



Acting General Counsel

U.S. Department of Justice
Executive Office for Immigration Review
Office of the General Counsel

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April 22, 2015

Steven Lang
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Office of Legal Access Programs
Executive Office for Immigration Review
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RE: Confidentiality of data collected by the Vera Institute of Justice regarding justice AmeriCorps

Dear Mr. Lang,

This letter is being provided in response to your request to the Office of General Counsel (OGC) to provide advice regarding safeguards attaching to personally identifiable information (PII) and other case and client-specific data provided by justice AmeriCorps (jAC) grantees (collectively, Grantee Data) to the Vera Institute of Justice (Vera).

By way of background, the jAC program is intended to improve the effective and efficient adjudication of immigration court proceedings involving certain children who crossed the border without a parent or legal guardian and who must appear in our immigration courts (Unaccompanied Children). In order to test this premise, the Executive Office for Immigration Review (EOIR) entered into a contract with Vera (Contract) to conduct a comprehensive study of the program. jAC grantees, in turn, agreed through the terms and conditions of the Notice of Funding Opportunity and the Notice of Grant Award to participate in the evaluation. Under the terms and conditions for these grants, jAC grantees are required to collect and report the Grantee Data to the vendor (Vera) conducting the evaluation. Vera will take this information about jAC program cases and clients¹ and compare it to data that EOIR will provide about all cases involving juveniles (EOIR Data), thereby enabling Vera to compare the efficacy of

¹ The Grantee Data includes the name, age, gender, and alien number assigned to children represented by jAC members. This information does not invade the attorney-client relationship, as the fact that an attorney represents a particular client is not privileged information. *See, e.g., Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1114 (Mass. 2007) (observing that it is “well recognized ... that the identity of an attorney’s client . . . [is] not normally protected by the attorney-client privilege.” (Citation omitted)); *Ravary v. Reed*, 415 N.W.2d 240, 243 (Mich. Ct. App. 1987) (observing the general rule that “the identity of an attorney’s client is information which is not protected from disclosure by the attorney-client privilege.” (Citation omitted)); *State v. Tate*, 239 S.E.2d 821, 824 (N.C. 1978) (stating that the attorney client privilege “extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose. . . .” (Citation omitted)).

adjudications in which children are represented by jAC members relative to all adjudications involving juveniles. Vera will report its results (Report) to EOIR and CNCS using anonymized and aggregated data. At the end of the evaluation Vera will destroy the Grantee Data.

There are several statutory and procedural safeguards in place to ensure that EOIR is precluded from obtaining the Grantee Data from Vera. Under the Privacy Act, government agencies may not obtain PII unless the information “is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute.” The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974), 5 U.S.C. § 552a(e)(1).² The Grantee Data (and any PII contained in it) is not relevant or necessary to the agency’s function of ensuring efficient and fair proceedings, since the study results (as well as the representation provided by jAC members to Unaccompanied Children appearing before EOIR’s immigration judges) will serve that need.

Moreover, the Contract provisions ensure that the Grantee Data will not become part of a government system of records because Vera, a third party entity, will be the custodian of the Grantee Data and preparing a Report for EOIR containing only aggregated, anonymized, and/or redacted data. (“The Contractor will be responsible for ensuring that research performed under this contract is redacted and/or anonymized in accordance with Institutional Review Board (IRB) standards. Upon request, the Contractor will provide EOIR with case-specific data sufficiently redacted and/or anonymized in order not to disclose to EOIR any IRB, attorney client, or other protected information.”)³

Furthermore EOIR has ensured that the confidentiality of the Grantee Data is to be strictly maintained. The Contract includes a general prohibition on disclosure:

The services to be performed under this Statement of Work may involve access to sensitive or protected information and data (including Personally Identifiable Information and other confidential identifying information). The Contractor shall comply with all security-related requirements as specified in Appendix A and have all contractor employees or subcontractors working on the contract complete the documents in Appendices B (Confidentiality Notice) and C (Information Technology (IT) Security User General Rules of Behavior) and return the completed documents to the COR before beginning performance on the contract.

Appendix A provides that “[d]uplication or disclosure of sensitive data to which the Contractor may have access as a result of this Task Order is prohibited by Public Law and is subject to criminal penalties, unless specifically authorized.” *See also* Appendix A, section 3.2.

² *See also* OMB Memorandum 07-16, *Safeguarding Against and Responding to the Breach of Personally Identifiable Information*, <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf> (specifically requiring agencies to reduce personally identifiable holdings to the minimum necessary for proper performance of agency functions); National Institute of Standards and Technology, Department of Commerce, Special Publication 800-122: *Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)*, at 2-3 (Apr. 2010), *available at* <http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf>.

³ The Grantee Data is also protected from Freedom of Information Act disclosures because Vera – not EOIR – will be the custodian of that data. Vera is not a government agency and the data will not become a government record. *See* 5 U.S.C. 552(f)(1)(2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

The Contract also requires that Vera maintain high level, industry standard measures for safeguarding the security and confidentiality of stored data (including, but not limited to, back-up methodologies, firewalls, encryption techniques, socket security features, and intrusion-detection systems), and that all data will be secured by such systems in any computer or device that Vera uses to access Grantee Data under the terms of the Contract. Vera will destroy the Grantee Data, and any Vera work product that includes Grantee Data will be redacted and/or anonymized before Vera provides those materials to EOIR.

Finally, confidentiality protections are required by the regulations governing government-supported research involving persons, and the evaluation project must be reviewed by an Institutional Review Board (IRB). 45 C.F.R. § 46.101 *et seq.* These regulations require that “there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.” 45 C.F.R. § 46.111. Vera’s IRB has reviewed and approved this evaluation.

In summary, the confidentiality of information provided by the grantees to Vera is fully protected by law and by the Contract.

Thank you for the opportunity to review this matter.

Sincerely,

Jean C. King
Acting General Counsel