

CONCEPT PAPER:
**A Proposal to Examine the Policy and Legal Implications of
DOJ Information Collection, Analysis, and Sharing Initiatives for
Law Enforcement and Counterterrorism**

This proposal is submitted by the Program on Law Enforcement and National Security in the Information Age (PLENSIA),¹ a collaborative research project of the World Policy Institute at New School University and the Center for Advanced Studies in Science & Technology Policy. Additional PLENSIA partners in this proposal include the Information Society Project at Yale Law School, the Center for Law and Security at NYU School of Law, and [OTHERS IN FORMATION, see page 13].

Abstract

A proposal to review (i) the civil liberties and privacy implications, (ii) the related information quality and disclosure issues, and (iii) the potential conflicts of law or policy issues (both domestic and international), relating to the Department of Justice Global Justice Information Sharing Initiative (Global), the National Criminal Intelligence Sharing Plan (NCISP), the Law Enforcement Information Sharing Strategy (LEIS) and related projects; and to help identify, comment on, or recommend, and then help disseminate, best practices in organizational, procedural, and technical policies, as well as authorization, oversight, and review mechanisms, for mitigating identified civil liberty, privacy, disclosure, and legal or policy conflicts issues raised by these initiatives and related information sharing and analysis projects.

The proposed project would examine and review material relating to the current DOJ initiatives on information sharing and analysis; review international, federal, state, and local laws and policies implicated by such federal initiatives; selectively interview government policy-makers, senior managers, and relevant others about existing programs or plans; convene a conference (or a series of roundtable meetings) of nationally-recognized academic, policy, law enforcement, intelligence, and civil liberty experts to examine and report on these initiatives and related issues; publish and distribute a comprehensive volume of papers presented at such conference; and issue a final report. In addition, three white papers setting forth project findings and recommendations of best practices for mitigating the identified concerns – civil liberties, information quality and security, and conflicts – will be produced and submitted for publication in national refereed law or policy journals.

¹ More information about PLENSIA is available at <http://www.PLENSIA.org/>

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I. Overview

New information technologies have the potential to significantly improve how information is collected, shared, and analyzed among or by international, federal, state, local and tribal law enforcement and related agencies and personnel for law enforcement and criminal intelligence purposes, including against terrorism and transnational crime. Improved efficiencies in information sharing and analysis, however, raise significant civil liberties and privacy issues,² related information quality and security issues, and potential conflicts between federal initiatives, procedures, and laws relating to information disclosure and privacy protection, and existing state, local, and tribal laws and regulations,³ or existing international obligations or foreign laws and policies.⁴

This proposed project would examine these issues by (i) conducting a thorough review of existing DOJ initiatives – including specifically the DOJ Global Justice Information Sharing Initiative (Global), the National Criminal Intelligence Sharing Plan (NCISP), and the Law Enforcement Information Sharing Strategy (LEIS) – and their

² The DOJ OJP has highlighted privacy and public access as a “key issue” within DOJ information technology initiatives, see http://it.ojp.gov/topic.jsp?topic_id=42

³ Existing state laws (for example, “sunshine” laws requiring disclosure of certain records, or state privacy laws restricting access to, or disclosure of, certain information) may conflict with laws of other states when information from multiple state sources is commingled, or may conflict with federal law requirements when accessed through federal systems, for example, the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

⁴ Information sharing between U.S. and foreign sources, or between federal and state sources or federal and private sector sources in which data about foreign nationals is exchanged, may conflict with foreign laws or treaty or other obligations mandating certain data protection requirements.

respective privacy, disclosure, and information quality plans, management and training procedures, and oversight mechanisms, (ii) reviewing relevant international, federal, state, and local law and policy for potential conflicts; (iii) interviewing selected policy-makers, senior government managers, and relevant others involved in or affected by these or related initiatives or projects, (iv) convening a multi-day conference (or series of one-day roundtable meetings) of academic, policy, law enforcement, intelligence, and civil liberty experts, as well as other interested parties, to examine and report on the civil liberties, privacy, disclosure, conflicts and related implications of such initiatives, (v) publishing and distributing a comprehensive “Proceedings” volume of individual peer-reviewed and edited conference papers addressing these issues, (vi) commissioning, researching, writing, and/or editing at least three white papers focused on the civil liberties and privacy, information quality and security, and conflicts issues⁵ for submission for publication in a national law or policy journal on behalf of the project, and (vii) issuing a comprehensive final report.

NIJ funding of approximately \$350,000 is sought to underwrite the cost of these research and dissemination activities, including the cost of the conference or roundtable series; the solicitation, review, and editing of the conference papers; the production, publication, and dissemination of the Proceedings volume; the research, writing, editing and submission of at least three academic articles for publication in national refereed journals; and, the issuance of the final report. It is anticipated that additional opportunities for dissemination of research results, including through web sites maintained by the participants or developed for the project, as well as through media and

⁵ It is currently contemplated that one paper would focus on each issue, but final topics may vary.

trade press, will be generated by the project although no specific funding is being requested for publication or dissemination beyond that relating to the Proceedings volume, the final report and the three sponsored academic articles referred to above. Additionally, it is anticipated that some proposal participants will contribute facilities or services as non-federal support for the project although no amounts have been budgeted in this preliminary concept paper. More details on dissemination and possible cost-sharing undertakings will be included in the full proposal, if invited.

II. Introduction to the Research Problem

The Department of Justice (DOJ) has undertaken to improve the overall effectiveness of the justice system through better information sharing among all its law enforcement and intelligence components, including juvenile justice, law enforcement, prosecution, defense, adult courts, corrections, probation and parole, and to lay the foundation for information sharing with affiliated government agencies, including social services, education, transportation, health, and homeland security. A significant goal within this overall effort is to improve information and intelligence collection, analysis, and sharing in order to prevent, prepare for, respond to, and mitigate terrorist incidents.⁶

To accomplish these objectives, the DOJ, through the Office of Justice Programs, established the Global Justice Information Sharing Initiative (Global) to address the policy, connectivity, and jurisdictional issues that have hampered effective justice information sharing. The Global Advisory Committee (GAC), consisting of key personnel from local, state, tribal, federal, and international justice, was formed to coordinate and facilitate the Global initiative and to advise the U.S. Attorney General on

⁶ Executive Order 13356 “Strengthening the Sharing of Terrorism Information” (Aug. 27, 2004) and the 9/11 implementation bills currently in conference committee expressly mandate certain information sharing developments for counterterrorism related information.

these matters. The Global Intelligence Working Group (GIWG), a subcommittee of the GAC, was established to focus specifically on criminal intelligence sharing among law enforcement and criminal intelligence agencies, as well as other agencies with domestic security responsibilities.

The National Criminal Intelligence Sharing Plan (NCISP) was developed by the GIWG and provides recommendations to help agencies establish effective criminal intelligence sharing programs. NCISP sets out standards and recommendations to enable the sharing of law enforcement data, including sensitive but unclassified information.

Within the Global initiative, the Global Privacy and Information Quality Working Group (GPIQWG) was set up to assist “government agencies, institutions, and other justice entities in ensuring that personal information is appropriately collected, used, and disseminated within integrated justice information systems. The GPIQWG is producing a policy level White Paper, which applies settled privacy principles to justice information sharing systems, addresses applicable legal mandates, and makes recommendations on best practices to ensure privacy and information quality.”⁷ GPIQWG released the Justice Information Privacy Guidelines in 2002, and more recently, Privacy and Information Quality Policy Development for the Justice Decision Maker in October 2004.⁸

To compliment the Global initiative and the NCISP, the DOJ, through the Justice Management Division, is developing the Law Enforcement Information Sharing (LEIS) Strategy to guide transformation of the law enforcement sharing environment. LEIS is a DOJ-wide plan to facilitate law enforcement collaboration across agency and jurisdictional boundaries and is designed to enhancing access to law enforcement

⁷ See http://www.it.ojp.gov/topic.jsp?topic_id=55.

⁸ It is anticipated that these documents, the companion Workbook (to be issued), and the GPIQWG White Paper will help frame part of the research agenda for this proposed project.

information for authorized users; improve information sharing within DOJ and among its federal, state, and local law enforcement partners; and coordinating information sharing projects across DOJ and with partner agencies.⁹

These DOJ information sharing initiatives are expected to benefit all aspects of criminal justice, not just homeland security or counterterrorism. Such developments, however, are challenging to existing policy and legal systems, as well as social expectations,¹⁰ that are at least partially based on protecting certain civil liberties and individual freedoms, as well as information security, by maintaining privacy or security through the “practical obscurity” of inefficient information access technologies and procedures. On the one hand there is a need to "connect the dots" through improved information sharing and analysis to provide for legitimate law enforcement and intelligence needs and on the other hand the notion of individual liberty in free society is at least partially built on keeping the power to easily "connect the dots" out of the control of government agencies by maintaining or imposing inefficiencies in information sharing through a system of checks and balances, due process and technical constraints. In order to maintain such liberties as new information sharing systems are developed and deployed, information sharing initiatives need to (and the DOJ initiatives do) include certain organizational, procedural, and technical policies, as well as authorization, oversight, and review mechanisms, to protect privacy of individuals and the security of information to be shared.

⁹ Global Justice Information Sharing Initiative Annual Report – 2003 at n. 27.

¹⁰ This project assumes that broad public support for new information initiatives requires an open debate involving many stakeholders and addressing myriad competing interests, not just narrow conformity with the “letter of the [existing] law”. This project is intended to help inform that debate, and to help develop and disseminate procedures and guidelines to engender such support.

In addition, sharing of law enforcement and criminal intelligence information across local, state, national, and international jurisdictional lines creates the potential for conflicts between various laws and policies regarding the management of such information, including, in particular, differing disclosure and privacy requirements for information collected in particular jurisdictions or under specific legal restrictions, or for information that relates to individual subjects of such jurisdictions or laws.¹¹

DOJ has undertaken in its initiatives to develop and adopt DOJ-wide policies and procedures (i) to ensure individual privacy and information security, including administrative, procedural, and technical safeguards, as well as strong authorization and audit functions together with sanctions, to maintain information integrity and to protect against abuse or misuse, (ii) to assure information quality, including accuracy, completeness, timeliness, and relevancy of data, and (iii) to collaboratively develop consistent privacy and information security policies and procedures among its various constituent agencies and its state, local, and international partners.

The proposed project will examine these efforts and related issues in order to help formulate and disseminate more widely best practices and guiding principles for application in the implementation of DOJ and other law enforcement or counterterrorism information sharing and analysis initiatives and related projects.

III. The Research Agenda: Methods, Questions, and Goals

The proposed project would examine available material relating to the DOJ initiatives on information sharing and analysis; review applicable federal, state, and

¹¹ This may be a particular problem with regard to international cooperation in information sharing to combat terrorism and transnational crime, especially where historic distinctions drawn on “line at the border” or by reference to “U.S. Persons” has determined information policy (see, e.g., USSID-18). These distinctions may no longer be relevant or viable in the context of global information sharing for terrorism and transnational crime where the line between domestic law enforcement and national security is blurred.

international law and policy; selectively interview government policy-makers, senior managers, and other relevant parties¹² about existing programs or plans; convene a national conference (or series of roundtables) of academic, policy, law enforcement, intelligence, and civil liberty experts to examine and report on these initiatives and related issues; publish a peer-reviewed, edited Proceedings volume of conference papers; sponsor development of three white papers to be submitted for publication in national refereed journals; and issue a comprehensive final report.

In particular, the project would examine how the DOJ initiatives will:

- protect the privacy of individuals and insure that individually identifiable information is not misused or inappropriately disclosed;
- limit the collection and sharing of information to the fulfillment of authorized law enforcement or legitimate intelligence purposes;
- ensure that information quality, including error correction, and information security needs are met;
- protect information against unauthorized access, destruction, use, modification or disclosure, including administrative and technical procedures for maintaining access records and audit trails;
- publicize or otherwise disseminate policies and procedures for protecting information privacy and security;
- train its employees or partners in appropriate information management policies, oversight, and procedures; and
- ensure that applicable federal laws and regulations regarding privacy and information disclosure are implemented and enforced and do not conflict with state laws or international obligations or foreign laws.

IV. Relevance for Policy and Practice

This project would examine DOJ information sharing initiatives and related projects in order to help formulate, develop, explain, and disseminate to a broader audience (including both academic, policy, media, industry and law enforcement experts as well as

¹² In addition to government officials it is contemplated that certain private sector suppliers or consultants as well as independent policy, civil society, and other experts will be interviewed.

the lay public) a set of guiding principles and best practices in organizational, procedural, and technical policy for the mitigation of civil liberties, privacy, disclosure, and conflicts of law concerns arising from information sharing initiatives in law enforcement and counterterrorism applications. These efforts would contribute to the development, implementation and management of information sharing and analysis projects in ways that mitigate these concerns, thus helping to foster both expert and public support for such programs and enhancing or improving legitimate law enforcement and intelligence functions. In addition to informing and influencing the public debate on these issues, this project would provide practical guidance for the management, operation, and oversight of these systems as they are developed, deployed, implemented, and used; as well as provide guidance and procedures for administrative and judicial review of their use in practice.

V. The Project Schedule: Timeline and Dissemination

The project partners are seeking funding of approximately \$350,000 for the academic year 2005-2006 to begin in September 2005. The project would consist of an initial period of planning, not to exceed one month, during which the detailed project plan to be set forth in the full proposal would be updated to reflect the then-current developments, and a detailed schedule for project activities would be initiated beginning early Fall 2005. Depending on this initial re-assessment of the then-current developments relating to the DOJ initiatives and other relevant projects, either a single, multi-day national conference, a series of one-day roundtable meetings, or some combination of the two, would be scheduled to begin in Fall 2005 or early Winter 2006. During the period leading up to the conference (or first roundtable), written source research and review, as well as interviews with selected government officials and other

relevant parties, would begin.¹³ Invitations to the conference and a call for papers (approx. 20-22, including at least three from project investigators) to be presented by the participants would go out early or mid Fall 2005. Leading up to and following the conference, 12-18 papers will be selected, reviewed, and edited for publication in a special Proceedings volume (or consolidated into a single comprehensive conference report) by the project partners. Additionally, three conference papers will be selected for further research and development for publication as white papers and to be submitted as full-length academic articles to one or more national refereed journals. The project would provide additional research, editing, and funding support to the selected authors for development of such articles.¹⁴ A comprehensive final report will also be prepared and published. Publication of the Proceedings volume and submission of the sponsored articles for publication consideration in refereed journals would be planned for Late Spring to Early Summer 2006. The final report would be delivered by mid-Summer 2006. Additional dissemination efforts, including development and maintenance of a project web site, and trade press and media outreach activities, are also contemplated.¹⁵

It is anticipated that project partners may submit one or more follow-on proposals in out years to continue the process of examining DOJ information sharing and analysis initiatives and procedures as they are further developed, implemented, deployed, and operated. These follow-on projects would seek to continue to examine, help refine, and disseminate best practices for organizational, procedural, and technical policies, as well as authorization, oversight, and review mechanisms. Dissemination of best practice

¹³ Many potential interviewees and conference participants have already been identified and additional details will be provided in the full proposal.

¹⁴ Senior project investigators may co-author one or more of such articles.

¹⁵ These will be discussed in more detail in the full proposal, if invited. They may include development and submission of opinion pieces, non-academic periodical articles, and other activity.

procedures and guidelines from these DOJ projects would help inform other federal, state, and international information sharing initiatives, and help further public understanding and support for information sharing projects throughout government.

VI. Project Staffing, Partners, and Estimated Costs

This project will be staffed by nationally recognized academic and policy experts, whose professional work in these areas is both well known and well-regarded, together with research associates or fellows associated with the project partners or their home institutions. Kim Taipale, executive director of the Center for Advanced Studies and the director of the Global Information Society Project at the World Policy Institute, will serve as lead investigator and project director.¹⁶

Mr. Taipale, BA, JD (NYU) MA, EdM, LLM (Columbia), has over twenty years of diverse experience relating to information technology and policy.¹⁷ He is a frequent invited speaker and has written extensively on information, technology, security, and privacy issues, including, most recently:

- "Technology, Security and Privacy: The Fear of Frankenstein, the Mythology of Privacy, and the Lessons of King Ludd," to be jointly published in the Yale J. L. & Tech. and the Int'l J. Comm. L. & Pol'y (forthcoming Dec. 2004),¹⁸
- "Designing Technical Systems to Support Policy (Enterprise Architecture and Civil Liberties)," a book chapter in R. Popp and J. Yen, "21st Century Enabling Technologies and Policies for Counter-Terrorism" (forthcoming 2005),
- "Technology, Security and Privacy," a book chapter in "Cybercrime and Digital Law Enforcement," Yale Information Society Project book series, (forthcoming 2005), and
- "Data Mining and Domestic Security: Connecting the Dots to Make Sense of Data," 5 Colum. Sci. & Tech. L. Rev. 2 (Dec. 2003).¹⁹

¹⁶ More information about Mr. Taipale, the Global Information Society Project, and the World Policy Institute, is available at <http://www.worldpolicy.org/projects/gisp/index.html>.

¹⁷ See <http://www.taipale.org/>

¹⁸ Pre-publication draft available at <http://ssrn.com/abstract=601421>

¹⁹ Published article available at <http://www.stlr.org/cite.cgi?volume=5&article=2>

Recent invited presentations given by Mr. Taipale relevant to this proposal include:

- "How Should the US Implement Information Sharing? A Discussion of the Executive Order Strengthening the Sharing of Terrorism Information to Protect Americans," at the Potomac Institute for Policy Studies, (Nov. 9, 2004),²⁰ and
- "Counterterrorism Technology and Privacy" at the American Bar Association Committee on Law and National Security conference "National Security Law in a Changed World: The Fourteenth Annual Review of the Field,"²¹ (Nov. 18, 2004).

In addition, he recently served as moderator for:

- WPI Program on National Security and Law Enforcement in the Information Age panel discussion, "Technology, Security and Privacy" (Oct. 14, 2004),²² and
- "Balancing Security and Privacy" at the Government Emerging Technologies Association 2004 Government Symposium on "Information Sharing for Homeland Security" (Jun. 28-30, 2004).²³

Additional project partners in this proposal include:

The Information Society Project (ISP) at Yale Law School.²⁴ The Yale ISP embraces a variety of activities, including fellowships for scholars and advice and education for policy makers, business leaders, nonprofit organizations, and the legal community. The ISP studies how economic, political, and social forces interact as a result of changes in information technology. ISP will supply one senior investigator and the equivalent of one or more research fellows to the project, and may host the conference or one or more roundtable meetings.

The Center for Law and Security at NYU School of Law.²⁵ The Center on Law and Security (CLS) is a research and policy program focused on examining the legal dimensions of counter-terrorism and peacekeeping at the national and international levels. The CLS convenes policymakers, academics, and law enforcement officials to discuss and make recommendations on a wide range of security issues, including transformations in legal procedures in the wake of 9/11, and regulatory reform in the matter of information sharing among law enforcement agencies. The CLS will supply one senior investigator and the equivalent of one or more research fellows to the project, and may host the conference or one or more roundtable meetings.

²⁰ Presentation material available at <http://www.information-sharing.info/>

²¹ Presentation material available at <http://www.counterterrorism-technology.info/>

²² More at <http://www.global-info-society.org/PLENSIA/panel-101404.htm>

²³ More at <http://www.stilwell.org/presentations/CAS-GETA.htm>. Representatives of the DOJ (including OJP) also participated in the GETA conference on other panels. Various DOJ initiatives covered by this proposal, including LEIS, were presented at the GETA Information Sharing conference. More information about the GETA conference is available at <http://www.ncsi.com/ishs/agenda.asp>

²⁴ More at <http://islandia.law.yale.edu/isp/about.html>

²⁵ More at <http://www.law.nyu.edu/centers/lawsecurity/>

Additional project partners are in formation. Detailed discussions with several other academic centers at national law schools or research universities and with independent national policy research organizations (each of which has expressed interest in participating), are ongoing and it is contemplated that the full proposal may include one or more additional partners. These additional partners and their contribution to the project would be identified in the full proposal. It is expected that such additional partner(s) will supply one senior investigator and additional research support.

Proposed staffing for the project and the approximate budget:

Position or Use	Number	Time Commitment	Approx. Budget
Project Director/ Lead Investigator	1	1/3 time = \$50K	\$50,000
Senior Investigators (3 subject areas)	3	1/6 time = \$20K/per	\$60,000
Research Fellows	2FTE or 4HT	FTE = \$50K/per	\$100,000
Admin. Support	1	1/5 time = \$10K	\$10,000
Conference Budget (or roundtable series)			\$30,000
Publication Budget (final report)	1		\$20,000
Publication Budget (sponsored articles)	3	\$5K/per article	\$15,000
		SUBTOTAL	\$285,000.00
		Indirect @ 30% (est.)	\$65,000
		TOTAL	\$350,000

Should this concept paper be accepted and a full proposal invited, detailed biographies of the other principal investigators, as well as a detailed budget and schedule, will be provided in the full proposal. In addition, it is anticipated that prior to submission of the full proposal, several policy-makers and senior government managers to be interviewed for the project will have been contacted and will have agreed to participate. Letters of support from project partners, government officials, potential conference participants, and others may be included with the full proposal, as appropriate.