



ASIAN AMERICANS  
**ADVANCING  
JUSTICE**  
AAJC

VIA EMAIL

February 21, 2017

Jennifer Jessup  
Departmental Paperwork Clearance Officer  
Department of Commerce  
Room 6616, 14th and Constitution Avenue NW  
Washington, DC 20230  
[jjessup@doc.gov](mailto:jjessup@doc.gov)

**Re: Notice of revision of the confidentiality pledge under Title 13 United States Code, Section 9**  
(Document Citation: 81 FR 90319)

Dear Ms. Jessup:

Asian Americans Advancing Justice – AAJC submits this comment in response to the Census Bureau’s federal register notice regarding the Revision of the Confidentiality Pledge Under Title 13 United States Code, Section 9, 81 FR 94321 (December 23, 2016). The confidentiality pledge, in its current form, has served the Census Bureau well in gaining the trust and protecting the civil liberties of people residing in the United States, and any revision to this fundamental and time-tested promise raises concerns. The proposed revision of the confidentiality pledge is the result of a false choice between security and confidentiality, which risks compromising personally identifiable or proprietary data of U.S. households and organizations and discouraging participation in the Census Bureau surveys. Therefore, we urge the implementation of alternative measures by the Census Bureau and the U.S. Department of Homeland Security (DHS) that will allow the Census Bureau’s longstanding confidentiality pledge to remain intact while complying with the Federal Cybersecurity Enhancement Act of 2015.

### **Organizational Background**

Advancing Justice – AAJC is a national non-profit, non-partisan organization founded in 1991. Our mission is to advance the human and civil rights of Asian Americans, and build and promote a fair and equitable society for all. Our wide-ranging efforts include promoting civic engagement, forging strong and safe communities, and creating an inclusive society.

Advancing Justice – AAJC is part of Asian Americans Advancing Justice (Advancing Justice), a national affiliation of five independent nonprofit organizations dedicated to serving our nation’s

most rapidly growing racial minority community. The Advancing Justice affiliation is comprised of our nation's oldest Asian American legal advocacy center located in San Francisco (Advancing Justice – Asian Law Caucus), our nation's largest Asian American advocacy service organization located in Los Angeles (Advancing Justice – Los Angeles), the largest national Asian American policy advocacy organization located in Washington D.C. (Advancing Justice – AAJC), the leading Midwest Asian American advocacy organization (Advancing Justice – Chicago), and the Atlanta-based Asian American advocacy organization that serves one of the largest and most rapidly growing Asian American communities in the South (Advancing Justice – Atlanta). Additionally, over 150 local organizations are involved in Advancing Justice – AAJC's Community Partners Network, serving communities in 32 states and the District of Columbia.

Advancing Justice – AAJC considers the Census, including the American Community Survey (ACS), to be the backbone of its mission. Advancing Justice – AAJC has maintained a permanent census program monitoring census policy, educating policy makers, and conducting community outreach and education to encourage participation in the surveys conducted by the Census Bureau in conjunction with other Advancing Justice affiliates.

### **Confidentiality Is Critical to a Fair and Accurate Census**

Confidence in the confidentiality of survey responses is critical to the Census Bureau's ability to conduct a fair and accurate census. As the Census Bureau itself notes, "[m]any of the most valuable Federal statistics come from surveys that ask for highly sensitive information.... Strong and trusted confidentiality and exclusively statistical use pledges under Title 13, U.S.C. and similar statistical confidentiality pledges are effective and necessary in honoring the trust that business, individuals, and institutions, by their responses, place in statistical agencies."<sup>1</sup>

Title 13 requires confidentiality of data collected by the federal government and originally prohibited the Secretary of Commerce or any other officer or employee of the Department of Commerce from: a) using data collected for any purpose other than the statistical purposes for which it is supplied; b) publicizing the data collected in any manner by which a particular establishment or individual can be identified; and c) permitting anyone other than the sworn officers and employees of the department/bureau/agency to examine the individual responses. It also requires the Census Bureau to disclose to individuals and businesses surveyed that the sole purpose to the data collected is for statistical use.

Additionally, in 2002, the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) expanded the confidentiality protection to all federal data collected for statistical purposes under a confidentiality pledge. CIPSEA places strict limitations on the disclosure of individually identifiable information, assures federal statistical survey respondents of the nature of the confidentiality, and requires informed consent from respondents before disclosure of their statistical information (and those who will have access to that information). Importantly,

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<sup>1</sup> Department of Commerce, Census Bureau; Revision of the Confidentiality Pledge Under Title 13 United States Code, Section 9, 81 Fed. Reg. 94,321-22 (Dec. 23, 2016).

CIPSEA also provides penalties (up to 5 years in prison, up to \$250,000 in fines, or both) for employees or sworn agents of statistical agencies who knowingly and willfully disclose confidential information.

These legal protections have been in place for many decades and have played an important role in encouraging people to participate in census surveys. Census Bureau testing has shown that assurances of confidentiality are effective at securing respondent participation in its surveys.<sup>2</sup> Testing for Census 2010 showed that anonymity was important to participants. In addition, participants responded well to assurances that their data would only be used for statistical purposes and responded negatively to the idea of two-way agency data sharing. As the Census Bureau acknowledges, “[t]hese acts protect such statistical information from administrative, law enforcement, taxation, regulatory, or any other non-statistical use and immunize the information submitted to statistical agencies from legal processes.”<sup>3</sup> Census Bureau staff has recommended against including information that evokes strong reactions, like “immigration agencies.”<sup>4</sup>

### **Revised Pledge Abandons Confidentiality Protections**

Revising the confidentiality pledge is a result of an agreement between the Census Bureau and DHS under the Federal Cybersecurity Enhancement Act of 2015 and goes against the most recent decennial census operational plan’s stated goal of ensuring “that all people handling or reviewing Title 13 and Title 26 materials are Special Sworn Status certified.”<sup>5</sup> The agreement has DHS providing “protection against cyber malware” through technology known as Einstein 3A, which “electronically searches Internet traffic in and out of Federal civilian agencies in real time for malware signatures.”<sup>6</sup> Consequently, the revised pledge would state, “Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data.”

Additionally, it is unclear what data will be seen by public officials not bound by Title 13’s strict confidentiality protections. In fact, the Federal Register notice states that when a malware signature is detected by Einstein 3A, “...the Internet packets that contain the malware signature are shunted aside for further inspection by Department of Homeland Security (DHS) personnel. Since it is possible that such packets entering or leaving a statistical agency’s information technology system may contain a small portion of confidential statistical data, statistical agencies

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<sup>2</sup> U.S. Census Bureau, Report of Cognitive Testing of Privacy and Confidentiality-Related Statements in Respondent Materials for the 2010 Decennial: Results from Cognitive Interview Pretesting with Volunteer Respondents (Mar. 28, 2008), available at <https://www.census.gov/srd/papers/pdf/rsm2008-04.pdf> (“Privacy Report”).

<sup>3</sup> Department of Commerce, Census Bureau; Revision of the Confidentiality Pledge Under Title 13 United States Code, Section 9, 81 Fed. Reg. 94321, 94322 (Dec. 23, 2016).

<sup>4</sup> See Privacy Report.

<sup>5</sup> U.S. Census Bureau, 2020 Operational Plan—Version 2.0 (Sept. 2016), available at <http://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan2.pdf> (“2020 Operational Plan”).

<sup>6</sup> Department of Commerce, Census Bureau; Confidentiality Pledge Revision Notice, 81 Fed. Reg. 90319, 90320 (Dec. 14, 2016).

can no longer promise their respondents that their responses will be seen only by statistical agency personnel or their sworn agents.”<sup>7</sup> Neither DHS employees nor the contractors it employs would be subject to the legal penalties for unauthorized disclosures and thus, there can no longer be a guarantee that personally identifiable information could not be accessed by other federal government agencies. Once any such information is in the possession of individuals not bound by Title 13’s strict confidentiality requirements and penalties, the potential for misuse arises and could be difficult to detect, monitor, and prevent. At a time when the Census Bureau itself has identified negative public perceptions and distrust as major threats to a successful decennial census in 2020, this revised pledge moves in the wrong direction.<sup>8</sup>

The reality is that such disclosure of potential DHS access, as well as the inability to guarantee confidentiality of personal data, would reduce response rates to statistical surveys. Lower response rates result in less accurate and timely statistics that can only be summarized at highly aggregated levels and preclude detailed information at the geographic and subpopulation levels. This would likely exacerbate the effects of previous decreases in response rates, leading to unsustainable increases in costs and higher risks of bias in published results. Small and minority populations would likely be underrepresented by official statistics, including Asian Americans, particularly at the disaggregated levels.

### **History Has Shown That Confidentiality Protections Are Critical to a Fair and Accurate Census, and This Is Even More True in Today's Political Climate**

The discussion around the revised confidentiality pledge must be grounded in both the history of confidentiality of census data as well as today’s political climate and anti-immigrant rhetoric. Historically, it is important to remember the most notable case of disclosure of unpublished information to assist another Federal agency was the provision of tabulations of Japanese Americans, by county, county subdivision, and -- in some cases -- by census block -- to the Department of War to help enable the unjust internment of Japanese Americans in camps during World War II.<sup>9</sup> Furthermore, it was later disclosed that the Census Bureau provided specific identifying information on Japanese Americans to the Secret Service as well.<sup>10</sup> Unfortunately, the legal protections in place at the time were not as strong as they are today, and the Census Bureau’s actions did not violate the law. Nevertheless, the tragic outcome – the incarceration of Japanese Americans in internment camps – spurred Congress to strengthen the confidentiality protections in Title 13, to prohibit any disclosure of personally identifiable information for any purpose whatsoever.

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<sup>7</sup> *Id.*

<sup>8</sup> See 2020 Operational Plan.

<sup>9</sup> JR Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WW II*, *Sci. Am.*, Mar. 30, 2007, available at <https://www.scientificamerican.com/article/confirmed-the-us-census-b/>.

<sup>10</sup> William Seltzer & Margo Anderson, *Census Confidentiality Under the Second War Powers Act (1942-1947)* (2007) (paper prepared for presentation at the session on “Confidentiality, Privacy, and Ethical Issues in Demographic Data,” Population Association of America Annual Meeting, March 29-31, 2007, New York, NY), available at <http://www.uwm.edu/~margo/govstat/Seltzer-AndersonPAA2007paper3-12-2007.doc>.

We must be mindful of today's political climate and the public's perception of the government and where its priorities lie because accuracy, a fundamental goal of a census, depends on broad participation by households and organizations. Lack of trust in the confidentiality of personal data provided to the Census Bureau presents a major barrier to census participation, especially among hard-to-count communities, such as Asian Americans, regardless of the survey's mandatory nature. Immigrant<sup>11</sup> and Muslim<sup>12</sup> communities have been shown to already fear the census. Assurances of confidentiality through the pledge has been a critical tool in allaying these fears and garnering responses.<sup>13</sup> The ability to assure these communities about the confidentiality of their response is even more critical today because of the increase in virulent anti-immigrant and anti-Muslim rhetoric. In fact, we have seen reports of immigrants shunning common activities out of fear of reprisal from the government. For example, journalists have noted stories of parents "keeping their children home from school [and] ... suspend[ing] after-school visits to the public library"<sup>14</sup> as well as immigrants avoiding attending church service.<sup>15</sup> Allowing non-sworn agents of the U.S. government to see confidential information for any reason, including advancing the Census Bureau's cybersecurity, would likely generate additional fear in disadvantaged and persecuted communities, resulting in disparate racial and ethnic impacts and undermining the validity of the data.

### **Revised Pledge Not Necessary as Alternative Approaches Are Available That Would Make Revision Moot**

There are practical alternative approaches that would eliminate the need to revise the Census Bureau's successful statistical confidentiality pledge. We believe that the Census Bureau and DHS should implement one of the following two administrative solutions to ensure that personally identifiable information cannot be seen by anyone other than Census Bureau employees or their sworn agents. One solution is to have sworn Census Bureau employees trained to perform Einstein 3A functions for Census Bureau internet traffic. Another solution is to require DHS employees monitoring Census Bureau internet traffic under Einstein 3A take the current Title 13 confidentiality pledge that binds Census Bureau staff to the strict requirements and penalties of the law. These straightforward, sensible solutions would maintain the strict confidentiality protections in the law, promote enhanced data security, and require no revision to the established confidentiality pledge that the Census Bureau makes to respondents.

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<sup>11</sup> Illinois Wesleyan University, *Observing Census Enumeration of Non-English Speaking Households in the 2010 Census: Spanish Report* (Aug. 10, 2012), available at <https://www.census.gov/srd/papers/pdf/rsm2012-06.pdf>.

<sup>12</sup> The Washington Post, *Some Muslims, fearing backlash, worry about intent of census*, (Mar. 10, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030901688.html?sid=ST2010031600020>.

<sup>13</sup> CNN, *Census chief works to calm deportation fears* (Feb. 2, 2010), available at <http://www.cnn.com/2010/US/02/02/census.poor.communities/>.

<sup>14</sup> CNN, *After ICE arrests, fear spreads among undocumented immigrants* (Feb. 12, 2017), available at <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/>.

<sup>15</sup> The Associated Press, *Immigrants wait in fear over raids; Trump takes credit* (Feb. 12, 2017), available at <http://www.cbsnews.com/news/immigrants-wait-in-fear-over-raids-trump-takes-credit/>.

## Conclusion

Thank you for this opportunity to comment on the revisions to the confidentiality pledge as the Census Bureau strives to count everyone once and in the right place, meet the urgent needs of communities, and strengthen public trust and participation in census surveys. If you have any questions, please feel free to contact me at [tminnis@advancingjustice-aaajc.org](mailto:tminnis@advancingjustice-aaajc.org) or (202) 296-2300 x127.

Sincerely,

A handwritten signature in black ink, appearing to read 'TAM' or similar, written in a cursive style.

Terry Ao Minnis  
Director of Census and Voting Programs  
Asian Americans Advancing Justice – AAJC