

September 19, 2013

Via Electronic and U.S. Mail

Attorney General Eric Holder
950 Pennsylvania Avenue
Washington, D.C. 20530

Joo Y. Chung, Director, Office of Privacy and Civil Liberties
United States Department of Justice
1331 Pennsylvania Avenue, NW, Room 1000
Washington, D.C. 20530

James Comey, Director
Federal Bureau of Investigation Headquarters
935 Pennsylvania Avenue, NW
Washington, D.C. 20535

Kshemendra Paul, Program Manager, ISE-SAR
Office of the Director of National Intelligence
Washington DC, 20511

David Sobczyk, Director
Office of Program Management
Nationwide Suspicious Activity Reporting Initiative
810 7th Street, NW
Washington, DC 20531

Re: Revision of Suspicious Activity Reporting Functional Standard

Dear Mssrs. Holder, Chung, Comey, Paul, and Sobczyk:

We write to urge reform of federal Suspicious Activity Reporting programs, which encourage state and local law enforcement agencies to collect, maintain and share Suspicious Activity Reports that do not meet legal standards required for sharing criminal intelligence files. Law enforcement collection and dissemination of information about Americans not reasonably suspected of criminal activity is prohibited by a federal regulation, 28 Code of Federal Regulations Part 23, which was promulgated in 1980 to protect the privacy and civil rights of innocent Americans. The time-tested “reasonable suspicion” requirement of 28 C.F.R. Part 23 has proven to be an effective standard that allows police to collect and share information

where necessary to address threats to public safety, while still requiring a reasonable connection to defined criminal activity to justify collection of personally identifiable information about any individual. Federal Suspicious Activity Reporting programs subvert this regulation, however, by deeming many innocuous activities, such as photography, videography and note-taking, as inherently suspicious and by encouraging the collection, retention and dissemination of information that does not meet the reasonable suspicion standard.

The federal government operates two primary Suspicious Activity Reporting programs for state and local law enforcement: the Director of National Intelligence Information Sharing Environment (ISE) and the Federal Bureau of Investigation's eGuardian program. These two programs cooperate through the Justice Department's Nationwide Suspicious Activity Reporting Initiative (NSI). In 2008 the DNI established a "Functional Standard" for the ISE SAR program that was heavily criticized by privacy and civil liberties advocates.

In response, the ISE Program Manager met with a variety of privacy and civil liberties advocates and federal, state, and local officials to revise the standard. The 1.5 version of the Functional Standard, published in 2009, contained many improvements, including defining "suspicious activity" as observed behavior "reasonably indicative of pre-operational planning related to terrorism or other criminal activity." Further, the 1.5 version made clear that "the same constitutional standards that apply when conducting ordinary criminal investigations also apply to local law enforcement and homeland security officers conducting SAR inquiries," including "constitutional protections and agency policies and procedures that apply to a law enforcement officer's authority to stop, frisk ('Terry Stop'), request identification, or detain and question an individual." Yet the failure to clearly state that ISE policy did not authorize the collection, retention or dissemination of personally identifiable information in violation of federal regulation 28 C.F.R. Part 23 has led to confusion and abuse. The ISE also appears to have abandoned a section of the Functional Standard requiring the redaction of "privacy fields" which were intended to mask personally identifiable information included on SARs shared through the ISE. More critically to the maintenance of privacy protections in the SAR policy, the FBI's eGuardian program clearly does not meet the ISE Functional Standard in collection, retention, and dissemination requirements, yet participates in the ISE through the NSI anyway, completely undermining whatever standards exist on paper. In addition, the FBI—through its Joint Terrorism Task Forces—encourages fusion centers to report "all potentially terrorism-related" information, even if it does not meet the criteria set forth in the Functional Standard.¹

¹ United States Government Accountability Office, Report to Congressional Requesters, "INFORMATION SHARING: Additional Actions Could Help Ensure That Efforts to Share Terrorism-Related Suspicious Activity Reports Are Effective," (March 2013) at 16. In 2008, the Department of Justice sought amendments to 28 C.F.R. Part 23 that would have allowed local and state law enforcement agencies to gather and maintain "terrorism-related" intelligence information. The FBI's encouragement of expanded reporting and its inclusion of such information in eGuardian overlooks the failure of that regulatory amendment.

Many of the undersigned organizations have long been concerned that these SAR programs would open the door to inappropriate and unnecessary collection of information based on racial, ethnic, religious or political bias rather than reasonably objective facts and circumstances justifying suspicion. The American Civil Liberties Union of California recently obtained summaries of Suspicious Activity Reports produced by the Central California Intelligence Center and the Joint Regional Intelligence Center that demonstrate these concerns were justified:

- UC Davis dorm bathroom had “anti-government graffiti written in black marker on the wall.”
- “Suspicious upside down American flag seen on big rig”
- “Suspicious gathering at private residence in Elk Grove” of individuals “of what appear to be Muslim Faith or Middle Eastern descent.”
- “Suspicious Conversation Overheard”: “The neighbor, one of 4 young clean cut Middle Eastern males, was speaking excitedly in a foreign language.”
- “Information regarding trending at Sunrise Mall”: “there was a substantial increase in the presence of female Muslims fully dressed in veils/burkas.”
- “subject was observed taking pictures from the AI Zampa Bridge (Carquinez Bridge) of Cal Maritime Academy in Vallejo, CA. Subject was also observed taking pictures of the adjacent bridge cables and towers”
- “a male and female subject parked their vehicle on Folsom prison property and were taking photographs of the face of Folsom Dam.”
- “I was called out to the above address regarding a male who was taking photographs of the [redacted]. The male stated, he is an artist and enjoys photographing building in industrial areas ... [and] stated he is a professor at San Diego State private college, and takes the photos for his art class.”
- “Received call of suspicious person filming at the [location blacked out] in the City of Carson. With the help of assisting units, we located the suspicious person. I detained and reviewed his video camera. I saw blurred lighting video. Subject stated he was filming ‘out of focus lighting.’ Subject was then released and given an explanation for his detention.”

- “A male white, poss. Middle Eastern, was seen photographing shopping center in the City of Norco CA. Subject exited a silver SUV and took pictures of the [redacted] Credit Union. He then drove around a row of cars, parked, exited again, took pictures of the [redacted] market and other portions of the building.”
- “Subject was taking pictures of another person onboard Metrolink train, who was dressed in a ‘Middle Eastern’ costume.”

The activities documented in these SAR summaries contain no reasonable evidence of criminal activity and demonstrate bias against racial and religious minorities and people exercising their First Amendment rights as the primary justification for these police activities. This type of collection violates 28 C.F.R. Part 23, as well as the First, Fourth and Fourteenth Amendments to the Constitution. Moreover, there is no basis for believing the collection of such innocuous activity creates any kind of security benefit. A March 2013 Government Accountability Office report concluded that there is no data to demonstrate that SAR programs have thwarted any terrorist threats, and criticized the NSI for failing to develop performance measures to evaluate whether SAR programs produced meaningful security benefits and provide accountability. The GAO further warned that maintaining two SAR programs in the federal government with conflicting policies created legal concerns among state and local law enforcement officials participating in the program and introduced additional security risks. Attempts to address these risks appear to further dilute privacy protections imposed by state and local law and regulation.

Based on the SARs obtained thus far, photography and videography are frequently reported without additional facts that render these constitutionally-protected activities inherently suspicious. This reporting trend matches anecdotal reports from photographers who frequently complain that they are not only detained and questioned, but are also prevented from taking photographs and video and deprived of their equipment by police. The ISE-SAR Functional Standard version 1.5 sought to address this concern by including a footnote defining photography as First Amendment-protected activity that should not be collected absent articulable facts and circumstances supporting suspicion the activity is not innocent, but “reasonably indicative of criminal activity associated with terrorism.” While this additional language was appreciated, it has clearly proven insufficient to prevent improper infringement of photographers’ First Amendment rights.

Maintaining SAR programs that create serious privacy and civil liberties violations but have no demonstrable security benefit is unjustifiable. We appreciate the engagement with privacy and civil liberties organizations the NSI and ISE have conducted in the past, and we look

forward to continued discussions, but we believe the evidence now clearly demands reform. We urge the Justice Department, the DNI and the FBI to reform their SAR programs to:

1. Require reasonable suspicion of specified criminal activity in order to collect, retain or disseminate SARs containing personally identifiable information, as required by federal regulation 28 C.F.R Part 23.
2. Clearly and unequivocally prohibit the collection, retention or dissemination of information about the political, religious or social views, associations, or activities of any individual or any group, association, corporation, business, partnership, or other organization unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.
3. Remove photography and other activities clearly protected by the First Amendment from inclusion in lists of SAR categories or other guidance criteria to prevent the unlawful stops, detention, and harassment of photographers, videographers, and journalists.
4. Give agencies contributing SARs continuing control over the information in the federal SAR systems to modify, correct, update and purge data according to state and local laws, regulations and policies.
5. Require routine review and re-examination of stored SARs to purge any information that is misleading, obsolete or otherwise unreliable. Require that all SARs be purged from all data systems within 5 years and that all recipient agencies be advised of such changes which involve errors or corrections. No data not leading to an investigation should remain in a SAR system or any other federal data base for more than 5 years.

Thank you for your attention to these concerns. We look forward to working with your agencies to establish meaningful and effective privacy and civil liberties protections for federal SAR programs.

Sincerely,

Advocacy for Principled Action in Government
American Civil Liberties Union
American Society of Media Photographers
Arab American Anti-Discrimination Committee
Arab American Institute

Arab Cultural and Community Center
Arab Resource and Organizing Center
Asian Americans Advancing Justice – Asian Law Caucus
Bill of Rights Defense Committee
Brennan Center for Justice
Center for Democracy and Technology
Center for Media Justice
The Constitution Project
Council on American-Islamic Relations, California
Government Accountability Project
Institute of Popular Education of Southern California
Line Break Media
Media Alliance
Media Mobilizing Project
Muslim Advocates
Muslim Public Affairs Council
National Center for Transgender Equality
National Lawyers Guild
National Press Photographers Association
National Workrights Institute
Privacy Times
Rights Working Group