foreign Counter-intelligence (FCI)/Counterterrorism Purposes Accessed in [a] Name Other Than FBI.GOV."

¹⁵ (U) Principle 1, Obtaining Information from Unrestricted Sources, DOJ Online Principles, p.8.

¹⁶ (U) Id.

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(U) ~~(S)~~ The DOJ Online Principles, we note, do not specifically define the terms "publicly available" or "online facilities configured for public access." However, concerning the concepts of "public information," "publicly available," and "available to the public" -- terms which we regard as essentially synonymous -- the DOJ Online Principles state that:

Under this Principle, online information available to anyone willing to pay a subscription or other user fee is "available to the public" in the absence of additional access restrictions.¹⁷

This guidance is consistent with the definition of the term "publicly available" in the Attorney General Guidelines:

[Publicly available information is] information that has been published or broadcast for general public consumption, is available on request to any member of the general public, could lawfully be seen or heard by any casual observer, or is made available at a meeting open to the general public.¹⁸

(U) These definitions, we believe, are unambiguous and clearly reflect Departmental policy permitting the use of information gleaned from public sources, including the Internet. Thus, we reiterate our prior conclusion that resources of the Internet may be used to collect publicly available information for FCI investigations "so long as [the collection of that information] conforms to the requirements of the Privacy Act and the Attorney General Guidelines."¹⁹

(U) ~~(S)~~ There is, however, the additional legal issue presented here concerning the FBI's use of ChoicePoint: namely, whether the use of a private (i.e., commercial) information resource, such as ChoicePoint, is consistent with the Attorney General Guidelines which place specific restrictions on the use

¹⁷ (U) Commentary, Principle 1, DOJ Online Principles.

¹⁸ (U) Sec. II, R, FCIG.

¹⁹ ~~(S)~~ Aindra memo, cited infra, n.13.

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Section 552

Section 552a

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consistent with the language of the Attorney General Guidelines which describes "publicly available information" as information "published or broadcast for general public consumption, . . . available on request to any member of the general public, [or that which] could lawfully be seen or heard by any casual observer, or [would be] available at a meeting open to the general public."²⁴

(U) X To resolve this issue, we need look first to the principal source of the Attorney General Guidelines, the Foreign Intelligence Surveillance Act (FISA).²⁵ When Congress crafted the Act twenty-two years ago, it sought to balance the federal government's inherent power to protect the Nation's security interests with the Fourth Amendment's restrictions on law enforcement activity.²⁶ Mindful of past abuses, Congress placed strict limitations on the government's ability to conduct covert intelligence gathering activities without court authorization. Every application to the Foreign Intelligence Surveillance Court (FISC) to conduct some form of intelligence collection activity must, of course, meet the requirements of both the FISA and the Constitution. In this regard, each application must be signed by the head of an intelligence gathering agency, be approved by the Attorney General and be authorized by the FISC. Additionally, the target of a proposed surveillance must be a foreign power or an agent of a foreign power, the information sought must be intended for foreign intelligence purposes, and the certification signed by the head of the requesting agency must state that the information to be gathered cannot be gained by any other, less-intrusive means. In short, the FISA was written deliberately to create multiple layers of scrutiny and to place rigorous limitations on the government's otherwise vast power to gain information on U.S. citizens and other legal residents of this country.²⁷ JDU

²⁴ (U) X Sec. II, R, FCIG.

²⁵ (U) 50 U.S.C. s 1801 et seq.

²⁶ (U) See H.R. Rep. 95-1283 on H.R. 7308, pt. 1 (1978).

²⁷ (U) Id.

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(U) These criteria are fully reflected in the Attorney General Guidelines.²⁸ Specific legal requirements must be met to [REDACTED]

[REDACTED]²⁹ As a limited exception to those requirements, Section III.B.5 of the Attorney General Guidelines provides, in pertinent part, as follows:

[REDACTED] to: (S) b1

- a. collect information from U.S. Government agencies . . .
- b. examine FBI records, review publicly available reference material or check the records of one public agency in order to obtain identifying data concerning an unknown person for indexing purposes;
- c. examine FBI records and review publicly available reference material in order to obtain identifying data concerning a known person for indexing purposes (Emphasis added.)

Stated differently, all other intelligence gathering activities which are not limited to the collection of information from U.S. Government agencies, FBI records, publicly available reference material or record checks of one public agency can only be conducted if a [REDACTED]

b1 [REDACTED] the Attorney General Guidelines still limit the scope (S) of those inquires to the sources of information itemized in Section III.B.3 -- namely: FBI indices and files, and the examination of publicly available records and other documentary sources of information, when approved by the SAC or other appropriate supervisory personnel. Clearly, these restrictions (S)

²⁸ (U) See Section III, FCIG.

²⁹ (U) Section III.B and C, FCIG.

³⁰ (U) These criteria have been summarized. See Section III.B.3.a, b and c, FCIG.

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or counterintelligence operations. The legal effect of OIPR's opinion is merely to reiterate the existing requirements of the Attorney General Guidelines."

(U) We also were asked to consider whether the FBI's use of ChoicePoint is consistent with the restrictions of the Fair Credit Reporting Act ("FCRA" or "the Act") (codified at 15 U.S.C. § 1681 et seq). In our opinion, it is.

(U) The FCRA protects information in consumer (credit) reports compiled by consumer reporting agencies from disclosure except for the permissible purposes described in Section 1681b of the Act. As used in the Act, however, the term "consumer report" is defined, in pertinent part, in Section 1681a(d) as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for --

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of [Title 15].
(Emphasis added.)

In this instance, none of the information which the FBI would seek to review has been collected by ChoicePoint for any of the

(U) OGC will prepare appropriate correspondence to advise all concerned regarding OIPR's opinion concerning the use of ChoicePoint for foreign intelligence collection and foreign counterintelligence investigations. This guidance should also be reflected in SCSU's periodic "public source" e-mail concerning ChoicePoint.

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purposes highlighted above.³⁸ Because ChoicePoint does not collect "public record information" for any of the highlighted purposes, ChoicePoint is not acting as a "consumer reporting agency"³⁹ for the purposes of the FCRA, and the collected information therefore does not constitute a "consumer report."⁴⁰

³⁸ (U) We note that the "catch all" provision in Subsection 1681a(d) (C) i.e., "any other purpose authorized under section 1681b of this title") refers to such things as evaluating a consumer for employment, promotion, reassignment, or retention, the underwriting of insurance, a determination of a consumer's eligibility for a license or other benefit granted by a governmental entity, evaluation of a consumer as a potential investor, and establishing an individual's paternity or an individual's capacity to pay child support. None of these limitations pertain to the Bureau's use of the public record information for its law enforcement functions or restrict the government's ability to consider public record information for foreign counterintelligence purposes.

³⁹ (U) A "consumer reporting agency" means any ["individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity" (§ 1681a(b))] which, for monetary fees, dues, or on a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." § 1681a(f). See, e.g., D'Angelo v. Wilmington Medical Center, Inc., 515 F. Supp. 1250, 1253 (D.Del. 1981) (definition restricted the scope of the statutory concept to firms which assemble or evaluate consumer credit information, implying a function which involved more than receipt and retransmission of information identifying a particular debt. The FCRA is directed at firms which, as a regular part of their business, aggregate credit information on individual consumers, prepare credit evaluations, and report those evaluations to persons or firms who rely on them in making decisions about extending consumer credit or offering employment).

⁴⁰ (U) See Health vs. Credit Bureau of Sheridan, Inc., 618 F.2d 693 (10th Cir. 1980) (holding that "a critical phrase in the definition of consumer report is the second requirement: the relevant information must be 'used or expected to be used or collected in whole or in part for the purpose of serving as a factor' with regard to the enumerated transactions. . . . Thus, if a credit bureau supplies information on a consumer that bears on personal financial status, but does not know the purpose for which the information is to be used, it may be reasonable to assume the agency expected the information to be used for a proper purpose"). See also Razor vs. Retail Credit Co., 554 P.2d 1041 (1976) (quoting a Federal Trade Commission staff opinion supporting this interpretation); Emerson v. J. F. Shea Co., 76 Cal. App. 3d 579 (1978) (holding that the FCRA does not apply to commercial credit reports issued for purposes other than establishing a consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, or employment purposes, or other purposes authorized under the FCRA; Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174 (S.D.N.Y. 1973) (holding that for a report to constitute a "consumer report" and fall within the

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Consequently, because the information being provided in any particular case is not a "consumer report" as that term is used in the Act, the other requirements of the Act do not apply.

(S) We turn next to the request that we define the terms "known" and "unknown" for the purposes of the Attorney General Guidelines.⁴¹ Concerning this issue, the request for our opinion quotes portions Section III.B.5 of the Attorney General Guidelines pertaining to [REDACTED] and questions whether the underlined language (footnoted below) should be interpreted to mean that the FBI may check only the records of one public agency to obtain public information concerning an unknown person. If so, the writer posits, then the use of the Internet exceeds the legal standard because that resource can check the records of numerous public entities. We disagree.

(S) Concerning the definitions of the terms "known" and "unknown," neither of these terms is defined in the Attorney General Guidelines, Executive orders, or Departmental regulations that pertain to foreign intelligence collection. Consequently,

coverage of the FCRA, the report must communicate information which bears on the consumer's credit status or general reputation and which is used in a determination of the consumer's eligibility for credit, employment, insurance, or other commercial benefit specified in the FCRA).

⁴¹ (S) Concerning these definitions, we also were asked whether an individual's status as known or unknown restricts the Bureau's ability to use ChoicePoint as a public source in conjunction with the conduct of a [REDACTED]. This issue has been mooted by our prior conclusion with regard to the use of ChoicePoint as a public resource.

⁴² (S) The relevant language was misquoted in the request for our opinion. Section III.B.5 provides, in pertinent part, as follows:

[REDACTED] to: (S) 61

- b. examine FBI records, review publicly available reference material or check the records of one public agency in order to obtain identifying data concerning an unknown person for indexing purposes;
- c. examine FBI records and review publicly available reference material in order to obtain identifying data concerning a known person for indexing purposes

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they are not considered to be "terms of art" or to have any special meaning or unique legal significance. To the contrary, we believe that for the purposes of the Attorney General Guidelines, these terms have only common sense meanings: An individual is "known" if he or she can be identified by name or an alias, and, thus, distinguished from other individuals.⁴³

(u) With regard to the possibility that the use of the Internet to obtain public agency data may be impermissible if used in conjunction with a [redacted] concerning an unknown person, this interpretation of the Attorney General Guidelines would require that a reader of the Guidelines parse the language of the regulation and ignore that portion of Section III.B.5.b which specifically authorizes the review of "publicly available reference material." As reflected by the language quoted on page 9 above pertaining to [redacted] FBI personnel have the option under the Attorney General Guidelines either "to review publicly available reference material" or "check the records of one public agency." Checking the records of a public agency -- i.e., a government source -- may be preferable or even required when an investigator requires a higher degree of confidence that the information being sought will be complete, accurate and "official." The use of an Internet resource simply may not afford FBI personnel the level of confidence required in a particular instance. This, however, is an operational decision, not a legal one. The Attorney General Guidelines do not preclude the use of an Internet resource to obtain publicly available identifying data concerning either known or unknown persons.

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(S) b1

Conclusion

In summary, it is our opinion that, as stated in the DOJ Online Guidelines, "obtaining information from online facilities configured for public access is a minimally intrusive law enforcement activity."⁴⁴ In this regard, individuals "do not have a reasonable expectation of privacy in personal information that has been made publicly available" ⁴⁵ FBI personnel who are tasked to collect information in support of FBI's foreign

⁴³ Webster's II defines "unknown" as not disclosed or identified.

⁴⁴ Principle 1, Obtaining Information from Unrestricted Sources, DOJ Online Principles, p.8.

⁴⁵ Id.

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intelligence or foreign counterintelligence operations are permitted to use the Internet to collect publicly available information, provided the collection of that information conforms to the requirements of the DOJ Online Principles and Attorney General Guidelines. In collecting foreign intelligence and conducting foreign counterintelligence investigations, FBI personnel may not review the ChoicePoint data prior to the

[REDACTED] (s) b1

Finally, the Attorney General Guidelines do not preclude the use of an Internet resource, such as ChoicePoint, to obtain publicly available identifying data concerning either known or unknown persons.

No manual changes are required as a consequence of this opinion.

LEAD (s):

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NATIONAL SECURITY

AT WASHINGTON, DC

Distribute the foregoing opinion to NSD personnel affected.

Set Lead : (Adm)

COUNTERTERRORISM DIVISION

AT WASHINGTON, DC

Distribute the foregoing opinion to ASD personnel affected.

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ADMINISTRATIVE SERVICES

AT WASHINGTON, DC

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 - ① - Mr. P. Kelley, Rm. 7427
 - 1 - Mr. Steele, Rm. 7159
 - 1 - [REDACTED] Rm. 7975
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