

Federal Laws That Protect Census Confidentiality

by Kelly Percival

The 2020 Census is rapidly approaching. A fair and accurate census depends on every person's responses remaining confidential. The Census Bureau has repeatedly affirmed the importance of confidentiality to its mission. Congress and numerous presidential administrations have similarly long recognized the centrality of strict confidentiality to getting a complete count.

Nevertheless, in today's environment, trust in the federal government is at an extreme low, especially among communities of color. Many people are fearful that their responses to the 2020 Census might be used against them or their families for immigration or law enforcement purposes.¹ Any effort to use census data in this way, however, would run headlong into robust laws that protect the confidentiality of census data and would trigger a fierce legal fight.

This document provides an overview of the strong, long-standing legal protections that prohibit the Census Bureau or any other part of the federal government from using census data against the people who supply it. These

laws unequivocally protect the confidentiality of information that people provide to the Bureau, ensuring that census responses do not leave the four walls of the Bureau except in aggregate, anonymous statistical form.²

Overview

The laws that safeguard the confidentiality of census data make clear that:

- It is illegal for the Census Bureau to disclose census responses in any way that would personally identify a respondent;
- It is illegal for anyone to see census responses except for employees of the Census Bureau, who are sworn to secrecy under the threat of criminal punishment;
- It is illegal for the Census Bureau to disclose census responses to other government agencies;
- It is illegal for data collected for the census to be used for any nonstatistical purpose, such as immigration regulation or other law enforcement; and

1 See U.S. Census Bureau, National Advisory Committee on Racial, Ethnic, and Other Populations, *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey and Focus Groups: Key Findings for Creative Strategy*, p. 35 (Oct. 31, 2018), <https://www2.census.gov/cac/nac/meetings/2018-11/mcgeeny-evans-cbams.pdf> ("Nearly 1 in 4 respondents fear that their answers to the 2020 Census will be used against them"); see also U.S. Census Bureau, *2020 Census Barriers, Attitudes, and Motivators Study Survey Report*, p. 1 (Jan. 24, 2019), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-study-survey.pdf> ("Fewer than seven in ten householders said they intend to fill out the census form").

2 The Census Bureau is a component of the U.S. Department of Commerce. All laws discussed here that apply to the Census Bureau also bind the Commerce Department, and all references to the Census Bureau incorporate the Commerce Department.

- It is illegal for the Census Bureau or any other federal agency to use census data to the detriment of the person to whom the information pertains.

These protections arise from several laws pertaining to census data, including:

- The Census Act, 13 U.S.C. § 1 *et seq.*;
- The Confidential Information Protection and Statistical Efficiency Act (CIPSEA), 44 U.S.C. § 3501, Note;
- The Privacy Act, 5 U.S.C. § 552a; and
- The Internal Revenue Code, 26 U.S.C. § 1 *et seq.*

Together, these laws and the legal protections they set forth threaten serious legal consequences for any attempts to misuse census data.

The Census Act Prohibits the Census Bureau from Disclosing Data that Identifies a Census Respondent.

The Census Act includes several robust, unambiguous protections for maintaining the confidentiality of census data. These protections are binding on the Commerce Department and any of its divisions, including the Census Bureau, temporary Department staff such as census collectors, and local government liaisons to the Census Bureau.³ As recently as December 2018, the secretary of commerce affirmed the Census Bureau’s commitment to upholding its duty to maintain complete confidentiality.⁴

The Census Act prohibits the Census Bureau from disclosing any personally identifiable data provided by a census respondent. The Census Bureau may not publish or disclose an individual’s personal information for any purpose.⁵ This means that, even when the Bureau produces statistics and analyses using census data, it must ensure that those products do not disclose any individual’s personal identity or information.⁶

Additionally, an individual’s census responses may not be disclosed in legal proceedings. They cannot be used “for any purpose” in a legal action or administrative proceeding without the consent of the individual who originally supplied the information.⁷ The U.S. Supreme Court has affirmed that this ban also prevents respondent-level information from being produced in response to a Freedom of Information Act request, even if the request has been made for a statistical purpose.⁸

Finally, individual census data may not be used “to the detriment” of any census respondent or other person to whom the data relates.⁹ Presidential administrations have repeatedly affirmed that no one may be harmed by furnishing census information, and that the census has nothing to do with the regulation of immigration or with the enforcement of any national, state, or local law or ordinance.¹⁰

The Census Act prohibits anyone other than sworn Census Bureau employees from viewing individual census responses.¹¹ Census Bureau employees who must view individual census responses are sworn to protect the confidentiality of those data for life. An employee who wrongfully discloses census data can be punished by a fine of up to \$250,000 and a prison sentence of up to five years.¹²

3 13 U.S.C. §§ 9(a), 23(c).

4 See Letter on Census Confidentiality from Sec. Ross to Sen. Schatz, Dec. 19, 2018, <https://apps.npr.org/documents/document.html?Pid=5675696-Dec-19-2018-Letter-on-Census-Confidentiality>.

5 13 U.S.C. § 9(a)(2) (Commerce Department may not “make any publication whereby data furnished by any particular establishment or individual under this title can be identified”); see also *Baldrige v. Shapiro*, 455 U.S. 345, 361 (1982).

6 13 U.S.C. § 8(b) (statistical materials may “not disclose the information reported by, or on behalf of, any particular respondent”).

7 13 U.S.C. § 9(a).

8 See *Baldrige*, 455 U.S. at 349, 361 (municipalities challenging population count are not entitled to Bureau’s address list under the Freedom of Information Act, even though “public policy favors disclosure under FOIA,” because Census Act “preclude[s] all disclosure of raw census data”).

9 13 U.S.C. § 8(c). The Census Act does not define “detriment.”

10 See, e.g., Proclamation No. 8488 (Mar. 31, 2010) (Pres. Obama affirming that census information “is never used against [census participants] or shared with other government or private entities”); Proclamation No. 6105 (Mar. 6, 1990) (Pres. George H. W. Bush affirming that “[i]ndividual information collected will not be used for purposes of taxation, investigation, or regulation, or in connection with military or jury service, the compulsion of school attendance, the regulation of immigration, or the enforcement of any other Federal, State, or local law or ordinance”); Proclamation No. 3973 (Mar. 24, 1970) (Pres. Nixon affirming that census information cannot be used “for the purposes of taxation, investigation, regulation, or for any other purpose whatsoever affecting the individual”).

11 13 U.S.C. § 9(a)(3) (Census Bureau may not “permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports”).

12 13 U.S.C. § 214; 18 U.S.C. §§ 3559, 3571.

In addition to Census Bureau personnel, it is possible that Department of Homeland Security (DHS) personnel involved in cybersecurity initiatives will have access to 2020 Census data that are stored electronically. The Federal Cybersecurity Enhancement Act of 2015 grants DHS access to information that any government agency, including the Census Bureau, collects over the internet or stores electronically. DHS may access these data, however, *only for the purpose of protecting against cyberattacks*.¹³ Thus, as the Census Bureau has stated, it “would be unlawful” for DHS to use any census data it has access to for any purpose unrelated to cybersecurity, such as immigration or law enforcement.¹⁴

Moreover, the program that DHS currently uses to detect cybersecurity risks — EINSTEIN version 3A — provides DHS with only encrypted information.¹⁵ EINSTEIN 3A “does not provide DHS with access to a respondent’s personal information.”¹⁶ And DHS requires that any employee with access to EINSTEIN sign an agreement not to disclose personal information. Violating that agreement can result in disciplinary action, including job loss.¹⁷ Further, the Bureau has worked with DHS to implement additional safeguards regarding “the collection, retention, use, and disclosure of information.”¹⁸ These safeguards include “notification and reporting requirements in the unlikely event that any unauthorized access, use, or dissemination of any Census Bureau information would occur.”¹⁹

The U.S. Supreme Court has recognized that census confidentiality is crucial to the integrity of the census. The Supreme Court has ruled that, under the Census Act, “the Director of the Census [has] no discretion to release data, regardless of the claimed beneficial effect of disclosure.”²⁰ The Court has determined that Congress intended the Census Act to protect all raw data from disclosure, even if the data do not reveal a respondent’s identity.²¹

The underlying need for the prohibition on disclosure, the Court explained, lies in the importance of “encourag[ing] public participation and maintain[ing] public confidence that information given to the Census Bureau would not be disclosed.”²² And “only a bar on disclosure of all raw data reported by or on behalf of individuals would serve the function of assuring public confidence.”²³

The U.S. Department of Justice has emphasized the importance of confidentiality to ensuring an accurate census count. The Justice Department has recognized that disclosure of data “might lead to widespread reluctance upon the part of the public about giving information and thus add to the difficulties already encountered in obtaining full and correct responses.”²⁴ For that reason, even before Congress passed the confidentiality protections that now bind the Census Bureau, the Bureau’s policy was to interpret the law “strictly against furnishing either official or private persons with information that would reveal to another the identity of the individuals to whom it relates.”²⁵

The Justice Department has also stated that “[t]here can be no doubt” that the Census Act is intended to assure census respondents that their identities and the information they provide to the Census Bureau will “be held in complete confidence by the Bureau” and that the Bureau should “adhere rigidly to its long-standing practice... of refraining from publishing statistics pertaining to a given community” when that publication “would involve any possibility of later identification of confidential information.”²⁶ This includes the rare instances in which census data are shared with other government officials or agencies. For example, under a law granting the National Archives broad access to the Bureau’s records for storage purposes, the Justice Department found that any census records provided to the Archives are still subject to the Census Act’s confidentiality protections and may not be disclosed.²⁷

13 6 U.S.C. § 151(c)(3).

14 Dep’t of Commerce, Census Bureau, Submission for OMB Review; Comment Request; Correction, 82 Fed. Reg. 31,553, 31,554 (July 7, 2017).

15 *Id.*

16 *Id.*

17 See Dep’t of Homeland Security, *Privacy Impact Assessment Update 2*, 5, 6 (2016), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-einstein3a-may2016.pdf>.

18 82 Fed. Reg. at 31,554.

19 *Id.*

20 *Baldrige*, 455 U.S. at 358.

21 *Id.* at 356–58.

22 *Id.* at 361; see also *Carey v. Klutznick*, 653 F.2d 732 (2d Cir. 1981); *McNichols v. Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981); *Seymour v. Barabba*, 559 F.2d 806, 807–08 (D.C. Cir. 1977); *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568, 570–71 (S.D.N.Y. 1958).

23 *Baldrige*, 455 U.S. at 361.

24 *Census Data Unavailable to Women’s Bureau of Dep’t of Labor and Individuals*, 36 U.S. Op. Atty. Gen. 362, 364–65 (1930).

25 *Id.*

26 41 U.S. Op. Atty. Gen. 120, 124–25 (1953).

27 *Confidential Treatment of Census Records*, 40 U.S. Op. Atty. Gen. 326, 328 (1944) (“[i]t would require very clear language in a general statute relating to the custody of records to justify attributing to the Congress an intention to depart from th[e] policy [of nondisclosure]”).

The U.S. Department of Justice’s Office of Legal Counsel has repeatedly found that the Census Act’s confidentiality provisions take precedence over other laws that otherwise allow for the disclosure of personal information. The Office of Legal Counsel has been asked to decide whether federal laws that permit the liberal disclosure of personal information authorize the disclosure of census data. Each time, it has concluded that the Census Act’s confidentiality protections supersede those other laws and bar disclosure of personal information.

In 1999, the Office of Legal Counsel concluded that the Census Act’s confidentiality provisions superseded an immigration law that allowed government officials to give the Immigration and Naturalization Service information about the citizenship or immigration status of any individual “[n]otwithstanding any other provision of Federal, State, or local law.”²⁸ The Office of Legal Counsel determined that even this broad language did not authorize disclosure of census data “in light of the federal government’s long-standing commitment to [census] confidentiality.”²⁹

In 2010, the Office of Legal Counsel came to the same conclusion with respect to the USA PATRIOT Act. The PATRIOT Act granted the attorney general broad powers to obtain “any tangible things” from government agencies for use in terrorism investigations “notwithstanding any other provision of law.”³⁰ Despite this sweeping language and Congress’s clear intent to give the federal government broad powers to fight terrorism, the Office of Legal Counsel concluded that no PATRIOT Act provisions override the historically strong census confidentiality protections.³¹

These precedents make clear that the Census Act bars an individual’s census data from disclosure under any circumstance.

The Census Bureau May Use Census Data Only for Statistical Purposes.

The Census Act prohibits the government from using census data for anything other than statistical purposes. The Census Act clearly states that individuals’ census data may be used only for “the statistical purposes for which it is supplied.”³² The Census Bureau’s privacy policy confirms this restriction.³³

Moreover, while the Bureau may disclose “tabulations” and other “statistical compilations” of census data to other government agencies, any statistical information the Bureau releases remains subject to the Census Act’s confidentiality protections discussed above.³⁴ In other words, when the Bureau releases statistical data, those data may not personally identify any individual or household.³⁵

While the Census Act does not define “statistical purpose,” another federal confidentiality law applicable to census data — the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) — defines a statistical purpose as “the description, estimation, or analysis of the characteristics of groups, without identifying the individuals or organizations that comprise such groups.”³⁶ In contrast, a nonstatistical purpose is the “use of data in identifiable form for any purpose that is not a statistical purpose, including any... regulatory, law enforcement ... or other purpose that affects the rights, privileges, or benefits of a particular identifiable respondent.”³⁷

Thus, it would be lawful for the Census Bureau to use census data to produce, for example, statistics on the Latino population for a state education department to use to measure education gaps.³⁸ But if the Bureau were to share that information with Immigration and Customs Enforcement so ICE could target Latino residents for

28 *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, Op. O.L.C. Supp. at 4 (1999), <https://www.justice.gov/opinion/file/844106/download>.

29 *Id.* at 11.

30 *Census Confidentiality and the PATRIOT Act*, Op. O.L.C. at 4 (2010), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/03/18/2010-01-04-census-confidentiality.pdf>.

31 *Id.* at 7 (“for more than sixty years, the Executive Branch has consistently employed a strong presumption that statutes affecting access to information in general should not be construed to overcome the specific protections afforded to covered census information by the Census Act”).

32 13 U.S.C. § 9(a)(1) (Census Bureau may not “use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied”).

33 U.S. Census Bureau, *Policy Cover Sheet of U.S. Census Bureau Privacy Principles 2* (Rev. 2009), https://www2.census.gov/foia/ds_policies/ds0pp.pdf (affirming that the Bureau will use census data “only for statistical purposes and will advise the public of these limited uses”).

34 13 U.S.C. § 8(b); *see also Seymour*, 559 F.2d at 809 (Census Bureau may release statistics “of a numerical nature, not names and addresses of specific individuals... a ‘tabulation’ is a computation to ascertain the total of a column of figures, or perhaps counting the names listed in a certain group, rather than supplying the individual names and addresses”).

35 13 U.S.C. § 8(b); *Seymour*, 559 F.2d at 809.

36 CIPSEA § 502(9)(A), 44 U.S.C. § 3501, Note.

37 CIPSEA § 502(5)(A).

38 *See, e.g.*, U.S. Census Bureau, *Using Census Data to Help Local Communities: Census Information Centers at Work* 17–18, <https://www2.census.gov/library/publications/2003/comm/clo03-cic.pdf>.

immigration raids, that would be an illegal use of the data for nonstatistical purposes. That is why the Bureau has pledged that it “will never share a respondent’s personal information with immigration enforcement agencies, like ICE; law enforcement agencies, like the FBI or police; or allow it to be used to determine their eligibility for government benefits.”³⁹

Furthermore, like individual-level data, statistical information may not be used “to the detriment” of any individual whose personal information was used to produce the statistics.⁴⁰

The Census Bureau additionally maintains procedural safeguards for handling requests for statistical information. Bureau policy requires requests for custom tabulations concerning “sensitive topics” and “sensitive populations” to go through a special review procedure. Any request that deals with sensitive topics or sensitive populations, topics that have policy implications, or topics that may negatively impact the Census Bureau’s reputation must be specially approved.⁴¹ The Census Bureau does not have to comply with a request for a custom tabulation, but if it does, it must publish the name of the requesting agency, a description of the request, the source of the information, and the date it provided the information.⁴²

Other Legal Protections Safeguard the Confidentiality of Census Responses.

Other laws work with the Census Act to protect the confidentiality of census data.

1. The Confidential Information Protection and Statistical Efficiency Act. Whenever the federal govern-

ment collects data confidentially for statistical purposes, CIPSEA, like the Census Act, prohibits the government from using those data for anything other than statistical purposes.⁴³ Enacted in 2002, CIPSEA additionally prohibits the government from disclosing confidential data in a way that would identify an individual without that individual’s consent.⁴⁴

CIPSEA clearly states that the confidentiality protections of the Census Act prevail and prohibit disclosure in any circumstance where CIPSEA could be construed to authorize information disclosure.⁴⁵ Unauthorized disclosure of information in violation of CIPSEA is a crime that can result in a fine of up to \$250,000.⁴⁶

CIPSEA also requires any federal agency collecting data for statistical purposes to publish a confidentiality pledge that discloses the possible uses of the data being collected.⁴⁷ The Census Bureau’s confidentiality pledge, which is binding on the agency, currently states:

The U.S. Census Bureau is required by law to protect your information. The Census Bureau is not permitted to publicly release your responses in a way that could identify you. Per the Federal Cybersecurity Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data.⁴⁸

2. The Privacy Act. The Privacy Act, 5 U.S.C. §552a, likewise prohibits federal agencies from disclosing personal records, by any means of communication, to any person or government agency without the written consent of the individual to whom the record pertains.⁴⁹ A “record” includes “any item, collection, or grouping of information about an individual that is maintained by an agency... and

39 U.S. Census Bureau, *2020 Census Complete Count Committee Guide 3*, <https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/ccc-guide-d-1280.pdf>.

40 13 U.S.C. § 8(c).

41 See *Policy on Providing Custom Tabulations and Custom Extracts Under 13. U.S.C. §8(b)*, Census Data Stewardship Program, DS-021 at 3 (2015), https://www2.census.gov/foia/ds_policies/ds021.pdf. A “custom tabulation” is a “statistical aggregation of confidential microdata collected by the Census Bureau . . . from internal Census Bureau files that are not accessible by the public.” *Policy on Providing Custom Tabulations and Custom Extracts Under 13. U.S.C. §8(b)* at 1. A “custom extract” is “a statistical aggregation or reorganization of nonconfidential Census Bureau data, that is . . . developed from published and previously published tables or from unpublished data that has been cleared for disclosure avoidance.” *Id.* at 2.

42 *Id.* See also *Custom Tabulations*, United States Census Bureau, https://www.census.gov/about/policies/foia/foia_library/custom_tabulations.html.

43 CIPSEA § 512(a).

44 CIPSEA § 512(b)(1).

45 CIPSEA § 504(c) (CIPSEA “shall not be construed as authorizing the disclosure for nonstatistical purposes of demographic data or information collected by the Census Bureau pursuant to [the Census Act]”); see also Census Bureau, DS007: *Safeguarding and Managing Information 5* (2009), https://www2.census.gov/foia/ds_policies/ds007.pdf (“All information collected on behalf of another federal agency, under the authority of CIPSEA, should be treated as Title 13 information”).

46 CIPSEA § 513.

47 CIPSEA § 512.

48 82 Fed. Reg. 31,553.

49 5 U.S.C. § 552a(b). The Privacy Act protects the records of U.S. citizens and lawful permanent residents only, 5 U.S.C. § 552a(a)(2).

that contains his name, or the identifying number, symbol, or other identifying particular.”⁵⁰ The Census Bureau recognizes that census responses are records protected by the Privacy Act.⁵¹

If the Bureau discloses an individual’s census information and that disclosure has an “adverse effect” on the individual, the Privacy Act allows that individual to bring a civil action for damages in federal district court.⁵² And any government employee who intentionally discloses census data in violation of the Privacy Act can be punished by a fine of up to \$5,000.⁵³

3. The Tax Code The Census Bureau sometimes uses tax return information from the Internal Revenue Service to improve the accuracy of the census.⁵⁴ Under Title 26 of the United States Code, tax return information is confidential, and it is illegal for a government official to

disclose return information.⁵⁵ These protections continue to apply when tax information is mingled with other data, including census data.⁵⁶ If a government official discloses an individual’s tax-return information in violation of Title 26, that individual may sue for damages.⁵⁷

Together with the Census Act’s confidentiality protections, these laws provide further assurances that individual census information will not be made public.

In sum, federal law clearly prohibits the Census Bureau from disclosing census responses in a way that would personally identify a census respondent, including to other government agencies. Furthermore, individual census responses cannot be used for any nonstatistical purpose like immigration regulation or other law enforcement. These clear, long-standing protections create a strong barrier against lawless attempts to misuse census data.

50 5 U.S.C. § 552a(a)(4).

51 See *Privacy Act Requests*, U.S. Census Bureau, https://www.census.gov/about/policies/foia/privacy_act_requests.html.

52 5 U.S.C. § 552a(g). A Privacy Act plaintiff may also seek attorneys’ fees. *Id.*

53 5 U.S.C. § 552a(i).

54 26 U.S.C. § 6103(j)(1)(A) (“Upon request in writing by the Secretary of Commerce, the Secretary [of the Treasury] shall furnish such returns, or return information reflected thereon, to officer and employees of the Bureau of the Census”); see also Census Bureau, *Agreement for the Review and Approval of U.S. Census Bureau Projects that Use Federal Tax Information* 4 (2012), https://www.census.gov/ces/pdf/IRS_Criteria_Document.pdf.

55 26 U.S.C. § 6103(a)(1).

56 See Census Bureau, DS007: *Safeguarding and Managing Information* 5 (2009), https://www2.census.gov/foia/ds_policies/ds007.pdf (confidentiality applies to “[a]ny dataset that is commingled with data that is protected by Title 26”).

57 26 U.S.C. § 7431(a)(1). Victorious plaintiffs are entitled to (1) “the greater of” \$1,000 in statutory damages for each act of wrongful inspection or disclosure and the “sum of” actual damages and punitive damages, (2) the costs of their action, and (3) attorneys’ fees. 26 U.S.C. § 7431(c).

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