Big Brother’s Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement

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ABSTRACT

Lawmakers should revisit federal privacy laws to account for private-sector database companies that sell personal information to the government for law enforcement purposes. Commercial data brokers (CDBs) operate websites tailored to law enforcement that enable police to download comprehensive dossiers on almost any adult. The CDBs have artfully dodged privacy laws, leaving a void where individuals’ personal information may be sold and accessed without adequate protections, and creating serious risks to privacy and due process. The author argues that CDBs have become arms of the government because they perform law enforcement functions for the police, and thus should be required to comply with the Privacy Act of 1974. Furthermore, the nation should revisit policies surrounding access to public records, as the dossiers increasingly are drawn from public registers.

I. Introduction

Traditionally, law enforcement officers obtained information by speaking with suspects’ neighbors, employers, or friends. They would analyze paper arrest records and crime reports. In order to obtain personal information stored in private databases, they would have to call a variety of different vendors.

The shift to a digital environment has brought many changes to law enforcement’s collection of information. Now, by visiting a single website, such as www.cpgov.com, law enforcement can

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obtain a comprehensive dossier on almost any adult. That website was custom-tailored for law enforcement by ChoicePoint, Inc. (ChoicePoint), a commercial data broker (CDB).

CDBs make available a wide variety of information, from arrest and court records to notice that a suspect has opened a private mailbox. Access to private sector databases has significantly altered the balance of power between law enforcement and the individual. As one internal document from the United States Marshals Service (USMS) put it:

With as little as a first name or a partial address, you can obtain a comprehensive personal profile in minutes. The profile includes personal identifying information (name, alias name, date of birth, social security number), all known addresses, drivers license information, vehicle information . . . telephone numbers, corporations, business affiliations, aircraft, boats, assets, professional licenses, concealed weapons permits, liens, judgments, lawsuits, marriages, worker compensation claims, etc.¹

This new power has been made possible by the confluence of fast network connections, the availability of public records, both electronic and paper, that are rich with personal information,² and the alacrity of companies that have become very profitable from selling personal data to the government.

A number of risks to due process and privacy are raised by the collection and maintenance of information. The information could be used for political or personal purposes. Examples of police misuse of databases abound in the media, with violations found involving street-level local police officers to Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) officers. There is also a general risk that the collection of information on individuals will upset the balance between

¹ Sole Source Justification for Autotrack (Database Technologies) (n.d.) (document obtained from the USMS), available at http://epic.org/privacy/choicepoint/cpusms7_30_02j.pdf [hereinafter Sole Source Justification for Autotrack (Database Technologies)].

government and individuals, resulting in a shift of power that is oppressive. In a report mandated by the Privacy Act of 1974,3 the Privacy Protection Study Commission highlighted this risk:

In a larger context, Americans must also be concerned about the long-term effect record-keeping practices can have not only on relationships between individuals and organizations, but also on the balance of power between government and the rest of society. Accumulations of information about individuals tend to enhance authority by making it easier for authority to reach individuals directly. Thus, growth in society's record-keeping capability poses the risk that existing power balances will be upset.4

There is nothing inherently wrong with law enforcement buying access to CDBs. After all, the private sector provides law enforcement with many tools, including pistols and batons. But there are strict rules for the use of these police tools. There is training to help ensure that pistols are only fired with justification, and that batons are employed properly. If these tools are misused, there are serious repercussions, including the discipline or dismissal of the officer and section 1983 lawsuits.5 The Electronic Privacy Information Center (EPIC) is exploring whether similar substantive and procedural safeguards are in place for law enforcement officers who use CDBs to gain access to personal information. Specifically, EPIC is evaluating what, if any, safeguards are in place to protect individuals' privacy and due process rights.

To answer these questions, in June 2001, EPIC filed a series of requests under the Freedom of Information Act (FOIA)6 seeking access to government records regarding companies that sell personal information to the government. Almost three years and a lawsuit later, EPIC has obtained over 1,500 pages of material from nine agencies about ChoicePoint and other CDBs. In this article,

3 See discussion infra Part III.B.


findings are presented from the requests, and concerns are raised regarding law enforcement access to personal information. The conclusion sets forth a framework of privacy protections to address risks to due process and the Fourth Amendment posed by companies like ChoicePoint. Based on the findings, the Privacy Act of 1974 should be extended to CDBs, as they regularly serve as private escrows for information that the government could not otherwise collect legally. Furthermore, there should be broader protections for personal information in public records, as these sources form perhaps the greatest threat to the future of data privacy.

Determining agency practices from FOIA documents is difficult. There are few “smoking gun” FOIA documents. Rather, analysis requires viewing many different documents in context to determine agency action. Because of these limitations, documents are interpreted conservatively, and I have indicated in the text where there are ambiguities in the documents.

The analysis is also limited by the willingness of agencies to provide documents. Of the agencies covered by EPIC’s request, the USMS released the largest number of unredacted documents. The FBI, on the other hand, had the greatest number of documents responsive to the FOIA request, but the substantial majority of this material was either heavily redacted or withheld in full. As a result, practices of certain agencies receive more analysis than others.

This article begins, in Part II, with a description of the information found in the FOIA requests. In Part III, it applies American privacy law to the use of CDBs. It concludes, in Part IV, with several recommendations for policymakers, including extension of the Privacy Act to CDBs that sell information to government and the need to reevaluate public records policy in the United States.

II. Findings from the FOIA Requests

On June 22, 2001, EPIC filed FOIA requests with seven agencies seeking access to records “concerning businesses that sell individuals’ personal information.” Several agencies initially

7 The seven agencies were the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency (DEA), the United States Marshals...
rejected the request, arguing that EPIC needed to further specify the topic for the search of records. In those cases, EPIC specified that the request sought all records related to ChoicePoint, LexisNexis, Experian, Dun & Bradstreet, and Database Technologies Online.

In January 2002, EPIC filed suit in the United States District Court for the District of Columbia against all seven agencies for failure to comply with the FOIA's requirements. That litigation is still pending. EPIC continues to seek 5,000 pages of ChoicePoint contracting documents held by the FBI's Criminal Investigative Division. EPIC also seeks access to a Department of Justice (DOJ) memorandum from the agency's Office of Professional Responsibility. That document concerns an internal investigation regarding unauthorized disclosure of agency information. The issues are fully briefed and are awaiting a ruling from the court.

Since filing the requests, EPIC has received over 1,500 documents. The documents led to six major findings. First, the documents show that law enforcement can quickly obtain a broad array of personal information about individuals. Second, although EPIC filed a broad request for documents, there was almost no evidence of controls to prevent agency employees from misusing the databases. It appears as though auditing employee use of the databases is either impossible or simply not done. Third, the database companies are extremely solicitous to the government and actually design the databases for law enforcement use. Fourth, ChoicePoint expanded significantly in 2000 by starting to acquire and sell personal information of non-citizens. That discovery has led to strong international dissent. Fifth, many of the contracts with CDBs are sole-sourced, meaning the contracts are not open to competitive bidding. Sixth, the FBI has a secret, sole-source contract with ChoicePoint to develop an information service prototype.

Service (USMS), the Internal Revenue Service (IRS), the Immigration and Naturalization Service (INS), and the Bureau of Alcohol, Tobacco and Firearms (ATF).


9 All of the documents are available online for review at EPIC's website, at http://epic.org/privacy/choicepoint.
A. Scope of Information Available to Law Enforcement

"One stop mind-boggling power."10

Federal law enforcement agencies have access to a broad array of personal data on both citizens and non-citizens. One document obtained from the USMS describes the agency's requirement that CDBs "produce a comprehensive profile on an individual, generated by only one or two queries."11 This power has resulted in considerable benefit to the agencies.12 And the agency uses it extensively; agency documents claim that the USMS ran 20,000 searches per month in the late 1990s.13 Actual invoices dating from February 1999 to September 2001 show that the agency ran between 14,000 and 40,000 searches per month.14 A document from the FBI's Public Source Information Program claims that the use of CDBs has increased by 9,600% since 1992.15

1. ChoicePoint, Inc.

ChoicePoint, Inc. is a company based in Alpharetta, Georgia, that concentrates on selling information and data services to insurers, businesses, government, and direct marketers.16 Last year alone, ChoicePoint amassed revenues of over $795,700,000.17

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12 See FBI, The FBI's Public Source Information Program: Fact Versus Fiction (n.d.) (document obtained from the FBI) (reporting that in the Butte and Savannah areas alone in FY 2000, 524 arrests were made using public source information programs, and those areas only accounted for 4% of the FBI's total searches), available at http://epic.org/privacy/choicepoint/cpfbia.pdf [hereinafter Fact Versus Fiction].

13 Exhibit V-1: Customer Reference (n.d.) (document obtained from the USMS) available at http://epic.org/privacy/choicepoint/cpusms7.30.02e.pdf.


15 Fact Versus Fiction, supra note 12.


ChoicePoint has managed to attain a large share of the CDB market with strategic purchases of other businesses. In 2000, ChoicePoint purchased DBT Online, Inc., a successful CDB that provides "AutotrackXP," a favored law enforcement-oriented service. In 2001, it purchased the Osborn Group, Inc., and in 2002, it purchased Vital Chek Network, Inc. and Vital Chek Network of Canada, Inc., the largest suppliers of vital records (birth, death, marriage, and divorce certificates) in the United States and Canada.

ChoicePoint owns a number of other subsidiaries in Texas, Delaware, Kansas, Arizona, Illinois, Tennessee, and Pennsylvania. These subsidiaries include EquiSearch Services, Inc. (asset recovery), Insurity, Inc. (insurance software), National Data Retrieval, Inc. (public records collection), Resident Data Financial, LLC (data collection), Resident Data, Inc. (data collection), and The Bode Technology Group, Inc. (forensic DNA and offender databanking).

ChoicePoint sells a wide array of information to the government, including:

- Credit headers, a list of identifying information that appears at the top of a credit report. This information includes name, spouse's name, address, previous address, phone number, Social Security number, and employer;
- "Workplace Solutions Pre-Employment Screening," which includes financial reports, education verification, reference verification, felony check, motor vehicle record, SSN verification, and professional credential verification;
- Asset Location Services;

18 *ChoicePoint, supra* note 16.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
25 Memorandum from David A. Mader, Assistant Deputy Commissioner
• The ability to engage in “wild card searches,” which allows law enforcement to “obtain a comprehensive personal profile in a matter of minutes” with only a first name or partial address;  

• The use of “Soundex” queries, which allow searches on personal information based on how names sound, rather than how they are spelled;  

• Information on neighbors and family members of a suspect;  

ChoicePoint’s AutoTrackXP is one of the most favored CDB products. It provides an interface for additional data points, including:

• Linkage services, which draw graphical relationships between suspects and other addresses, neighbors, and Social Security Numbers;  

• Public records, including Social Security Death Master Filings, bookings and arrests, liens, judgments, and bankruptcies;  

• Licenses, including drivers, pilots, and professional credentials;  

• Lists of residents of Georgia, New York, and Ohio;  

• National, real-time phone directories and reverse look-up services;  

Operations, IRS, to All Executives and Managers (Feb. 28, 2001) (document obtained from the IRS), available at http://www.epic.org/privacy/choicepoint/cpirs9.10.01a.pdf [hereinafter Memorandum to All Executives and Managers].


ChoicePoint, supra note 16.

Id.


Check Out What’s New, ONLINE WITH AUTOTRACK (DBT Online, Inc., Boca
• Business information, compiled nationwide from Secretaries of State; 33
• "SmartSearch," a tool that allows broad wildcard searches: "There may be thousands of Jane Does, but there's probably only one Jane Doe who's between 25 and 30 and lives on the upper west side of Manhattan. SmartSearch makes it possible to find that one"; 34
• U.S. Military Personnel; and
• Boat owners;

ChoicePoint also offered an "Interactive Pager Service" in 2000 to the USMS. 35 Under the arrangement, Marshals would receive two-way pagers that delivered ChoicePoint reports wirelessly. 36

2. LexisNexis

LexisNexis, a corporation owned by the United Kingdom-based Reed Elsevier, offers access to numerous databases and information retrieval services. 37 Through services such as its featured search tool, "SmartLinx," LexisNexis offers access to Social Security Numbers, addresses, licenses, real estate holdings, bankruptcies, liens, marital status, and other personal information. 38 It bills itself as the market leader in the United Kingdom and the British Commonwealth and as a major publisher in Continental Europe and Latin America. 39

LexisNexis began in Dayton, Ohio as a contractor for data and

33 Id.
34 AutoTrackXP, supra note 10.
36 Id.
information to the U.S. Air Force. In 1979, the company began to offer news and business information, and in 1987, the company purchased Michie, which, at the time, was the sole provider of statutes for thirty-five U.S. states and territories. In 1997, LexisNexis debuted the first web-based service for U.S. legal professionals. In 2003, LexisNexis merged with Canada’s Quicklaw, Inc. to form LexisNexis Canada.

Reed Elsevier additionally acquired the legal publishing Butterworths Group in 1970, which had operations in India, Canada, Australia, New Zealand, and South Africa. It acquired Martindale-Hubbell, publisher of the renowned law directory, in 1990. Since 1998, Reed Elsevier has acquired U.S. legal publisher Matthew Bender and leading citator Shepard’s Company.

LexisNexis provides services to the USMS, including the “location of witnesses, suspects, informants, criminals, parolees in criminal investigations, location of witnesses, parties in civil actions.” LexisNexis’ Person Tracker Plus Social Security Number is a private library “designed to meet the needs of law enforcement.” It provides information probably derived from credit headers, including the name, social security number, current address, two prior addresses, aliases, birth date, and telephone number on an individual. The company also provides the P-FIND white pages directory; information on pilots, military personnel, and professional licenses; driver’s licenses for Florida, Massachusetts, Texas, and Wisconsin; and access to the Social

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40 Company History, supra note 37.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
49 Id.
Security death master file.\(^50\)

3. **Dun & Bradstreet**

Dun & Bradstreet (D&B) is a provider of credit, marketing, purchasing information, and commercial receivables, with offices in over forty countries.\(^51\) Last year alone, D&B amassed revenues of over \$1.38 billion globally.\(^52\)

D&B was founded as the Mercantile Agency in New York City in 1841, as the world’s first business information provider.\(^53\) The current D&B Corporation was formed upon the separation of Moody’s Corporation on September 30, 2000.\(^54\) At the end of last year, D&B had over sixty subsidiaries worldwide.\(^55\)

D&B is growing rapidly. For example, during 2002, the Global D&B database grew by over 10 million records, to cover a total of 80 million businesses; over 40,000 new family tree members were added to the database, bringing the total number of globally linked businesses to 7.6 million.\(^56\) Nearly 372,000 new businesses from the Asia Pacific region were added to the D&B database.\(^57\) In addition, approximately 390,000 new businesses from the Latin America region were added to the D&B database.\(^58\) Finally, the U.S. Marketing file increased by over 3 million records, to cover nearly 18 million businesses.\(^59\)

Companies highly value D&B assessments of their businesses.

\(^50\) *Id.* The Social Security death master file is a list of deceased person’s Social Security numbers. *Id.*


\(^54\) *Id.*


\(^57\) *Id.*

\(^58\) *Id.*

\(^59\) *Id.*
It is unclear, however, if the executives at the companies understand that D&B eagerly sells reports not only to investors, but also to the government. In marketing materials obtained from the government, the company writes that D&B:

[M]aintains the largest commercial databases of business information in the world, including information on the largest Fortune 500 companies [unreadable] mom & pops who are doing business from their home. In fact, 85% of our records have less than 20 employees, and 97% of these records contain ownership details.\(^{60}\)

The company's marketing materials list four full pages of data elements available to the government, including assets, the age of the executives, credit information, socio-economic indicators, and the telecommunications capability of the company.\(^{61}\)

4. **Experian, Inc.**

Experian, Inc., a CDB based in Nottingham, United Kingdom and Costa Mesa, California, is a subsidiary of GUS plc, a U.K.-based holding company that includes retail, property investment, finance, and information services businesses.\(^{62}\) Experian offers a wide range of information and database services, including the sale of credit reports and credit headers.\(^{63}\) The information included in such credit reports includes the availability of credit, bankruptcy information, newly opened trades, the presence of a mortgage, recent credit inquiries, delinquencies, judgments, and liens.\(^{64}\)

Experian also runs an extensive direct marketing business,

\(^{60}\) E-mail from Jennifer Schaus, Dunn & Bradstreet, to Sharma Bahwana, Contract Specialist, INS (Sept. 27, 2001) (document obtained from the INS), available at http://epic.org/privacy/choicepoint/cpins3.25.02a.pdf.


\(^{64}\) See Experian, *Sample Credit Report* (2004), at http://www.experian.com/consumer_online_products/credit_manager.html#. The company delivered more than 2.7 million credit scores in 2003. *Company Profile*, supra note 63. Currently, more than 1.6 million members belong to its credit monitoring service. *Id.*
selling consumer financial, educational, racial, and family information. Experian maintains records on approximately 215 million U.S. consumers and more than 15 million U.S. businesses. The company’s medical databases include lists of individuals suffering from incontinence, prostate problems, and clinical depression.

The Internal Revenue Service (IRS) uses Experian to obtain credit reports.

B. Lack of Protections Against Insider Abuse

"[S]ed quis custodiet ipsos custodes?"

Juvenal made this statement to ridicule Roman men who attempted to control the sexual fidelity of their wives by providing them with male guards. Juvenal’s mocking statement has gained gravitas over the centuries, and it is now a serious question posed to those trusted with power: How does one supervise the authorities and ensure that government power is exercised with responsibility?

Supervising the authorities is a difficult task because literally tens of thousands of federal law enforcement agents have access to CDBs. A memorandum from the IRS shows that after the agency purchased services from ChoicePoint and Experian, it initially issued usernames and passwords to over 12,000

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68 Hoofnagle, supra note 65.

69 Memorandum to All Executives and Managers, supra note 25.

70 JUVENAL, SATIRE VI: JUVENAL AND PERSIUS, II. 346-7 (G. G. Ramsay trans., G.P. Putnam’s Sons 1918) (translated, “[B]ut who is to guard the guards themselves?”).

71 Id. (“I hear all this time the advice of my old friends – ‘Put on a lock and keep your wife indoors.’ Yes, but who will ward the warders? The wife arranges accordingly and begins with them.”).

72 See Memorandum to All Executives and Managers, supra note 25.
employees. The same document indicated that "additional end user names will be transmitted to ChoicePoint in the future." With the personal information of so many people at the fingertips of thousands of government agents, agencies need to establish sound measures to ensure responsibility.

One way to watch the watchers is to regularly audit access to CDB files. By doing so, a supervising officer can track personal use or other misuse of CDBs. Simple procedures, such as requiring an officer to keep an access log and to record the purpose for which searches are performed, can help promote a culture of accountability with personal information. However, these common sense precautions do not appear to have been implemented at any agency.

Since the agency's query records are held at the CDB, normally the CDB could audit or track suspicious behavior. But for good reasons, auditing at the CDB is technically impossible. The agencies have arranged for "cloaked" access. This type of access "prevents anybody inside or outside the Company from tracking records a law enforcement user is researching." Without cloaked access, employees of the CDB could monitor law enforcement investigations and possibly tip off suspects. Requirements for cloaking may have been adopted after it came to light that Edward Asher, the founder of DBT Online (who later founded Seisint, the principal company behind the Multistate Anti-Terrorism Information Exchange, or "MATRIX"), was suspected of having ties to drug smugglers. News of this impropriety

73 Id.
74 Id.
75 See IRS, Statement of Work: Section C (n.d.) (document obtained from the IRS), available at http://www.epic.org/privacy/choicepoint/cpirs9.10.01a.pdf. The IRS has session auditing, enabling the agent to recall all searches during one session use. Session auditing is inadequate to deter misuse of the CDB and the agency was emphatic in specifying that audits should be available only for one session. See id.
76 DBT's AutoTrackXP.com Secure, Anti-Fraud Web Site Listed on GSA Award Schedule, DBT ONLINE NEWS (DBT Online, Inc., Boca Raton, FL), July 8, 1999 (document obtained from the USMS), available at http://epic.org/privacy/choicepoint/cpusms7.30.02d.pdf [hereinafter DBT's AutoTrackXP.com Secure, Anti-Fraud Web Site Listed].
caused the DEA to suspend access to the company's main law enforcement product, AutoTrack.\(^7\)

If access to the CDB is cloaked, auditing would have to occur at the government agency. But no document obtained from the government discusses auditing of law enforcement access as a regular policy to ensure honesty. In fact, the documents suggest that no auditing to prevent employee misuse occurs at all. This inference comes from a heavily redacted memorandum, where the DOJ Office of Professional Responsibility reviewed "Misconduct Allegations [redacted] Concerning Unauthorized Disclosure of Information."\(^7\)

At one point in the investigation, a government employee uses ChoicePoint to search for personal information: "According to [redacted] conducted a 'Choicepoint data search' and discovered recent credit activity [redacted] was alive [redacted]."\(^8\)

In the "Discussion" section of the same memo, the text of a footnote suggests that auditing is not required and does not occur:

[redacted] requested a review [redacted] to determine the existence of any record of a Choicepoint database search. FBI [redacted] advised DOJ OPR that "no such record was found," but further stated that no such record is required to be maintained. FBI [redacted] also asked Choicepoint to conduct a review of its internal records to determine whether [redacted] performed a credit check of [redacted]. A representative of Choicepoint advised the FBI that the security parameters of its database do not permit Choicepoint to make such an inquiry.\(^8\)

The latter portion of that paragraph refers to the "cloaking" that prevents ChoicePoint from viewing government queries of the


\(^8\) Id.
It is reasonable to conclude that the first portion refers to the government's attempt to determine employee use of the database, and it appears that the government did not have, nor did it require, an audit trail.  

Other agency documents discuss information security, but in most cases, the measures are in place to protect the agency, rather than the privacy of individuals. For instance, one document from the USMS specifies that there are access restrictions for use of CDBs: "We must ensure that these [access lines to the database] are only being used for authorized purposes." But it becomes clear that the agency is primarily concerned about Marshals running searches for colleagues in other agencies, a technical violation of the contract with the CDB: "Any unauthorized purpose, such as running queries for another law enforcement agency, may prevent someone in another district from running queries for a USMS investigation."

In crafting access restrictions, the USMS is also concerned about the traffic load on the computers. Too many searches could exclude other branches or offices from running searches: "We also ask that queries be run as quickly as possible during peak hours and be mindful of other users nationwide. The extensive 'browsing' type searches should be saved for early or late hours in the workday, or after hours."

Another agency memorandum does warn that use of CDBs for "non-law enforcement purposes is prohibited." But merely prohibiting the behavior is unlikely to deter individuals from misusing the CDBs. If the agency does not audit, individuals can misuse the CDB and face only a small risk of detection.

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82 See id.
83 See id.
84 Memorandum from Robert J. Finan II, Assistant Director, Investigative Services Division, USMS, to All United States Marshals, All Chief Deputy United States Marshals, and All Warrant Supervisors (Feb. 19, 1999) (document obtained from the USMS), available at http://epic.org/privacy/choicepoint/cpusms7.30.02e.pdf.
85 Id.
86 Id.
87 Memorandum from Robert J. Finan II, Assistant Director, Investigative Services Division, USMS, to All United States Marshals, All Chief Deputy United States Marshals, and All Warrant Supervisors (Jan. 28, 1999) (document obtained from the USMS), available at http://epic.org/privacy/choicepoint/cpusms7.30.02e.pdf.
C. Data is Tailored to Government

The sale of personal information goes far beyond simply making the data available to government. ChoicePoint and others tailor their data for law enforcement agencies. A sales pitch from DBT Online, a company now owned by ChoicePoint, reads in part: "AutoTrack Plus was designed with law enforcement in mind. DBT created its services with the help of law enforcement and continues to maintain sworn law enforcement officers on site." Indeed, in a 1998 letter to the USMS, a DBT Vice President congratulates the agency for buying a subscription to AutoTrack Plus:

During my tenure as Special Agent of the DEA's Florida Division I became aware of AutoTrack PLUS as an exciting, new and truly innovative investigative resource . . . . I selected AutoTrack PLUS as the database resource for all of the DEA's offices in Florida. The system quickly became an integral part of our investigative process.

And after 26 years with the DEA, I retired and joined Database Technologies, Inc. as a Vice President. My goal here is to introduce AutoTrack PLUS to every member of the law enforcement community throughout our nation . . . . To that end, every law enforcement agency is extended an automatic 33% discount on our service.

DBT even circulated a special newsletter for law enforcement subscribers.

ChoicePoint was highly rated by its agency clients. In a review of ChoicePoint's services performed by a USMS employee, the company earned a perfect score and a strong written accolade: "ChoicePoint is very responsive to the Marshals Services and has made enhancements to their public information database (CDB Infotek) to meet our needs."

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90 Id.

D. The International Dimension

In 2000, ChoicePoint began collecting international data. In marketing materials provided to the Immigration and Naturalization Service (INS), the company emphasized that the information was legally obtained from official sources in compliance with the Foreign Corrupt Practices Act (FCPA). The INS has obtained cloaked access to ChoicePoint databases for the agency’s “Quick Response Teams” and “Headquarters Investigation Division.” In 2001, the agency ran approximately 20,000 “domestic” searches monthly, and 3,000 international searches. Eighty to ninety percent of the international searches were on Mexican citizens.

INS authorities chose ChoicePoint as their main CDB because it had a broad array of personal information on non-citizens. ChoicePoint is the only vendor capable of providing online access to the following data sets: complete listings of all Mexican, Colombian, and Argentine Citizens; inclusion of unlisted numbers in Mexico, Brazil, and Argentina; Mexican vehicle and driver license data; Colombian company data; and Brazilian business people.

A ChoicePoint marketing paper describes the source of the information available more fully. It appears as though ChoicePoint is selling information from Mexico’s voter registration rolls, a practice that is illegal in most American


93 Id.


95 Memorandum of the INS (n.d.) (document obtained from the INS), available at http://epic.org/privacy/choicepoint/cpins3.25.02a.pdf.


97 Choicepoint (INS), supra note 96.

98 Id.
BIG BROTHER'S LITTLE HELPERS

states. A Mexico citizen registry database has a nationwide listing of “all Mexican citizens registered to vote as of the 2000 national election . . . . Data includes full name(s), legal addresses, [date of birth], Place of Birth, Gender and identification information.”

For Columbia, ChoicePoint planned to offer a national registry file of all adults, “including date and place of birth, gender, parentage, physical description, marital status, registration date, registration and passport number, and registered profession.” Similar databases exist for Argentina and Costa Rica.

In April 2002, EPIC obtained and posted documents showing this extensive information sale by ChoicePoint. On April 14, 2003, Jim Krane of the Associated Press wrote an article about the sale of this information that ran in newspapers internationally. Public reaction to this news was intense. ChoicePoint quickly issued statements to soothe the situation, claiming that the data was legally acquired from third-party vendors. But whether the data was obtained legally did not matter to the individuals whose information was sold. The sale was morally objectionable to them, and threatened the integrity of their elections process and

99 Generally, American state laws protect personal information in voting registers, and only allow candidates to use the information for campaigning. See, for instance, Maryland’s code on the subject: “Any individual who knowingly allows a registration list under the individual’s control to be used for commercial solicitation or any other purpose not related to the electoral process is guilty of a misdemeanor and shall be punished under the provisions of Title 16 of this article.” MD. CODE ANN., ELECT. § 3-507(c) (2000).

100 ChoicePoint International Data Access Statement of Work, supra note 92.

101 Id.

102 Id.


the very sovereignty of their countries. Legal experts from the region disagreed with ChoicePoint's assessment. One legal expert described the sale as "espionage." Tec de Monterrey University Professor Julio Tellez argued that the information on Mexicans could only be used for elections, and its use for impermissible purposes subjected ChoicePoint and the U.S. government to suit.

Within two days, the Presidents of Nicaragua and Costa Rica announced investigations into the sale, and Mexican officials hinted that the country would retaliate against the United States at an upcoming United Nations meeting. Later that week, Nicaraguan authorities raided businesses thought to have sold information to ChoicePoint. Mexican authorities eventually placed three suspects under house arrest; the charge was treason.

The American government was monitoring these developments. Documents obtained from the American Embassy in San Jose show that the government was monitoring news reports covering the information transfer. On April 15, 2003, the American Embassy in Mexico sent a confidential action cable regarding the controversy to several agencies, including the DOJ, the Department of Homeland Security, the Department of Treasury, the Central Intelligence Agency, the White House, and the National Security Council. The message noted that the

106 Latin American Officials Demand Investigation Into Data Sales, USA TODAY, Apr. 16, 2003 [hereinafter Investigation Into Data Sales].
109 Investigation Into Data Sales, supra note 106.
112 News Articles (various dates) (documents obtained from the Department of State), available at http://epic.org/privacy/choicepoint/cpdos11.3.03.pdf.
113 Department of State, Action Cable: Media Hammers U.S. on Alleged Purchase of Database Information, (Apr. 15, 2003) (document obtained from the Department of
Mexican media had covered the sale of personal information from the federal elections institute database, and that officials had already filed a complaint against unnamed election officials. The Embassy noted that "a potential firestorm may be brewing" and that ChoicePoint's spokesperson had confirmed that American government "agencies regularly use ChoicePoint information for fighting drug trafficking and terrorism." The cable closes, "Most importantly, embassy requests guidance for press inquiries."

The embassies discussed generating public relations materials to shape the debate. In an e-mail from the American Embassy in Managua, a public relations officer asked colleagues to find "articles or writers on this issue." The public relations officer continued:

The kind of article I am thinking of would outline the debate within the U.S. about the extent of government access to electronic info and efforts to pass laws that restrict that access . . . . The article shouldn't be one-sided and alarmist, but rather point to the difficult challenge of striking a balance, and to make clear that this is a dynamic process. If a good article like this exists, we might try and get rights. If the article doesn't exist, we might think about commissioning a writer.

Eventually, the news of the sale sparked calls for privacy reform in Central and Latin America. The President of Costa Rica later proposed legislation that would limit the sale of databases containing personal information. In addition, five other countries reconsidered passing comprehensive database privacy

114 Id.
115 Id.
116 Id.
117 E-mail from William Peters to Reference at IIP (Apr. 28, 2003) (document obtained from the Department of State), available at http://epic.org/privacy/choicepoint/cpdos2.2.04.pdf.
118 Id.
It is worth asking why the reaction to ChoicePoint activities was so intense in other countries, while in the United States, less critical attention has been directed at these practices. It could be because Americans have already been inundated with the public relations strategies that the American Embassies discussed. It could be because Americans trust domestic companies and law enforcement; perhaps if Canada or some other country collected troves of information on Americans, the public would become upset.

In any case, ChoicePoint seems to be expanding its access to personal information of non-citizens: "ChoicePoint... is actively seeking to add data from other countries in Latin America, Asia, and Europe." The company will face serious challenges in doing so, especially if other nations implement comprehensive data protection acts to prevent uncontrolled access and aggregation of personal information.

E. Sole-Source Contracts

Many of the contracts with ChoicePoint are "sole-sourced," that is, they are not open to competitive bidding. Since sole-source bidding may be unfair or wasteful, agencies must justify their decisions to avoid the competitive bidding process.

The agencies have heavily redacted documents that justify sole-sourcing. For instance, in seeking a sole-sourced contract for AutoTrackXP, all justifications for the lack of a competitive bidding process were fully withheld. The IRS withheld the "Statement of Need," "Trade-offs," "Risks," and even the "Product Descriptions." A July 1999 press release from DBT Online announced that AutoTrackXP is available on the General

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121 ChoicePoint International Data Access Statement of Work, supra note 92.

122 Dep't of the Treasury, Justification for Other Than Full and Open Competition (Apr. 9, 2002) (document obtained from the Dep't of the Treasury), available at http://epic.org/privacy/choicepoint/cpatf4.9.02a.pdf.

123 Id.
Services Administration award schedule. This allows an agency to purchase the service automatically, without entering into competitive bidding.

Several federal agencies buy access to ChoicePoint data through the DOJ’s Justice Management Division. The DOJ maintains a “Telecommunications Services Staff” that facilitates the data sale. This arrangement allows smaller agencies to more quickly gain access to CDB services at a lower cost and without having to issue solicitations for contracts.

**F. The FBI’s Criminal Investigative Division Has a Secret, Sole-Sourced Contract with ChoicePoint**

The FBI released documents that refer to a secret, classified contract between the agency’s Criminal Investigative Division and ChoicePoint. The documents contain a discussion of the agency’s justification for awarding a sole-source contract to ChoicePoint. The agency reasons that such an arrangement is necessary because revealing the topic of the contract to other companies would endanger national security. Specifically, it would expose the Criminal Investigative Division and National Security Division operations to risk. After learning of the release of these documents, the DOJ urgently requested the documents back from EPIC and another requester. The Department recently asked a court to fully exclude the classified contract from EPIC’s FOIA request.

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124 DBT’s AutoTrackXP.com Secure, Anti-Fraud Web Site, supra note 76.


126 The FOIA has a provision that allows the government not to reveal the presence of classified documents that are secret. 5 U.S.C. § 552(c)(3) (2000). When individuals request such material, the agency may respond that it has no responsive records. See id.


128 FBI, Justification for Other Than Full and Open Competition (n.d.) (document Obtained from the FBI), available at http://epic.org/privacy/choicepoint/cpfbi1.31.02b.pdf.

129 Letter from Jennifer Paisner, Trial Attorney, DOJ, to Chris Hoofnagle, Deputy Counsel, Electronic Privacy Information Center (Apr. 29, 2003) (on file with author).

130 See Defendant’s Motion to Exclude Classified Documents from Plaintiff’s FOIA
The documents are heavily redacted, and the reader is invited to infer their meaning. One contract schedule describes the following service: "The Criminal Investigative Division (CID) [redacted] has a requirement to conduct a feasibility study for a prototype methodology to meet the requirements of the Federal Bureau of Investigation's (FBI), [redacted] Program." The term for this prototype methodology is nine months.

Both parties wished to keep the prototype under wraps. The contract has severe terms, specifying that if the agency releases proprietary information, it will constitute a material breach of the contract. Proprietary information was to be released to the FBI only on a need-to-know basis. Under one draft of the contract, if ChoicePoint released FBI law enforcement information, it also would constitute a material breach. One agency employee working on the contract wrote after this provision: "{CAN WE GET SOME LIFE OR DEATH LANGUAGE FOR HERE?}.

ChoicePoint employees with access to the FBI facility housing the prototype had to have "secret" level security clearances.

III. Role of Privacy Law is Unclear

American privacy law tends to be sectoral and context based. Unlike other nations, the United States lacks a comprehensive privacy law to protect data. Information is protected based on the sector of the economy regulated and sometimes the context in which the information is collected. For instance, medical information communicated to a health provider is protected by the Health Insurance Portability and Accountability Act of 1996

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133 Id.

134 Id. (providing at paragraph H.7(5)(a), Secret Security Clearances, that "[a]ll Owners, officers, directors, executive personnel, job superintendents, and security officers of the Contractor and selected subcontractors with access to the FBI Facility or to the contract documents shall possess . . . [c]learances at the "SECRET" level").
(HIPAA). However, when a consumer completes a product warranty card that requests details about ailments, that information can be freely sold to anyone for any purpose. Similarly, cable companies face strict rules limiting the use of data on viewers' behaviors, but the law does not extend to intermediate devices, such as a Tivo personal video recorder. Tivo, Inc. can sell the same information that the cable company cannot. Privacy law in the United States is riddled with similar deficits in protection.

A 2001 FBI memorandum analyzed the application of privacy law to CDBs. The agency's Office of General Counsel considered whether ChoicePoint could be used for foreign intelligence and counterterrorism purposes. Much of the analysis is redacted, but the agency concludes that the use of ChoicePoint is consistent with privacy law and DOJ regulations:

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." In this regard, individuals "do not have a reasonable expectation of privacy in personal information that has been made publicly available . . . ." 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.

In a routing slip that appears to accompany this memorandum, an FBI employee writes: "you may use ChoicePoint to your heart's content."

James Dempsey and Lara Flint argued in 2003 that "[a]n analysis of existing law shows that there are, in fact, few legal constraints on government access to commercial databases . . . . [L]aws on specific categories of commercial data are riddled with

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137 Id. (emphasis in original).

exceptions for law enforcement or intelligence uses.  

While it is true that Congress and the courts have allowed the government broad access to personal information held by commercial organizations, privacy protections apply in some cases. It is apparent at least to the CDBs that privacy laws apply to some extent. Their contracts with agencies are peppered with requirements to comply with several privacy laws. CDBs view certain federal privacy laws as limiting their activities, but the scope of those limits is unclear. These limits are explored in the section below. The best prospect for meaningful privacy protection flows from the Fair Credit Reporting Act. Other acts have been interpreted narrowly, or were written to regulate specific sectors of the economy that do not reach CDBs.

A. The Fourth Amendment

The Fourth Amendment prohibits unreasonable searches and seizures. It has been up to courts to define the bounds of "unreasonable" and "search." In Katz v. United States, the Supreme Court adopted the modern test, one where the government is prohibited from intruding into zones where individuals enjoy a "reasonable expectation of privacy." Justice Harlan’s concurring opinion set forth two requirements for a constitutionally-recognized zone of privacy: (1) it must be a place that a person subjectively believes to be private; and (2) society must be prepared to recognize the zone as private.

The Supreme Court decided in United States v. Miller that individuals do not have a reasonable expectation of privacy in information provided to others. As a result, law enforcement agencies do not need a warrant or subpoena to obtain information from a large array of sources that hold personal data. Dempsey

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141 U.S. Const. amend. IV.
143 Id. at 361.
and Flint discuss some categories of sensitive information that can be acquired easily by law enforcement agencies as a result of *Miller*. Such information includes travel records, store purchases (from books to groceries), automated toll records, building access records, real estate information, utility bills, club memberships, and magazine subscriptions.145

News reports following the September 11, 2001 attacks indicated that law enforcement agencies increased requests to private parties for communications information.146 In particular, internet service providers (ISPs) were targeted by these requests. The Seattle Times quoted Al Gidari of Perkins Cole describing this increase: “What we’ve seen after Sept. 11 – at least in the United States – is about a fivefold increase in the number of subpoenas requested of service providers, and frankly . . . just requests for information.”147

Furthermore, some private businesses have crafted “law enforcement-friendly” policies that exploit the *Miller* case in order to provide data to government. In a closed-door conference in February 2003, eBay, the world’s largest Internet auction site, revealed that it had crafted its privacy policy to maximize efficiency in responding to law enforcement requests for personal data.148 eBay described in detail how the company “is willing to hand over everything it knows about visitors to its web site that might be of interest to an investigator.”149 eBay’s Joseph Sullivan, director of the company’s Law Enforcement and Compliance Department, specified that law enforcement only need to ask for the information they wish to obtain: “There’s no need for a court order.”150 The article specifies that law enforcement requests for

145 DEMPSEY & FLINT, supra note 139, at 3.


147 Brennan, supra note 146.


149 Id.

150 Id.
data are sometimes delivered by e-mail or fax.

The shortsighted *Miller* decision does not take into account the reality that individuals need to give their information to third parties in order to participate in society. It is unfair to cede all individuals' rights to a company that can simply hand over personal information to law enforcement. Congress acted swiftly to reverse the *Miller* decision with respect to financial records, and several state supreme courts have rejected the *Miller* approach.

The current conception of protections under the Fourth Amendment provides individuals with little protection against CDBs.

**B. The Privacy Act**

Some contracting documents require ChoicePoint to fully comply with the Privacy Act. The Privacy Act of 1974 requires government agencies to apply a full set of "Fair Information Practices" to systems of records that contain personal information. Principally, the Act prohibits amassing personal information unless the agency has a proper purpose for doing so. Once collected, personal information is subject to a series of rights. The government must give notice of all the databases it maintains. It must provide access and correction rights. It must limit collection to only the information necessary to fulfill a specified government function. Finally, data must be destroyed after a certain period of time.

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152 Most recently, a New Jersey Appellate Court rejected *Miller*, and now the government in that state must obtain a search warrant to obtain access to financial records. See State v. McAllister, 840 A.2d 967, 976, 978 (N.J. App. Dv. 2004).


The Act only applies to the federal government and to private companies that are administering a system of records for the government.\textsuperscript{156} When the information originates from the government and is transferred to a private company, Privacy Act requirements apply to the contractor. For instance, in a contract between ChoicePoint and the USMS, when the agency transfers fugitive data to the company, Privacy Act obligations accompany the data.\textsuperscript{157} However, a database of information that originates at a CDB would not trigger the requirements of the Privacy Act. In fact, credit reporting agencies are specifically exempted from being considered a federal contractor for systems of records.\textsuperscript{158}

This limitation to the Privacy Act is critical—it allows CDBs to amass huge databases that the government is legally prohibited from creating. Then, when the government needs the information, it can request it from the CDB. At that point, the personal information would be subject to the Privacy Act, but law enforcement and intelligence agencies have special exemptions under the Act that limit access, accuracy, and correction rights.\textsuperscript{159}

\textbf{C. The Fair Credit Reporting Act}

The Fair Credit Reporting Act (FCRA)\textsuperscript{160} was the first federal law to regulate private-sector use and disclosure of personal information. It offers the greatest opportunities for protection of data held by CDBs. The law regulates the collection, maintenance, and dissemination of "credit reports." The law is opt-in; that is, individuals must consent to release of their credit reports unless the transfer of data is authorized under a specific section of the Act.\textsuperscript{161}

Under the law, police have a number of avenues to access credit reports. Full credit reports can be accessed by court order, by grand jury subpoena, or by request of a child support

\textsuperscript{156} Id. § 552a(m).

\textsuperscript{157} USMS, Modification: M001 (n.d.) (document obtained from the USMS), available at http://epic.org/privacy/choicepoint/cpusms7.30.02d.pdf.

\textsuperscript{158} 5 U.S.C. § 552a(m)(2).

\textsuperscript{159} Id. § 552a(k).


\textsuperscript{161} Id. § 1681b (2000).
enforcement agency. Credit information can be obtained through three other FCRA provisions. The Act allows the FBI access to individuals' account information and identifying information for counterintelligence purposes upon written request. A provision added by the USA PATRIOT Act allows any government agency with a counterintelligence purpose to obtain the full credit file upon written certification that it is necessary for either an investigation or intelligence analysis. Another section allows any government agency to obtain credit headers, identifying information from a credit report, upon request.

The FBI has interpreted the FCRA artfully in order to evade all of the requirements and procedures of the Act. The FCRA has a poorly drafted definition of "consumer report" that has allowed some to narrow the Act's coverage in a way that contradicts Congress' intent. The Act conditions the definition of "credit report" on how the information is used. That is, a "credit report" is any communication bearing on a consumer's character or general reputation, which is used for credit evaluation, employment screening, insurance underwriting, or licensing. Some have used this awkward construction to limit the scope of the Act, resulting in absurd, unintended consequences. One could argue, for instance, that a criminal who obtains credit information from a bureau, but uses it for fraud, has not triggered the Act, because fraud is not one of the enumerated uses of a "credit report."

The FBI uses similar reasoning to evade protections of the FCRA: "In this instance, none of the information which the FBI would seek to review has been collected by ChoicePoint for any of the [FCRA] purposes." The agency further concludes that ChoicePoint is not a credit reporting agency: "Because ChoicePoint does not collect 'public record information' for any

162 Id. § 1681b(a).
163 Id. § 1681u.
165 Id. § 1681v (Supp. 2001).
166 Id. § 1681f.
167 Id. § 1681a(d) (emphasis added).
168 Memorandum from Office of the General Counsel, supra note 136.
of the highlighted purposes, ChoicePoint is not acting as a 'consumer reporting agency' for the purposes of the FCRA and the collected information therefore does not constitute a 'consumer report.'”

Both of these conclusions are based on a strained reading of the Act which contravenes the intent of Congress. The provisions governing law enforcement access make it clear that Congress intended procedural safeguards against disclosure of credit information, regardless of its intended use.

Two courts have rejected the reasoning underlying the FBI’s logic, although no court has ruled directly on the issue of whether law enforcement access to CDBs triggers the FCRA. As Dempsey and Flint note in their review of federal privacy law and access to commercial information, some courts have ruled that when information is collected for credit reporting purposes, it remains a credit report, despite the fact that it may be employed for non-FCRA purposes.

There are FCRA-style contract requirements in an agreement to provide the USMS with interactive pagers that transmit ChoicePoint information wirelessly. The agreement places ChoicePoint under a burden to assure “maximum possible accuracy” of information reported to the agency, and requires the company to “reinvestigate” any information disputed by the agency. Both of these terms are taken from the FCRA.

D. The Gramm-Leach-Bliley Act

Some agency documents discuss compliance with the Gramm-Leach-Bliley Act (GLBA). That law allows individuals to opt-out of a limited amount of information sharing among financial services companies, including credit reporting

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169 Id.
170 DEMPSEY & FLINT, supra note 139, at 6 n.16.
171 Interactive Pager Service Agreement, supra note 35.
agencies. The Act specifically allows disclosure of personal information to law enforcement agencies. It also preserves law enforcement access to financial records under the Right to Financial Privacy Act. Furthermore, the GLBA contains a savings clause that preserves the ability of law enforcement to obtain personal information under the standards of the FCRA summarized above.

The GLBA requires financial services institutions to develop privacy and security safeguards for non-public personal information, but law enforcement agencies are not subject to this requirement. The only prohibition that might apply to law enforcement is a requirement that information not be passed on to third parties or used for secondary purposes, such as direct marketing.

E. Driver’s Privacy Protection Act

Since 1998, the Driver’s Privacy Protection Act (DPPA) has required state motor vehicle administrators to gain opt-in consent before selling personal information. The Act principally provides protection by preventing release of information from the state to CDBs. However, both ChoicePoint and LexisNexis offer to sell motor vehicle administration information on residents of Texas and Florida. At least three class action suits have been initiated against CDBs for these practices.

The Act only protects information at motor vehicle

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175 Id. § 6802(e)(5).
176 Id.
177 Id. § 6806.
178 Id. §§ 6801(b), 6809.
179 Id. § 6802(c)-(d).
181 Id. § 2721.
182 See id.
183 Pricing Schedule D, supra note 31.
184 Two of the lawsuits, Levine v. Reed Elsevier, No. 03-80490 (S.D. Fla. filed May 30, 2003) and Levine v. ChoicePoint, No. 03-80491 (S.D. Fla. filed May 30, 2003) have been dismissed. Brooks v. Auto Data Direct, No. 03-61063 (S.D. Fla. filed May 29, 2003) is still being litigated.
administrations. Once information leaves the state administration office and is transferred to a CDB, the Act’s protections do not apply. Furthermore, the Act does not protect information on the driver’s license, thus allowing businesses to capture and sell data from identification cards. Some businesses regularly “swipe” licenses now, collecting all the information off the card, and resell it.¹⁸⁵

F. The Self-Regulatory Individual Reference Services Group Principles

Some documents¹⁸⁶ require the law enforcement agency to comply with the Individual Reference Services Group (IRSG) Principles.¹⁸⁷ The IRSG was formed in order to manage fomenting criticism regarding companies that sold personal information.¹⁸⁸ After passage of the GLBA in 1999, the group dissolved, but some members still adhere to the IRSG Principles. The Principles set forth a weak framework of protections, allowing companies to sell non-public personal information “without restriction” to “qualified subscribers,” which include law enforcement agencies.¹⁸⁹ So-called “qualified subscribers” need only state a valid purpose for obtaining the information and agree to limit redissemination of information.¹⁹⁰ Under IRSG Principles, individuals can only opt-out of the sale of personal information to the “general public,” but ChoicePoint does not consider its customers to be members of the general public:

ChoicePoint limits access to its information products to government and businesses with legitimate business purposes for the data, such as detecting and preventing fraud, performing legal due diligence, locating criminal suspects, finding missing


¹⁸⁶ Reimbursement Agreement Between Agencies, supra note 172.

¹⁸⁷ A thorough review of the Principles exceeds the scope of this article. For such a review, see FED. TRADE COMM’N, INDIVIDUAL REFERENCE SERVICES: A REPORT TO CONGRESS (Dec. 1997), available at http://www.ftc.gov/bcp/privacy/wkshp97/irsd1oc1.htm.


¹⁸⁹ Id.

¹⁹⁰ Id.
children, and managing business risks in a variety of ways. We feel that removing information from these products would render them less useful for important business purposes, many of which ultimately benefit consumers. ChoicePoint DOES NOT DISTRIBUT NON-PUBLIC INFORMATION (as defined in the Principles) TO THE GENERAL PUBLIC PURSUANT TO SECTION V(C) OF THE PRINCIPLES. The general public therefore has NO direct access to or use of NON-PUBLIC INFORMATION (as defined in the Principles) from ChoicePoint whatsoever.191

The IRSG Principles have been carefully crafted in order to ensure maximum flexibility by CDBs. They have failed to set forth a reasonable degree of protection for individuals. Accordingly, recommended protections are suggested in the next section to promote privacy.

IV. Recommended Protections

Because collection of information empowers the state and private businesses over individuals, a system of protections is recommended for personal data. Law enforcement access to personal information databases is not inherently problematic. But there has to be reasonable limits on that access, unless we are comfortable in becoming a dossier society.

There should be four principal changes in public policy to better accommodate the rights of individuals in their data. First, government and businesses should minimize the amount of information collected on individuals. When these entities collect less information, it is difficult for CDBs to amass dossiers on individuals. Second, policymakers should no longer make distinctions between commercial and government collection of information. Policymakers often set different standards for information collection, reasoning that commercial actors pose less risk than government information collectors. This distinction is no longer tenable with the cozy relationships between CDBs and the government described in this article. Third, we must realign public records policy so that it is compatible with modern technology. The amount of personal information poured into

191 Letter from Gina Moore, ChoicePoint, to Chris Hoofnagle, Electronic Privacy Information Center (Feb. 21, 2003) (emphasis in original) (on file with author).
public registers, combined with the absence of limits on use of the data, poses serious risks to privacy. Fourth, the Privacy Act of 1974 should apply to CDBs. These companies are performing government functions and allowing the government to have access to dossiers that otherwise could not be assembled.

A. Minimization

The first principle in privacy protection is the practice of minimizing data collection. Minimization is the process of reducing the amount of personal information collected from individuals. Often, commercial transactions can be performed with no exchange of recorded personal information. We experience this every day by engaging in cash transactions. We even have anonymous authentication systems in the real world, such as subway passes and movie tickets, that give us access to services without leaving any identifying information. Minimizing information collection cuts off dossier-building at the source.

Some companies are voluntarily engaging in minimization as a result of post 9/11 incursions into civil liberties. Bear Pond Books in Montpelier, Vermont, for instance, is purging the consumer records of those who request it, and has erased records held by members of its readers’ club.¹⁹²

B. Drop Untenable Distinctions Between Government and Commercial Collectors

U.S. constitutional, common, and statutory law has long recognized that government access to personal information presents risks to individuals’ privacy and autonomy. Our nation also has a deep suspicion of government action and motives, while maintaining trust in the action of the private sector.

Libertarians and conservatives have employed persuasive

arguments to stave off privacy regulation that affects the commercial sector. They have argued that government collection, use, and disclosure of information presents more risk than commercial collection because the government has the power to arrest, imprison, and even to execute citizens. Commercial entities, although they hold our mortgages and often control our employment, arguably present less risk to our autonomy. But as this article shows, this distinction between the risks of government and commercial privacy risk is no longer tenable. Commercial actors provide personal information to the government in a number of contexts, and often with astonishing alacrity.

The illusory nature of the distinction becomes clear when one reviews the documents obtained from the government agencies. Some of the agencies have news clippings that track privacy limitations on the private sector, or on access to public records. These include news clippings on the right to opt-out under state laws from sharing Maryland motor vehicle information and the Supreme Court's upholding of the DPPA. Government agents understand that limits on the commercial sector will ultimately reduce their access to personal information. Indeed, one presentation from the FBI's Public Source Information Project noted that the passage of the GLBA coupled with litigation in the D.C. Circuit "[l]imit[ed] access to Credit Header information." It further noted that the law has a law enforcement exception, but "at least one of the credit bureaus has stated that they will no longer make credit header information." An IRS memorandum notes that:

ChoicePoint will provide public record information.... The coverage is national, but will vary based on the availability of data from specific states and counties. For example, ChoicePoint provides DMV data.... However, due to California's Anti-Stalking laws, that state will not sell DMV


\footnote{Fact Versus Fiction, supra note 12.}

\footnote{Id.}
information to any 3rd-party vendor, and thus no California DMV data will be available.\textsuperscript{196}

In an unrelated FOIA request, EPIC obtained an e-mail\textsuperscript{197} from an employee at the Defense Advanced Research Projects Agency sent to Total Information Awareness developers John Poindexter and Robert Popp.\textsuperscript{198} The e-mail discusses private-sector CDB Acxiom as a supplier for Total Information Awareness' mega-databases of personal information:

Acxiom is the nation's largest commercial data warehouse company ($1B/year) with customers like Citibank, Walmart, and other companies whose names you know. They have a history of treating privacy issues fairly and they don't advertise at all. As a result they haven't been hurt as much as ChoicePoint, Seisint, etc. by privacy concerns and press inquiries.\textsuperscript{199}

The e-mail claims that Jennifer Barrett, Acxiom's Chief Privacy Officer, gave recommendations that would help quell public scrutiny of the transfer of data from the company to the government:

One of the key suggestions she made is that people will object to Big Brother, wide-coverage databases, but they don't object to use of relevant data for specific purposes that we can all agree on. Rather than getting all the data for any purpose, we should start with the goal, tracking terrorists to avoid attacks, and then identify the data needed (although we can't define all of this, we can say that our templates and models of terrorists are good places to start). Already, this guidance has shaped my thinking.\textsuperscript{200}

The employee continues: "Ultimately, the US [sic] may need huge databases of commercial transactions that cover the world or certain areas outside the US [sic]. This information provides

\begin{itemize}
  \item \textsuperscript{196} Memorandum to All Executives and Managers, \textit{supra} note 25.
  \item \textsuperscript{197} E-mail from Doug Dyer, Lt. Col., DARPA/IAO, to John Poindexter & Robert Popp, DARPA/IAO (May 26, 2002) (document obtained from the Department of Defense), \textit{available at} http://www.epic.org/privacy/profiling/tia/darpaacxiom.pdf [hereinafter E-mail from Doug Dyer].
  \item \textsuperscript{198} Total Information Awareness is a now-defunct plan of the Department of Defense where the agency had planned to use ultra-large databases to find leads on criminal behavior.
  \item \textsuperscript{199} E-mail from Doug Dyer, \textit{supra} note 197.
  \item \textsuperscript{200} \textit{Id.}
\end{itemize}
economic utility, and thus provides two reasons why foreign countries would be interested. Acxiom could build this mega-scale database.\textsuperscript{201}

In the 1990s, privacy advocates warned the public about the risks to privacy that were posed by Acxiom and other direct marketers. The worst case scenario painted by privacy advocates is contained in the DARPA e-mail described above: a situation where direct marketers and CDBs cooperated with law enforcement to create ultra-large databases of personal information. In response to this criticism, the Direct Marketing Association (DMA), which is the main industry group representing commercial collectors of information, touted its self-regulatory ethical guidelines. Article 32 of the guidelines specifies that "Marketing data should be used only for marketing purposes."\textsuperscript{202}

In numerous representations to the media and regulators, DMA officials and direct marketers attempted to quell criticism surrounding the possibility of law enforcement access to marketing data. As early as 1993, DMA president Jonah Gitlitz attempted to avoid regulation by promising limited use of direct marketing information: "It's hard to say what the future of regulation will be, but our stance is that as long as (direct marketers) continue to use information for marketing purposes only, and use it responsibly, there should be no problem in the implementation of data in direct marketing for advertisers."\textsuperscript{203}

In 1997, the DMA renewed this promise, stating in a filing to the Federal Trade Commission that:

The Direct Marketing Association has long had a policy opposing the use of personal data obtained from marketing transactions for non-marketing purposes. Our Guidelines therefore limit the sources of the information used by look-up services. Companies that maintain databases of both marketing and non-marketing information ensure that information gained from marketing transactions is not used as an information source

\textsuperscript{201} Id.


for the look-up database.

The DMA’s Guidelines for Personal Information Protection indicate that personal information collected for marketing “should only be used” for marketing purposes. This was the basis for The DMA’s response to a December 20, 1994 Federal Register notice in which the Internal Revenue Service suggested that agency personnel would begin accessing commercial databases as part of its Compliance 2000 program. The DMA filed comments and led a public outcry against the proposal. DMA stated: “Commercial lists used by DMA members were created for the purposes of marketing and were never intended to be used for any other purpose.” The IRS backed away from its intention to use marketing data for law enforcement.

In addition, The DMA Committee on Ethical Business Practice reviews complaints it occasionally receives regarding the alleged use of marketing data for non-marketing purposes. The Ethics Committee reviews these complaints to ensure that companies’ use of marketing data is in accordance with the guidelines of The DMA.204

These promises worked. The federal government adopted a policy of self-regulation, allowing the continued collection of personal information in the private sector. These policies in turn led to our current situation where troves of personal information are available to both the government and the private sector.

If we are ever unfortunate enough to have George Orwell’s Big Brother205 in the United States, it will be made possible by the private sector. It is time to drop distinctions between governmental and commercial collection of personal information. Both types of collection present the same risks, and it is foolish for us to continue to act otherwise.

C. Address Emerging Privacy Issues Presented by Personal Information in Public Records

“Like other vendors in the field, DBT acquires and ‘repackages’


205 See GEORGE ORWELL, 1984 (1949).
publicly-available data into its own formats and makes them available through its own query and reporting mechanisms.\textsuperscript{206}

Much of the personal information made available to law enforcement originates from public records. In a variety of contexts, the government compels individuals to reveal their personal information, and then pours it into the public record for anyone to use for any purpose.\textsuperscript{207} The private sector has collected the information, repackaged it, and brought it back to the government full circle.

Privacy expert Robert Ellis Smith published a list of personal information that appears in court records systems in various states.\textsuperscript{208} The list includes medical records, Social Security numbers, victim's names, credit card and account numbers, psychiatric evaluation reports, juror's names, tax returns, payroll information, vehicle identification and driver's license numbers, and family profiles.\textsuperscript{209} It is unfair to have this information systematically poured into the public record and used for any purpose by the private sector.

If we wish to limit law enforcement power in this arena, we must find a policy for public records that reflects Twenty-first Century technology. Our current policy for public records was developed in a day where all information was on paper, dispersed across the country in small courthouses. Information was poorly indexed; periodically, it was destroyed by fire, improper storage, or negligence. Access was difficult enough. Aggregation was impossible.

Today vast quantities of personal information flow into the public domain from electronic court filings, arrest records, land sales, and dozens of other interactions that individuals have with

\textsuperscript{206} Sole Source Justification for Autotrack (Database Technologies), \textit{supra} note 1.


\textsuperscript{209} Id.
the government. It is not enough, however, to focus only on electronic public records because the CDBs employ "stringers" to obtain information from paper records. ChoicePoint has a "staff of more than 1,500 researchers who obtain public record information from courthouses and other public sources on a daily basis."

States that allow broad access to public records are supplying troves of data to law enforcement. For instance, ChoicePoint's AutoTrackXP services include thirty-six extra databases on Florida residents and seven extra on Texans. Access to information on Florida residents is particularly broad. It includes marriage records, beverage licensees, concealed weapons permits, day care licensees, handicapped parking permits, "sweepstakes," worker compensation, medical malpractice, and salt water product licensees.

Public record policy in America was designed to protect people from government power; to provide a window into the operations of officials and thus a check on arbitrary or abusive exercise of authority. To a large extent, access to public records has served this purpose. But with electronic access and the power of aggregation, these policies have increasingly shifted to benefit the government and businesses. We need to realign these policies so that less personal information appears in the public record, while maintaining access to documents that allows for investigation and oversight of government.

D. The Privacy Act Should Apply to Private Sector Companies That Sell Information to the Government

The Privacy Act was enacted, in part, because of the specter of a federal data clearinghouse, one central place where all personal information could be stored for government access. When the law was passed in 1974, Congress envisioned that only the

210 ChoicePoint International Data Access Statement of Work, supra note 92.
211 Pricing Schedule D, supra note 31.
212 Id.
government could have the incentive and precious computing resources to build such a data clearinghouse.

Similarly, dystopian depictions of the future, including those made in George Orwell’s 1984,214 saw government as the entity hungry for personal information of individuals. The reality is that arrays of individuals are interested in amassing individuals’ personal information. As Professor Daniel Solove has argued, public policymakers should see information architecture as less Orwellian and more Kafkaesque; a dizzying array of private and public-sector actors have strong interests in tracking individuals and building dossiers of their personal information.215

In passing the Privacy Act, legislators added section m, which was included in order to prevent the government from simply farming out data operations in order to avoid the Act’s responsibilities.216 Section m, as explained above, applies to systems of records created by a government, but administered by a private entity. It does not create rights or responsibilities in data collected by the private sector and delivered to the government at its request.

Subsection m falls short of the protections necessary to safeguard privacy. Companies in the business of collecting personal information for sale to the government should be held to Privacy Act responsibilities. It simply does not make sense to maintain the current framework; one where the private sector has created the very federal data center that was so feared in the 1960s and 1970s. Our law should not allow an end-run around protections where the private sector can escrow troves of personal information custom-tailored for the government.

V. Conclusion

In passing the Privacy Act of 1974, Congress placed limits on the Executive branch’s collection, maintenance, and use of personal information. But those protections have failed to meet Congress’ intent because the private sector has done what the government has been prohibited from doing. Private sector

\footnote{214}{See Orwell, supra note 205.}

\footnote{215}{Daniel Solove, Privacy and Power: Computer Databases and Metaphors for Information Privacy, 53 STAN. L. REV. 1393, 1398 (2001).}

\footnote{216}{See 5 U.S.C. § 552a(m) (2000).}
commercial data brokers have built massive data centers with personal information custom-tailored to law enforcement agents. This has upset the balance of power between individuals and the government, allowing the police to peer into our lives from their desktops. Current privacy law does little to establish rights and responsibilities in the collection and maintenance of this information, in part because the government has employed artful interpretations of the Fair Credit Reporting Act to avoid privacy protections.

The release and use of public records containing personal information must be reevaluated, with three goals in mind. First, in order to promote privacy while accommodating legitimate law enforcement investigations, policymakers should establish a framework of rights that limit the collection of information. Second, they should cease to make policy distinctions between government and private sector collections of information. Third, the Privacy Act should apply to companies that regularly sell personal information to the government. Only after these protections are in place will “personal” information truly be personal.