



September 2, 2008

Michael Dever  
Bureau of Justice Assistance  
810 7<sup>th</sup> Street NW  
Washington, DC 20531

Re: OJP Docket No. 1473, Comments on Department of Justice Proposed Amendments to 28 C.F.R. 23, Criminal Intelligence Systems Operating Policies  
(Submitted electronically)

Dear Mr. Dever,

OMB Watch submits these comments as an organization dedicated to government accountability, transparency, civic participation and a strong civil society. We urge the Department of Justice (DOJ) to withdraw proposed amendments to 28 C.F.R. 23, which governs programs that receive funding under the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), published in the Federal Register on July 31, 2008. The proposed changes are unnecessary to protect public safety and national security, and harmful because they threaten freedom of speech and association, and relax quality control for information collected and stored.

The proposed rule is a major shift in long established policies that is being rushed through with a short comment period. It also violates a memo from White House Chief of Staff Joshua Bolton that states, "[R]egulations to be finalized in this administration should be proposed no later than June 1, 2008" and finalized by Nov. 1, except in extraordinary circumstances.

Law enforcement officials do not need the proposed amendments to collect and share information about criminal activity, including terrorism. Both the current rule and the powers in the Patriot Act provide law enforcement with expansive investigative powers. Instead, it appears the real justification for the proposed new rule is after-the-fact validation of illegal surveillance and investigation of lawful activities of Americans. This illegal surveillance has been well documented by the ACLU Spy Files Project<sup>1</sup> and revelations of illegal warrantless surveillance of Americans under the guise of the Foreign Intelligence Surveillance Act.<sup>2</sup> Illegal information sharing was revealed in criminal charges brought against military reservists at Camp Pendleton

<sup>1</sup> <http://www.aclu.org/safefree/spyfiles/index.html>

<sup>2</sup> "Illegal Government Surveillance: It's Not Just for Foreigners", *Electronic Frontier Foundation*, Jan. 30, 2008 at <http://www.eff.org/deeplinks/2008/01/illegal-government-surveillance-its-not-just-foreigners>

in California for stealing classified information to share with local law enforcement in Los Angeles.<sup>3</sup>

Specifically, we object to:

*Opening the door to investigation of legal activities*

The proposed amendment to 28 C.F.R. 23.2 would add "domestic and international terrorism, including material support thereof" to the list of activities that could be investigated. This is redundant, since terrorism and providing material support for it are crimes, and the current rule already covers criminal activity. A separate listing implies that non-criminal activity could be subject to investigation.

This is not just a potential danger. The government has treated free speech activities as a terrorist threat, using anti-terrorism resources to investigate people and groups that publicly and vocally dissent from Bush administration policies. For example, in July 2008 ACLU reports revealed that Maryland state police infiltrated the Baltimore Pledge of Resistance, a peace group, the Coalition to End the Death Penalty (CEDP), and the Committee to Save Vernon Evans<sup>4</sup> despite the fact that no violent protests were planned. The state police shared information from the surveillance with at least seven federal, state, and local law enforcement agencies. Similarly, in 2005, the Department of Defense identified a 79 year-old grandmother attending an anti-war meeting at a Quaker meeting house in Florida as "potential terrorist activity"<sup>5</sup> after the American Friends Service Committee invited the public to join a protest against the Iraq war.

*Making speech and association targets of investigation*

The addition of "organizations" to the list of targets for information collection and storage in proposed 28 C.F.R. 23.20(a) invites government scrutiny based on political point of view or religious belief. The current regulation clearly allows investigation of individuals using organizations to carry out criminal activity. Expanding the list of investigative targets to "organizations" threatens freedom of association, since Americans may become reluctant to participate in organizations if they feel it will make them targets of government investigations. Nonprofit organizations are essential to fostering free exchange of ideas and healthy debate on public policy issues. When government investigative powers are used to intimidate or silence this voice, our entire democratic system suffers.

This problem is exacerbated by the expansive information sharing proposal in the rule at proposed 28 C.F.R. 23.(e), which would allow private information, untested by rules of evidence or a validation process, to be shared with employers, creditors, landlords and others. The

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<sup>3</sup> Rick Rogers "2 Marines charged in secrets theft ring", *San Diego Union Tribune*, July 18, 2008

<sup>4</sup> Press Release "ACLU of Maryland Lawsuit Uncovers Maryland State Police Spying Against Peace and Anti-Death Penalty Groups", July 17, 2008 at [http://www.aclu-md.org/aPress/Press2008/071708\\_PeaceGroups.html](http://www.aclu-md.org/aPress/Press2008/071708_PeaceGroups.html)

<sup>5</sup> *Collateral Damage: How the War on Terror Hurts Charities, Foundations and the People They Serve*, OMB Watch and Grantmakers Without Borders, p. 70 July 2008

practical effect of such sharing could be to effectively blacklist the subject of the investigation, even when no criminal activity is suspected.

The proposal in 28 C.F.R. 23.20(h) to allow information collected under the proposed rule to remain in government databases for ten years before it is reviewed or validated greatly increases the potential for harm to innocent Americans. It also decreases the likelihood such databases will provide useful information to law enforcement, since solid information will be needlessly buried in a haystack of inaccurate and outdated data.

Abuse and politicization of investigative powers are not just a potential danger. The problem already exists, and has been exposed in the press. In our July 2008 report, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, co-authored with Grantmakers Without Borders, we devoted an entire chapter to examples of government surveillance and investigation of peaceful organizations whose only "crime" was to dissent from Bush administration policies.<sup>6</sup> In that report we noted that:

"These actions illustrate an unfortunate historical tendency by the U.S. government to use overbroad police and national security powers for political purposes. This result almost inevitably flows when the law lacks clear standards, transparency, due process, and independent review. Beginning with the Alien and Sedition Acts of 1798, the U.S. government's response to national emergencies has included suppression of political dissent and opposition. This includes the Palmer Raids during World War I, the internment of Japanese-Americans during World War II, the civil liberty abuses of the McCarthy era, and the FBI's COINTELPRO program during the 1960s that interfered with civil rights and peace groups."

The original regulation in 28 C.F.R. 23 was written to protect Americans from this kind of abuse. The need for such protections has not gone away. In fact, recent history proves it is needed more than ever.

### *Conclusion*

In 1968 when Congress passed the Safe Streets Act it instructed the Office of Justice Programs to come up with regulations that insure criminal intelligence systems are "not utilized in violation of the privacy and constitutional rights of individuals."<sup>7</sup> The current regulation, at 28 C.F.R. 23.20(b) clearly states:

"A project shall not collect or maintain criminal intelligence 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."

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<sup>6</sup> Chapter 8: Counterterrorism Measures Used to Limit Dissent and Debate on Public Policy Issues, at [http://www.ombwatch.org/npadv/PDF/col42 U.S.C.A.3789\(g\) lateraldamage\\_chapter8.pdf](http://www.ombwatch.org/npadv/PDF/col42%20U.S.C.A.3789(g)%20lateraldamage_chapter8.pdf)

<sup>7</sup> 42 U.S.C.A.3789(g)

The proposed rule would be inconsistent with the Safe Streets Act and effectively repeal this very necessary protection of our constitutional rights. As a result, it should be withdrawn.

Yours truly,

A handwritten signature in cursive script that reads "Kay Guinane".

Kay Guinane  
Director, Nonprofit Speech Rights