

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE INSTITUTE OF EDUCATION SCIENCES

of the

DEPARTMENT OF EDUCATION

Notice of New System of Records:  
“Study of Promising Features of Teacher Preparation Programs”

July 30, 2012

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By notice published on June 28, 2012,<sup>1</sup> the Institute of Education Sciences (“IES”) of the Department of Education (“Education Department” or “Department”) issued a notice of a new system of records entitled “Study of Promising Features of Teacher Preparation Programs” (18-13-29) (“Study”). According to the system of records notice (“SORN”), the research database will help facilitate “a rigorous study of the effect on student learning of teachers who have experienced intensive clinical practice in their teacher preparations programs” and “will contain records on approximately 5,000 students and 360 teachers . . . .”<sup>2</sup>

Pursuant to the Department’s notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to address the privacy issues raised by the proposed research database. EPIC recognizes the importance in providing students with effective teachers and a thriving educational environment, and therefore commends the

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<sup>1</sup> Privacy Act of 1974; System of Records—Study of Promising Features of Teacher Preparation Programs, Notice of a new system of records, 77 Fed. Reg. 38611 (proposed June 28, 2012) (to be codified at 34 C.F.R. pt. 5b) [hereinafter “Privacy Act SORN”].

<sup>2</sup> *Id.*

Department on this endeavor. The research database, however, collects extraneous information, including information on “disciplinary incidences,” and consequently exposes students to privacy risks. Specifically, EPIC notes: (1) under the Privacy Act, the Education Department is permitted to collect only relevant and necessary information, and (2) the Department does not clearly articulate the purpose of its proposed routine use, as it is required to under the Act. Therefore, it should limit its information collection on students.

EPIC is a public interest research center located in Washington, D.C. EPIC focuses on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has a particular interest in preserving privacy safeguards established by Congress, including the Privacy Act of 1974, and routinely comments in public rulemakings on agency proposals that would diminish the privacy rights and agency obligations set out in the federal Privacy Act.<sup>3</sup> EPIC is also a leading advocate for student privacy rights.<sup>4</sup>

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<sup>3</sup> See, e.g., Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0082 (Nov. 28, 2011), *available at* <http://epic.org/privacy/1974act/EPIC-DHS-2011-0082.pdf>; Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records, DHS-2011-0030 (June 8, 2011), *available at* <http://epic.org/privacy/EPIC%20E-Verify%20Comments%20Final%2006.08.11.pdf>; Comments of the Electronic Privacy Information Center to the Office of the Director of National Intelligence, Notice of Privacy Act System of Records (May 12, 2010), *available at* [http://epic.org/privacy/ODNI\\_Comments\\_2010-05-12.pdf](http://epic.org/privacy/ODNI_Comments_2010-05-12.pdf); Comments of the Electronic Privacy Information Center to the Department of Homeland Security, Notice of Privacy Act System of Records: U.S. Customs and Border Protection, Automated Targeting System, System of Records and Notice of Proposed Rulemaking: Implementation of Exemptions; Automated Targeting System (Sept. 5, 2007), *available at* [http://epic.org/privacy/travel/ats/epic\\_090507.pdf](http://epic.org/privacy/travel/ats/epic_090507.pdf); Comments of the Electronic Privacy Information Center to the Department of Homeland Security United States Customs and Border Protection, Docket No. DHS-2005-0053, Notice of Revision to and Expansion of Privacy Act System of Records (May 22, 2006), *available at* <http://epic.org/privacy/airtravel/ges052206.pdf>; Thirty Organizations and 16 Experts in Privacy and Technology, Comments Urging the Department of Homeland Security To (A) Suspend the “Automated Targeting System” As Applied To Individuals, Or In the Alternative, (B) Fully Apply All Privacy Act Safeguards To Any Person Subject To the Automated Targeting System (Dec. 4, 2006), *available at* [http://epic.org/privacy/pdf/ats\\_comments.pdf](http://epic.org/privacy/pdf/ats_comments.pdf); Comments of the Electronic Privacy Information Center to the Department of Homeland Security: Bureau of Immigration and Customs Enforcement and Bureau of Customs and Border Protection, Docket No. DHS/ICE-CBP-001, Notice of

## The Scope of the System of Records

The SORN states that the research database “will contain records on approximately 5,000 students and 360 teachers from 125 school districts” and will include:

information about the students and teachers who participate in the study. For students, this information will include, but will not necessarily be limited to, name; birth date; demographic information such as race, ethnicity, gender, and educational background; information on attendance and disciplinary incidences; and scores on reading and mathematics achievement tests. For teachers, this information will include, but will not necessarily be limited to, name and contact information; demographic information such as race and ethnicity; information on postsecondary institution attended and teaching experience; scores on postsecondary entrance exams; and will possibly include scores on teacher licensure exams.<sup>5</sup>

The research database’s purpose is to help facilitate “a rigorous study of the effect on student learning of teachers who have experienced intensive clinical practice within their teacher preparation programs.”<sup>6</sup> The Study will focus centrally on the following research question:

What is the impact on students' reading and math achievement of novice elementary school teachers who experienced intensive clinical practice as part of their pre-service teacher preparation programs compared to

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Privacy Act System of Records (Jan. 12, 2004), *available at* [http://epic.org/privacy/us-visit/ADIS\\_comments.pdf](http://epic.org/privacy/us-visit/ADIS_comments.pdf).

<sup>4</sup> *See, e.g., Student Privacy, EPIC*, <http://epic.org/privacy/student/>; *EPIC v. The U.S. Department of Education, EPIC*, <http://epic.org/apa/ferpa/default.html>; Comments of the Electronic Privacy Information Center to the Department of Education, Family Educational Rights and Privacy Act Notice of Proposed Rulemaking, May 2, 2011, *available at* [http://epic.org/privacy/student/EPIC\\_FERPA\\_Comments.pdf](http://epic.org/privacy/student/EPIC_FERPA_Comments.pdf); Comments of the Electronic Privacy Information Center et al., to the Department of Defense, DOD DHRA 04 Joint Advertising and Market Research Recruiting Database (June 22, 2005), *available at* <http://epic.org/privacy/profiling/dodrecruiting.html>; The Privacy Coalition to Donald Rumsfeld, Secretary of Defense, DOD Database Campaign Coalition Letter (Oct. 18, 2005), *available at* <http://privacycoalition.org/nododdatabase/letter.html>; Br. *Amicus Curiae* Electronic Privacy Information Center (EPIC) Supp. Apl., *Chicago Tribune Co. v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001 (7th Cir. 2012) (No 11-2066), *available at* [http://epic.org/amicus/tribune/EPIC\\_brief\\_Chi\\_Trib\\_final.pdf](http://epic.org/amicus/tribune/EPIC_brief_Chi_Trib_final.pdf).

<sup>5</sup> Privacy Act SORN, 77 Fed. Reg. at 38612.

<sup>6</sup> *Id.*

students of novice elementary school teachers who *did not* have the same experience as part of their pre-service teacher preparation programs?<sup>7</sup>

The Study will also address the following questions:

Among the teachers studied, what are the core features of teacher preparation programs? In particular, to what extent does preparation vary on the basis of selected dimensions of clinical practice? What is the impact on the classroom practices of novice elementary school teachers who experienced intensive clinical practice as part of their pre-service teacher preparation programs compared to novice elementary school teachers who *did not* have the same experience as part of their pre-service teacher preparation programs? What teacher preparation features (such as opportunities to teach throughout the preparation program, extent or nature of the clinical practice, and structured feedback during clinical practice) are associated with teacher effectiveness?<sup>8</sup>

The Department proposes one “routine use” that would permit the agency to disclose the research database records without individual consent. The agency states

If the Department contracts with an entity to perform any function that requires disclosing records in this system to the contractor's employees, the Department may disclose the records to those employees who have received the appropriate level of security clearance from the Department. Before entering into such a contract, the Department will require the contractor to establish and maintain the safeguards required under the Privacy Act (5 U.S.C. 552a(m)) with respect to the records in the system.<sup>9</sup>

Although the scope of the system of records is generally narrow, as EPIC discusses below, the Department should not collect certain categories of records that relate to student data. Additionally, the Education Department must clarify the purpose of its routine use.

**I. The Privacy Act Permits the Education Department to Collect Only Relevant and Necessary Information. Therefore, the Education Department Should Narrowly Tailor its Collection of Student Records.**

When it enacted the Privacy Act in 1974, Congress sought to restrict the amount of

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

personal information that federal agencies could collect and required agencies to be transparent in their information practices.<sup>10</sup> Congress found that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies,” and recognized that “the right to privacy is a personal and fundamental right protected by the Constitution of the United States.”<sup>11</sup> Thus, Congress sought to “provide certain protections for an individual against an invasion of personal privacy” by establishing a set of procedural and substantive rights.<sup>12</sup>

The Privacy Act’s “relevant and necessary” requirement<sup>13</sup> is a fundamental and necessary part of the Privacy Act’s protections, as it is designed to assure observance of basic principles of privacy and due process by requiring that where an agency delves into an area of personal privacy in the course of meeting government’s needs, its actions may not be arbitrary.<sup>14</sup>

Part of the Privacy Act’s purpose was to stave off the risk that government databases might become dossiers cataloging the various details of individuals’ lives. By limiting the data kept by an agency to that which is necessary and relevant to the agency’s purpose, the Privacy Act limits the extent to which a system of records may invade privacy. Limiting the data to that which is necessary and relevant also reduces the risk of “mission creep,” in which a system is pressed into unintended uses.

The Education Department claims that the purpose of the research database is to evaluate teacher effectiveness. Indeed the Study’s central and secondary research questions revolve around teacher preparation programs and clinical practice and

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<sup>10</sup> S. Rep. No. 93-1183 at 1 (1974).

<sup>11</sup> Pub. L. No. 93-579 (1974).

<sup>12</sup> *Id.*

<sup>13</sup> The Privacy Act of 1974, 5 U.S.C. § 552a(e)(1) (2006).

<sup>14</sup> S. Rep. No. 93-3418, at 47 (1974).

experience, and their “impact on students’ reading and math achievement.”<sup>15</sup> It is understandable and appropriate, then, that the research database contain teacher personally identifiable information such as actual name and contact information, along with certain student records, including “educational background” and “scores on reading and mathematics.”<sup>16</sup> The connection between teacher effectiveness and other student records that the Department intends to collect (*e.g.*, actual name and disciplinary instances) is a bit more tenuous. If the Department’s purported goal of the Study and corresponding purpose of the research database is to evaluate teacher effectiveness, it is unclear why the Department needs student information, like actual names and disciplinary records, that does not plainly relate to educational background and test scores. And because the category of student records within the SORN is an expansive list,<sup>17</sup> any additional student information that the Department intends to collect should be solely germane to scholastic achievement.

Moreover, in October 2011, the Education Department’s website for Direct Loans, Myedaccount.com, exposed “the personal financial details of as many as 5,000 college students” to borrowers that had logged into the website.<sup>18</sup> The security breach occurred while agency officials upgraded the website’s features.<sup>19</sup> Although the Department shut down the website while it resolved the problem, and “notified and

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<sup>15</sup> Privacy Act SORN, 77 Fed. Reg. at 38612.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Government Site Exposes Financial Info of Thousands of College Students*, ASSOCIATED PRESS (Oct. 26, 2011 12:30 PM), <http://washington.cbslocal.com/2011/10/26/government-site-exposes-financial-info-of-thousands-of-college-students/>. See also Alice Lipowicz, *Education Dept.’s New Website Suffers Data Leak, Malfunctions*, FEDERAL COMPUTER WEEK, Oct. 31, 2011, <http://fcw.com/articles/2011/10/31/education-dept-experiencing-data-leak-glitches-on-new-student-loan-website.aspx>.

<sup>19</sup> ASSOCIATED PRESS, *supra* note 17.

offered credit monitoring services” to those affected,<sup>20</sup> this is an unfortunate example of the Education Department not “establish[ing]appropriate . . . technical safeguards to insure the security and confidentiality of [student] records . . .” as required by the Privacy Act.<sup>21</sup> Because the Education Department has ineffectively safeguarded against security breaches in the recent past, the Department should limit the proposed collection to only relevant and necessary student information. A more narrowly defined information collection will diminish risks to student privacy.

## **II. The Education Department Does Not Clearly Articulate the Purposes of its Proposed Routine Use.**

Under the Privacy Act, the Education Department does not meet its burden to establish a “routine use” exception. The Privacy Act defines “routine use” to mean “with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.”<sup>24</sup> The Privacy Act’s legislative history and a subsequent report on the Act indicate that the routine use for disclosing records must be specifically tailored for a defined purpose for which the records are collected. The legislative history states:

[t]he [routine use] definition should serve as a caution to agencies to think out in advance what uses it will make of information. This Act is not intended to impose undue burdens on the transfer of information . . . or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however,

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<sup>20</sup> *Id.*

<sup>21</sup> 5 U.S.C. §552a(e)(10). In fact, many government websites and databases are frequently compromise. Accordingly, EPIC strongly recommends data minimization. *See, e.g.,* Matt Liebowitz, *Iranian ‘Cyber Warriors Team’ Takes Credit for NASA Hack*, MSNBC.COM, May 22, 2012, [http://www.msnbc.msn.com/id/47522497/ns/technology\\_and\\_science-security/t/iranian-cyber-warriors-team-takes-credit-nasa-hack/#.T9pOHOJYs5O](http://www.msnbc.msn.com/id/47522497/ns/technology_and_science-security/t/iranian-cyber-warriors-team-takes-credit-nasa-hack/#.T9pOHOJYs5O); Lisa Rein, *For Commerce Unit Hit by Computer Virus, Hardship of Being Unplugged Has Upside*, WASHINGTON POST, Apr. 9, 2012, available at [http://www.washingtonpost.com/politics/for-agency-a-loss-of-technology-has-had-down--and-upside/2012/04/08/gIQAvpAY5S\\_story.html?hpid=z3&tid=sm\\_twitter\\_washingtonpost](http://www.washingtonpost.com/politics/for-agency-a-loss-of-technology-has-had-down--and-upside/2012/04/08/gIQAvpAY5S_story.html?hpid=z3&tid=sm_twitter_washingtonpost); Nicole Perloth, *Hackers Step Up Attacks After Megaupload Shutdown*, THE NEW YORK TIMES, Jan. 24, 2012, available at <http://bits.blogs.nytimes.com/2012/01/24/hackers-step-up-attacks-after-megaupload-shutdown/>.

<sup>24</sup> 5 U.S.C. § 552a(b)(3) referencing § 552a(a)(7).

intended to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material.<sup>25</sup>

The Privacy Act Guidelines of 1975—a commentary report on implementing the Privacy Act— interpreted the above Congressional explanation of routine use to mean that a “ ‘routine use’ must be not only compatible with, but related to, the purpose for which the record is maintained.”<sup>26</sup>

Subsequent Privacy Act case law interprets the Act's legislative history to limit routine use disclosure based upon a precisely defined system of records purpose. In *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, the Court of Appeals for the D.C. Circuit relied on the Privacy Act's legislative history to determine that “the term ‘compatible’ in the routine use definitions contained in [the Privacy Act] was added in order to limit interagency transfers of information.”<sup>27</sup> The Court of Appeals went on to quote the Third Circuit as it agreed, “[t]here must be a more concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure.”<sup>28</sup>

The Education Department's sole routine use of information disclosure will be to contractors and contractor employees that “perform *any* function that requires [the Education Department] [to disclose] records in this system . . .”<sup>29</sup> (emphasis added). As discussed in detail above, the routine use must be narrowly and specifically defined and

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<sup>25</sup> *Legislative History of the Privacy Act of 1974 S, 3418 (Public Law 93-579): Source Book on Privacy*, 1031 (1976).

<sup>26</sup> *Id.*

<sup>27</sup> *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 9 F.3d 138, 144 (D.C. Cir. 1993).

<sup>28</sup> *Id.* at 145 (quoting *Britt v. Natal Investigative Serv.*, 886 F.2d 544, 549-50 (3d. Cir. 1989). *See also Doe v. U.S. Dept. of Justice*, 660 F.Supp.2d 31, 48 (D.D.C. 2009) (DOJ's disclosure of former AUSA's termination letter to Unemployment Commission was compatible with routine use because the routine use for collecting the personnel file was to disclose to income administrative agencies); *Alexander v. F.B.I.*, 691 F. Supp.2d 182, 191 (D.D.C. 2010) (FBI's routine use disclosure of background reports was compatible with the law enforcement purpose for which the reports were collected).

<sup>29</sup> Privacy Act SORN, 77 Fed. Reg. at 38612.



compatible with the purpose of the system. As it is written, the proposed routine use is overly broad because does not establish a clear nexus between the proposed routine use and the system's purpose. The Department must clarify the specific "functions" that will require the agency to disclose records to contractors and their employees. This clarification is required by the Privacy Act, and will ensure accountability, oversight, and transparency when the Department discloses student records.

### **Conclusion**

For the foregoing reasons, the Education Department must revise its Privacy Act notice for the Study of Promising Features of Teacher Preparation Programs to: (1) limit the collection of student information to only that which is necessary and relevant; and (2) clarify the circumstances under which it will disclose information pursuant to the routine use exception. EPIC anticipates the Education Department's specific and substantive responses to each of these proposals. As the SORN provides, EPIC anticipates that the system of records will not go into effect on July 30, 2012, as a result of these public comments.<sup>30</sup>

Respectfully submitted

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<sup>30</sup> *Id.* at 38611.