



Civil Liberties Impact Assessment
for the
State, Local, and Regional Fusion Center
Initiative

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INTRODUCTION

The 9/11 Commission acknowledged the challenge of information sharing between the Federal government and State and local entities. As a result, many states and municipalities began adopting a “fusion” center approach to information sharing that was uncommon in the pre-9/11 era. Using various local, State, and Federal funds, state and local executives have now created approximately 58 fusion centers around the country. These fusion centers (FC) serve as a place where State and local officials, along side their Federal partners, collaborate, coordinate and share law enforcement and intelligence information in an effort to prevent future threats to the Nation. The U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties (CRCL) recognizes the importance of information sharing in the homeland security effort. At the same time, CRCL wants to ensure that information sharing is conducted in a lawful manner consistent with Constitutional, statutory, regulatory, and other legal and policy requirements, including applicable privacy and civil liberties standards.

In accordance with the *Implementing Recommendations of the 9/11 Commission Act of 2007* (“9/11 Act”), CRCL has conducted its civil liberties impact assessment of the State, Local and Regional Fusion Center (SLRFC) Initiative for inclusion in the Concept of Operations. *See* 9/11 Act, Sec. 511 (d)(1). This impact assessment analyzes the Department of Homeland Security’s interactions and activities with FCs through the DHS Office of Intelligence and Analysis (I&A), SLRFC Initiative.¹ This impact assessment does not evaluate other Department of Homeland Security interactions and activities with FCs, state actions or compliance with state enacted civil liberties standards, nor does it evaluate the interactions of other Federal Departments with SLRFCs. This review also serves as a preliminary assessment based on information as of November 30, 2007. As required by the 9/11 Act, CRCL will conduct a one-year impact assessment of the SLRFC Initiative, at which time CRCL expects to further examine the civil liberties impact of the program while addressing any developments since the time this preliminary impact assessment was completed.

The information used to conduct this assessment is based on program documents, including, but not limited to, the *State and Local Fusion Center (SLFC) Concepts of Operations* and the SLFC Program Management Office’s *DHS Support Implementation Plan for State and Local Fusion Centers*, interviews with program staff, on-site visits to FCs, meetings with outside organizations, Congressional testimony, and reports on FCs. The results and findings of this assessment are contained herein.

POTENTIAL CIVIL LIBERTIES IMPACTS

Impact on Particular Groups or Individuals

The SLRFC Initiative, as designed, does not directly impact or categorize individuals or groups based on race, ethnicity, national origin, gender, or religion. The SLRFC Initiative also does not directly affect people with disabilities or individuals with limited English language proficiencies. Under the SLRFC Initiative, Department analysts are deployed to selected FCs to support information requirements or requests, provide context for information, and develop joint products

¹ *See* Appendix A of questions considered in conducting civil liberties impact assessments. Not all questions were applicable to this program.



with the centers. However, the manner in which information is accessed, used, and shared between the Department and state and local officials has civil liberties implications. In some cases, analysts may exchange with FCs information that contains personally identifiable information for the purposes of assessing emerging threats or incidents. Some of this information may reference race, ethnicity, national origin, or associations, and this information must be handled in accordance with applicable law, including but not limited to the First, Fourth, Fifth, and Fourteenth Amendments to the Constitution; the Privacy Act of 1974; 28 CFR 23; Executive Order (EO) 12333; and the Department's *Guidance on Use of Race in Law Enforcement Activities*.

To help ensure protection of civil liberties during the course of information sharing, the State and Local Fusion Program Management Office requires that all Department analysts, before deployment, receive specific training on Criminal Intelligence Systems Operating Policies, Intelligence Oversight and Information Handling, and civil liberties and privacy standards training provided by the Officer for Civil Rights and Civil Liberties and the Chief Privacy Officer. In addition, if an individual believes that his or her information has been misused, that individual may file a complaint with the Inspector General, the Chief Privacy Officer, or the Officer to Civil Rights and Civil Liberties. To date, no such complaints have been received by these offices.² However, the Office for Civil Rights and Civil Liberties, in conjunction with the Privacy Office, will continue to work with the SLRFC Initiative to provide advice and guidance on the use and retention of information, particularly that information which contains any reference to race, ethnicity, or groups of individuals.

Influence of Government

As partnerships with Federal authorities and FC participants increase, there is increasing risk that the balance between Federal and state governments is disturbed. The U.S. Constitution acknowledges a delicate balance between Federal and state governments, which helps to prevent the accumulation of excessive power in either the States or our central government. As the Supreme Court has explained, "The Constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). To ensure this balance remains, it is important to clearly articulate roles and responsibilities of the Federal government versus the State and local governments. The SLFC CONOPS, SLFC Program Management Office's *DHS Support Implementation Plan for State and Local Fusion Centers*, and the *National Information Sharing Strategy* have enumerated many of these roles and responsibilities. *See Support Implementation Plan for State and Local Fusion Centers: Executive Summary* (June 2006) and *National Strategy for Information Sharing Successes and Challenges in Improving Terrorism-Related Information Sharing*, "Appendix 1: Establishing a National Integrated Network of State and Major Urban Area Fusion Centers: Roles and Responsibilities of Federal, State, Local, and Tribal Authorities," (October 2007).

While considering these roles and responsibilities, it is equally important to articulate a framework that addresses any conflict of civil liberties laws that may arise in the course of information sharing between the Department and the State and local entities. On the one hand, applicable Federal laws may restrict how the Department shares or uses data, particularly an individual's data, with State and local entities and outside parties. On the other hand, some States have adopted sunshine laws, which may provide less civil liberties protections than its Federal counterpart. In addressing this concern,

² As of November 30, 2007.



the SLRFC initiative maintains that Federal information is governed by Federal law, while any information shared with State and local, may then be subject to applicable State laws. Additionally, much of the information shared with the FCs is maintained on Federal databases, such as Homeland Security Information Network (HSIN) or Homeland Secure Data Network (HSDN), whereby access is given to FCs officials. In moving forward, the SLRFC Initiative should encourage that this framework be translated and incorporated into governing standard operating procedures, systems, and training that governs how information is shared beyond Federal systems.

The Department's role in coordinating with the private sector raises civil liberties concerns, such as potential mission creep and what type of individual data is shared. As previous reports on FCs have identified, there is common misconception that fusion centers have access to large amounts of private sector data or share information on individuals with the private sector. *See e.g. CRS Report for Congress, "Fusion Centers: Issues and Options for Congress,"* (July 6, 2007). As designed, the primary function of the SLRFC Initiative is to facilitate information sharing between the Department and the State and local government to prevent emerging threats or incidents. However, there are instances where this information sharing with the private sector may be lawful and appropriate, such as addressing specific threats to buildings, obtaining suspicious activity reports from private individuals, and creating incident response plans that factor in private efforts. As the SLRFC initiative further develops, the Office for Civil Rights and Civil Liberties will continue to provide guidance to the Department on the role of the private sector in FCs to ensure civil liberties protections are clearly expressed in applicable policies and procedures.

Redress

A process of redress is an important procedural safeguard at FCs given that information is accessed, used, modified, and shared between the Department and State and local officials that may impact an individual's civil liberties. If an individual believes his or her civil liberties have been violated by the SLRFC initiative, the individual should have an opportunity to raise these concerns. At the state level, the SLRFC initiative should promote and encourage each FC to have a clearly defined process for redress. For example, this process could include information for how to file a complaint with the State's Attorney General Office. If an individual has a concern that involves information shared at the Federal level, there are several arenas of redress. An individual may file a complaint with the U.S. Department of Homeland Security, Officer for Civil Rights and Civil Liberties, by e-mailing a complaint to civil.liberties@dhs.gov or mailing a complaint to the following address:

U.S. Department of Homeland Security
Office for Civil Rights and Civil Liberties
Review and Compliance Unit
Mail Stop #0800
Washington, D.C. 20528

An individual may also file a complaint with the U.S. Department of Homeland Security, Chief Privacy Officer, by e-mailing a complaint to privacy@dhs.gov or mailing a complaint to the following address:

U.S. Department of Homeland Security
Chief Privacy Officer
Washington, D.C. 20528



An individual may file a complaint with the U.S. Department of Homeland Security Inspector General, by emailing a complaint to DHSOIGHOTLINE@dhs.gov or mailing a complaint to the following address:

U.S. Department of Homeland Security
Attn: Office of Inspector General, Hotline
Washington, D.C. 20528

Recognizing that it is sometimes difficult for the individual to know if the information is State or Federal information, all complaints or questions may be submitted to the Federal level for review and will be referred to the State level if appropriate. To date, no such complaints regarding the misuse of an individual's information at State and Local Fusion Centers have been received by the Department.

Safeguards

In addition to redress, the SLRFC initiative has taken a proactive role in establishing procedural safeguards by working with the Office for Civil Rights and Civil Liberties and the Privacy Office. The Department's State and Local Fusion Center Program Management Office (SLFC PMO) has been actively working with these offices to develop mandatory civil liberties and privacy training for Department analyst before deployment. Already, fusion center directors and DHS personnel assigned to fusion centers have now received the Office for Civil Rights and Civil Liberties' list of training materials, such as a tutorial on the Department's policy on racial profiling and a DVD providing an overview of Arab and Muslim cultures, traditions, and values. Specific to the SLRFC Initiative, the Office for Civil Rights and Civil Liberties and the Privacy Office are working with the SLFC PMO to deploy civil liberties and privacy training. The purpose of this training is to teach basic civil rights, civil liberties and privacy awareness at the federal level applicable to most fusion centers and suitable for both federal and/or non-federal partners handling federal information. The training covers relevant federal legal authorities, systems, approaches, policies and missions applicable for fusion centers.³ Such training ensures SLFCs have a keen awareness of civil rights, civil liberties, and privacy issues and help to ensure lawful information sharing between federal and state partners that protect individual rights. The training offered through this program should help fusion center personnel conduct their work while understanding basic rights and using these rights as a compliment to their work, not an afterthought or a hindrance.

The Department's Information Sharing Coordinating Council (ISCC), charged with fulfilling Department tasks outlined in the Information Sharing Environment – Implementation Plan, and the SLFC PMO have also actively involved the Office for Civil Rights and Civil Liberties and the Privacy Office in its review of the State and Local Fusion Center CONOPs, as well as consultation with the Privacy and Civil Liberties Oversight Board⁴. Additionally, the ISCC and SLFC PMO have been collaborating with the Department of Justice's Global Initiative and the Information Sharing Environment (ISE) Privacy Guidelines Committee, where the Office for Civil Rights and Civil Liberties and the Privacy Office serve as members, in preparing and distributing guidance on

³ While the training will not cover state law, it encourages SLFCs to understand and comply with state civil rights, civil liberties, and privacy laws by working with relevant state officials.

⁴ DHS consulted with the earlier iteration of the Privacy and Civil Liberties Oversight Board, and will continue to consult the Privacy and Civil Liberties Oversight Board once the new Board, as conceived in the 9/11 Act, stands up.



implementing privacy and civil liberties policies at FCs. These cooperative relationships help facilitate program development that builds in safeguards for civil liberties at inception.

In addition, the SLFC PMO has made a concerted effort to provide transparency of the initiative to Congressional oversight, the Inspector General, and non-governmental organizations concerned about civil liberties. The SLFC PMO Director has met with several non-governmental organization and other oversight entities to explain the program and to address any civil liberties concerns. This level of transparency helps foster an open and constructive dialogue where civil liberties issues can be identified and addressed by ensuring necessary safeguards are in place.

Finally, this Office is required to submit a one year follow-up civil liberties impact assessment under the *Implementing Recommendations of the 9/11 Commission Act of 2007*. The Department's Privacy Officer also has a similar requirement. These follow-up assessments will provide an opportunity to examine how safeguards and protections of civil liberties are embedded in developing policies and procedures.

CONCLUSION

This Office will continue to work with the SLRFC Initiative to address civil liberties issues identified in this assessment and to help ensure that procedural safeguards are in place to protect our freedoms. As the SLRFC Initiative evolves in the upcoming months and years, this Office will continue to revisit these issues of concern and evaluate new issues that may arise. As Congress, the President, and the Department have recognized, fusion centers are key to sharing information that may prevent threats to our Nation. At the same time, we must ensure information is shared in accordance with the law. As noted previously, CRCL will conduct a follow-up one-year assessment of the SLRFC Initiative pursuant to Sec. 511(d)(2) of 9/11 Act. This assessment will further examine the Initiative's impact on civil liberties, particularly as it relates to SLRFC analysts' access to information gathered by non-Federal partners, how analysts obtain, access, process, and analyze information, and other issues that have developed since the time this assessment was completed.



Approval Signature Page

Original signed and on file with the DHS Office for Civil Rights and Civil Liberties

Daniel W. Sutherland

Officer for Civil Rights and Civil Liberties

Department of Homeland Security



APPENDIX A:

Questions considered in conducting this civil liberties impact assessment:

- *Is the program intended to have a direct impact on certain racial or ethnic groups? Even if it is not, might the program have an effect on certain racial or ethnic groups that might reasonably be perceived to be intentional?*
- *Would the program further the Constitutional principle of race-neutral government action, or would it encourage or depend upon a government official categorizing people by race?*
- *How would the program affect people with disabilities?*
- *How would the program affect those attempting to exercise a particular religion?*
- *How would the program affect people with limited English language proficiency?*
- *Would the program increase the authority, control, or influence of the federal government in its relationship with private citizens? Specifically:*
 - *Would the program require or authorize the federal government to collect more information about private citizens?*
 - *Would the program require or authorize the federal government to centralize the collection of information that was previously dispersed?*
- *Would the program increase the authority, control, or influence of the federal government in its relationship with state or local governments?*
- *Would the program increase the authority, control, or influence of the federal government in its relationship with the private sector?*
- *Would the program require or authorize the federal government to share information about private citizens with third parties outside the federal government?*
- *Does the program include an intelligence or surveillance component? Will the program be governed by the provisions of Executive Order 12333 and/or the National Security Act of 1947?*
- *Is the program the least burdensome alternative with respect to civil liberties? Could the agency formulate other alternatives to accomplish the same goal while minimizing the impacts on civil liberties?*
- *Could the agency alter the program to enhance civil liberties?*
- *Will any impositions on liberty created by the program be voluntarily incurred?*
- *Is any imposition on civil rights and civil liberties equally distributed, randomly distributed, or focused on identifiable groups?*



- *Is any imposition on civil rights and civil liberties brief or extended?*
- *Would effective implementation of the program be dependent, in whole or in part, on government employees having a heightened awareness of Constitutional rights, federal laws or regulations, or Departmental policies as they carry out their duties?*
- *Would the program increase or decrease the discretion of those employees or agents implementing the program?*
- *Does the program have embedded legal counsel or ready access to legal counsel?*
- *Are reports to Congress, or Congressionally-mandated audits, required, and if so are they one-time or periodic in nature?*
- *Could the program limit protected political or religious expression? Could the program implicitly chill open discourse or a person's ability to express their beliefs in writing that does not threaten or amount to shouting fire in a theater?*
- *Could the program lead to some restriction on property ownership, such as real, personal or intellectual property, firearms, or would it grant an unfair advantage to a particular business entity? Will the program have an impact on voting rights? Does the program take the least restrictive approach possible to regulating travel, including the travel of United States citizens? Does the program take away a freedom without affording proper due process?*