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Introduction

In over ninety years of service to the Government and the public as a principal source of information on subjects broadly connected with labor, the Bureau of Labor Statistics has successfully relied on the willingness of its respondents to provide the basic information used in nearly all of its statistical programs. This outstanding history of respondent cooperation has been based to a great extent on the widespread recognition that the statistical programs involved are in the interest of the general public and very often to the respondents as well. Respondent cooperation has stemmed also from the understanding that the data collected are intended for statistical purposes only, and will not be disclosed or used for any other purpose without the respondent's express permission. The Bureau has sought to foster this expectation and to merit that trust, and has followed an administrative policy of data confidentiality and respect for the privacy of its respondents. The advent of the Freedom of Information Act in 1967, the 1974 Amendments to the FOIA, and the Privacy Act of 1974 have required the Bureau to consider more carefully the actions which it must take to continue to receive the active support and cooperation of its respondents. The purpose of this paper is to describe the nature of the Bureau's statistical programs, the implications of privacy and freedom of information legislation for their present and future conduct, and the action which the Bureau is taking to assure the continued success of its programs within the context of these statutes.

I. The Nature of the BLS Statistical Programs and Systems of Records.

The Bureau of Labor Statistics is a fact-finding agency engaged in the collection, analysis, and dissemination of economic information. It has the dual roles of compiling and disseminating basic data covering the economy and of serving as the research arm of the Department of Labor and preparing studies and factual analysis for the guidance of the Secretary. Over the years, the Bureau has developed a body of general-purpose statistical series on wages, prices, manpower, and productivity that are available to the public.

The Bureau gathers its data through three basic approaches:

- (1) The Bureau collects most of its wages and retail price data from business establishments either by the personal visit of a Bureau data collector, through telephone contacts with respondent establishments or through mail questionnaires.
- (2) The Bureau obtains most of its data derived from households or persons from the Bureau of the Census. The Bureau of the Census collects data for the BLS on employment and unemployment as part of its Current Population Survey (CPS). It also collects data on consumer spending patterns (Consumer Expenditure Survey or CEX) and information on where consumers make item purchases (Point of Purchase Survey or POPS). The latter are used in the revision of the CPI.
- (3) The BLS obtains other data in cooperation with agencies of State government. Much of the Bureau's data on establishment employment, hours and earnings, labor turnover, and occupational employment are collected by State Employment Security agencies who forward the micro data to the Bureau for tabulation of national estimates. Data used for occupational safety and health statistics are collected by other cooperating State agencies and in a few instances directly by the Bureau. The Bureau is perhaps unique among Federal statistical agencies in the extent to which Federal/State cooperative statistical programs have been developed and implemented.

Most of the Bureau's data sources are business and institutional entities. In those cases where information is collected directly from an individual, the data generally cannot be used to identify that individual. For example, in the surveys mentioned above which the Census Bureau conducts for the BLS, micro data transferred to the BLS have been edited to remove individual identifying information. When rent data for the CPI are collected from a tenant rather than from a landlord or apartment manager, the data record concerns only the "price" of the rental unit, not information about the tenant. In another regular Bureau program, the Characteristics of the Insured Unemployed, social security numbers (but not names and addresses) of individual respondents are collected by the State Employment Security agencies from a 10 percent sample of those filing claims for unemployment insurance and these data are made available to the Bureau. Thus, only a small proportion of the Bureau's records identify individual persons as opposed to other kinds of reporting entities, and this fact greatly conditions the impact, described at greater length below, which the Privacy Act of 1974 has on the BLS.

Respondent cooperation is a key factor in the success of the Bureau's directly collected and cooperative programs. This cooperation is entirely voluntary except in the case of the Bureau's Occupational Safety and Health Statistics program, where the law requires mandatory reporting by sampled establishments, and in the case of the survey of characteristics of the insured unemployed, where data are essentially derived from the administrative actions of unemployment insurance claims takers.

A significant decline in respondent cooperation would adversely affect the quality and reliability of BLS statistics. Such an event would in turn threaten to reduce the utility of such key economic indicators as the Bureau's employment statistics and price indexes. Therefore, it is crucial to the Bureau's continued operation that respondent trust be retained and that the Bureau assure that this trust is merited. To the extent that each respondent's cooperation is contingent on the expectation that data given in confidence will be held and treated in confidence, then circumstances that could reduce that expectation would have a negative impact on the programs of the Bureau. It is in this context primarily that this paper considers the impact of the Privacy and Freedom of Information Acts on the voluntary statistics programs of the BLS.

II. Impact of Privacy Act.

The Privacy Act of 1974 amends Title 5, United States Code, by providing a new section 552a which serves, in part, to protect records about citizens and resident aliens from unwarranted use or disclosure by Federal agencies. "Records" are defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."^{1/} The coverage of the Act is not extended to cover records concerning business or other entities. Consequently, the Privacy Act applies to only a small set of the data which the Bureau collects and retains. In this respect the Privacy Act has less of an impact on the BLS than on most other Federal statistical agencies. At the present time, the Bureau conducts only one statistical program involving a system of records, its survey file of the Characteristics of the Insured Unemployed, which is covered by the Act. Therefore the administrative burden of the Act on the program operations of the Bureau is expected to be slight. Department of Labor regulations covering the Privacy Act and notice of the Department's systems of records will be issued very shortly.

III. Impact of Freedom of Information Act.

The 1974 amendments to the Freedom of Information Act (FOIA)^{2/} are intended to make Federal agencies more responsive to the public's requests for information. Their enactment coincides with and reflects heightened public concern that information held by the Federal Government should be widely and generally accessible to all citizens. It is clear from the legislative history of the original FOIA passage and the 1974 amendments that Congress has sought to make all information publicly accessible, except for those matters very specifically exempted. This poses the question of whether identifiable, individual respondent records held by the Bureau must be provided to the public under the disclosure requirements of the Act or can be withheld under one of the nine specific exemptions which the Act enumerates. If such data could not be established as exempt under the Act, then the Bureau's pledge of confidentiality to respondents would become largely meaningless.

It is the view of the BLS, supported by the opinion of the Solicitor of Labor, that section (b)(4) of the Act, exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential," clearly applies to data collected by, or in cooperation with, the BLS under an actual or implied pledge of confidentiality. The exemption also covers any information which might disclose the presence of a respondent in a sample, or the publication or release of aggregated data that fail to satisfy reasonable statistical disclosure tests.

This interpretation finds support in both the legal and the legislative record of the FOIA. For example, in the case of National Parks and Conservation Association vs. Morton, et.al.,^{3/} the Court's interpretation of exemption (4) was consistent with the Bureau's claim to protection under that provision. Specifically, the Court stated that commercial or financial matters are confidential if disclosure of the information is likely to impair the Government's ability to obtain necessary information in the future. In expressing this view the Court relied on the legislative history of the FOIA, citing the debate on a predecessor bill of 1964. Although one of that bill's provisions explicitly exempted trade secrets from its coverage, commercial or financial information was not similarly exempted. Noting this, Senator Humphrey during debate on the Senate floor pointed out that the sources of information relied upon by the Bureau of Labor Statistics would be "seriously jeopardized" unless the information collected by the Bureau were exempt from disclosure.^{4/} He was then

assured by the Chairman of the Committee reporting the legislation that such information was fully protected under the exemption as it then appeared.

The Department of Labor regulations ^{5/} implementing the FOIA which govern the BLS have been drafted in accordance with the clear view that BLS data collected in confidence are not disclosable. Thus "every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing or making known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . , which information concerns or relates to ^{6/} . . . confidential statistical data . . .

One of the Bureau's basic functions is to disseminate information. As a practical matter, the amended FOIA does not greatly change the Bureau's data dissemination activities. BLS personnel may continue to furnish routinely, and without changing existing procedures, the information which they have customarily provided to the public. However, requests for confidential information held by the Bureau, ^{7/} or explicitly invoking provisions of the FOIA must be handled as FOIA requests. In such cases the time limitation for action on requests and appeals specified by the Act must be met in accordance with the procedures contained in the Department's regulations. ^{8/} If such a request is made orally to a Bureau employee, the requester must be advised to address the request in writing to the Commissioner of Labor Statistics, with the term "FOIA Request" clearly marked on the envelope to insure special handling within the Bureau once it has been received. All written requests received in other parts of the Bureau involving data protected by the Bureau's confidentiality policy are also to be forwarded promptly to the Office of the Commissioner.

The Bureau itself has directly received only one formal FOIA request to date. That request was for a report which the Bureau was preparing for the Secretary of Labor under the terms of the Comprehensive Employment and Training Act of 1973. On other occasions the Bureau has been asked to review its records to see if it holds any information which relates to FOIA requests received elsewhere in the Department. None of these instances have posed disclosure problems for the Bureau. As a result, it has not been necessary for the Bureau to allocate significant resources to meet the administrative burden of the Act or to establish a special organizational unit with dedicated responsibilities in this area.

While the administrative impact of the FOIA and the amendments of 1974 has been slight,

there have been indications that respondent cooperation might be affected to some extent. The FOIA amendments were enacted within the context of widespread public concern about the Federal Government's responsiveness to the public's requests for information. By emphasizing a rigorous discipline for Government disclosure, the amendments have alerted Bureau respondents to the limited circumstances in which Federal agencies may withhold data. This has caused a number of Bureau respondents to question whether under the FOIA the Bureau might be compelled to disclose individual respondent data. This question has been raised particularly by larger companies which consult with their legal departments or outside attorneys before participating in BLS surveys. These larger establishments are usually crucial in BLS samples and their refusal to cooperate can have a particularly adverse impact on the conduct of BLS surveys. In recent months the Bureau has received numerous requests for clarification of its confidentiality policy and the basis of its safeguards under the FOIA. In all such cases the Bureau has assured respondents that confidential data will continue to be protected, and to affirm that confidential BLS data are exempt from disclosure under exemption (4). As yet there are no known instances where respondents have failed to cooperate specifically because of concerns about BLS confidentiality safeguards under the FOIA. While the existence of the FOIA may have been a factor where cooperation was not forthcoming, the principal cause for noncooperation is now, as before, dissatisfaction with the volume of Federal, State, and local government data gathering, rather than specific distrust of the BLS and its status under the FOIA. While there is no evidence that respondent cooperation has declined as a result of the FOIA, the level of concern over confidentiality is clearly more acute and extensive now than in the period prior to the recent publicity surrounding privacy and freedom of information.

IV. Recent BLS Actions.

The Bureau has acted to assure continued respondent trust by seeking to clarify and publicize the safeguards afforded respondent data under exemption (4) of the FOIA; by assessing its internal practices and those of its partner cooperating agencies to assure that they are consistent with contemporary requirements; and finally by formulating a legislative proposal to reinforce respondent confidence and cooperation through statutory protection of data collected in confidence by, or in cooperation with, the Bureau of Labor Statistics. The objective of such legislation would be to place confidential BLS data squarely under the protection of the FOIA's exemption (3), which specifically protects matters exempted from disclosure by

statute. This protection would be similar to that which the Census Bureau now has under Title 13.

The Bureau faces a different set of circumstances than applies to other Federal statistical agencies in formulating a suitable legislative proposal because of the vital need to accommodate the various interests involved in cooperative Federal-State programs. Federal-State statistical program cooperation has been a productive arrangement for all parties concerned. It has, for example, reduced multiple reporting requirements imposed on respondents. However, it also increases the complexity of assuring adherence to the confidentiality and privacy expectations of respondents.

This complexity results in part from the fact that access to data collected under a pledge of confidentiality ^{9/} is shared by agencies operating under a range of specific laws, organizational arrangements, and program and operating priorities. In addition, there is a range of views as to just what the term "confidential" means. Some State agency personnel, for example, believe that it would not be a violation of the confidentiality pledge to use confidential micro data for constructive employer-oriented job development programs, as long as the data are not disclosed outside the agency. Use of data for such purposes would also further serve to reduce the need for duplicate data gathering. The view of others, shared by the BLS, is that confidential data must be limited to statistical uses only, except where the respondent has granted permission to use the data for some other specified purpose. Thus it can be seen that the challenge in drafting legislation within the context of a full-fledged Federal-State relationship is to provide a suitable basis for meeting a range of statistical, research, and appropriate operational needs, without compromising the basic confidentiality standards to which the Bureau and its partners must adhere.

The Bureau will continue to work actively with the State agencies to assure that all data collected in confidence are accorded a full measure of protection, whether or not legislation is ultimately proposed by the Department and adopted by the Congress. While doing this the Bureau must also provide for constructive alternative statistical approaches to satisfy State agency information requirements that do not compromise the Bureau's ability to safeguard individual respondent data. The Bureau would need to follow such a course of action regardless of the existence of the Privacy and Freedom of Information Acts. However, the existence of these statutes has reemphasized the importance of Bureau policies and practices that merit continued respondent trust and confidence.

Footnotes

- ^{1/} 5 U.S.C. 522a(a)(5)
- ^{2/} 5 U.S.C. 552
- ^{3/} U.S. Court of Appeals, District of Columbia Circuit, April 24, 1974.
- ^{4/} 110 Congressional Record 17667 (1964)
- ^{5/} Contained in Title 29, Code of Federal Regulations, Part 70
- ^{6/} 29 C.F.R. Part 70.21
- ^{7/} Generally any information which would identify respondents directly or by imputation. The Bureau's administrative policy on this matter is set forth in Commissioner's Administrative Order 6-3.
- ^{8/} 29 C.F.R. Part 70.53-55
- ^{9/} The statements on the collection forms used in the various surveys vary, but all promise that the State and Federal agencies cooperating in the data gathering program will hold the data in confidence.