

Breakout Discussion Notes: Government Action

Data & Civil Rights
October 30, 2014 – Washington, D.C.
<http://www.datacivilrights.org/>

This document was produced based on notes taken during the Government Action breakout session of the Data & Civil Rights conference. This document represents a general summary of the discussion that took place. Not all attendees were involved in every part of the conversation, nor does this document necessarily reflect the views and beliefs of individual attendees. For an overview of the breakout sessions, including a description of the questions participants were asked to consider, see: <http://www.datacivilrights.org/pubs/2014-1030/BreakoutOverview.pdf>

Overview

The participants discussed the difficulties of the government employing data-based solutions in five subject areas: Health, Employment, Education, Finance, and Criminal Justice. In each subject area, they discussed laws that already apply to privacy or data issues, or that could be used as templates to inform a new law, and often provided suggestions for the government as it addresses these issues. It ended with a discussion of how to incentive transparency by those employing data-based techniques.

Themes and Discussion Topics

Health

- The participants noted that a federal advisory committee will be meeting with private sector stakeholders soon, and recommended that civil rights advocates be in the room to ensure the connection between health, big data, and civil rights is discussed.
- The participants determined that HIPAA is too narrow to protect patient's privacy, given the breadth of data, and the number of entities collecting it.
 - They recommended that the FCRA and the FTC's approach to privacy could inform uses for HIPAA.
- The participants questioned whether non-traditional health data is being discussed in relation to HIPAA and whether it fits into the broader discussion, noting that an unspecified report to Congress suggested entities not covered by HIPAA should be regulated.
- Further, the group discussed the need to address abuses of data.

Employment

- Participants recommended using the FCRA as a template for drafting new legislation that expands the scope of anti-discrimination laws in regards to data collection and use in employment contexts.

- Participants also recommended that federal agencies look at third party vendors more carefully, and look at positive uses of data to advance these areas of concern, as well.

Education

- Participants suggested that No Child Left Behind should be adjusted to allow states to use race, income, and other factors as part of their accountability systems.
- Participants also noted a Dear Colleague letter from the Department of Education that said that Title 2 money could be used for technology, giving the Administration the chance to discuss civil rights protections for federal money going to education.
- Several observations from the workshop:
 - There are links between employment and criminal justice. When education data informs other areas, there are major civil rights implications.
 - Information available on children is skewed towards high poverty, minority school systems that monitor discipline more intensively than wealthy, mostly white schools.

Finance

- Participants noted that FRCA could inform solutions in the health and education sectors, but it has some holes that must be filled, and that the FTC can use it more creatively.
- Big data has blurred distinctions between types of data, and legislation is probably needed to redefine the distinction and target data brokers.
- Further, the participants discussed transparency rules, suggesting that government consider: whether a company could ensure a consistent rule is applied across categories; whether certain factors would be used, or not; and defining and identifying proxy factors applied.
- The FCRA was discussed as a good framework that needs improvement, particularly in light of the changes in the field over the past decades. A more comprehensive picture of the field may be needed, along with new ways to apply the FCRA or new legislation.
 - In particular, the participants discussed the need to determine what, precisely, finance data is, given that the finance industry has broadened its sight beyond the traditional understandings of what finance data is.

Criminal Justice

- The participants' main concern expressed was a desire to have more data about their subject.
 - They noted that data is needed most from the state and local levels, where there are lower technological and data capabilities than at the federal level.
- Participants also thought there was a need to explain what big data means in law enforcement applications and replace stories that dominate the discussion and slant how people view the field of big data.
- Participants specifically discussed using big data to flag police who may need more training, but noted that this might raise privacy concerns. They also discussed using big data to identify low-risk people to release.

Areas for Further Exploration

The areas for Further Exploration centered on the issues of building expertise in Big Data across sectors, and secondly, how to incentivize private companies to be more transparent and accountable with how they use their data, in ways that improve understandings of how people are affected by its use across different areas.

1. Question:

- How do you build expertise in big data, when this requires bringing in technologists, topical experts, having the right tools, and growing internal expertise within organizations that are germane to different sectors? Are there opportunities, and where are the potential areas to capacity build to have a greater impact?
 - i. Participants recommended building out the Technologists Fellows Program that works with agencies, not just with the White House.
 1. Members of the White House Fellows program should be embedded in other agencies to work on these issues.
 - ii. Participants also noted that HHS has entrepreneurs that focus on innovation that could be built out like the White House Fellows program.
 - iii. Further, OMB has offered money for data analytics, but departments have refused to keep OMB out of their operations. No suggestions were offered to incentivize departments to take the money.

2. Incentives: How do we incentive companies to be more accountable and transparent?

- Participants in the discussion made a number of suggestions:
 - Incentivize companies to be proactive by regulating their systems and procedures, not their use of data or the outcomes of the algorithms they employ. This would require companies to examine the civil rights perspective sooner.
 - This approach would be similar to that taken in data security, where the point is often not whether a company suffered a breach, but whether the proper protocols were in place to prevent foreseeable breaches.
 - Participants suggested that data breach protocols were a good analogy, but that merging both big data measures and data breach would not necessarily be constructive.
 - Government could create a presumption of compliance for companies with a plan in place and who have made a good faith effort to implement that plan.
 - Participants suggested there is a mental health framework that could be used to inform other contexts.
 - Others suggested this would not be persuasive, and would matter more in the context of lawsuit than an administrative investigation, where investigators are looking at facts as a whole instead of weighing presumptions.
 - Also, complaint databases, like those run by CFPB, could be used to affect the reputation of companies that fail to deal with these issues.
 - Dialogue should be started between offices that already deal with the overlap between technology and civil rights.
 - Some suggested developing a badge system for good or best practices to encourage competition.

- However, there are problems if practices are constantly changing and if two agencies rate a single company differently on their respective issues.
- Participants said that merger guidelines could be a useful tool to get at what everyone thinks.
- Participants were also concerned that schools do not use data, opting to act on their emotional responses or personal relationships.
 - Part of the question is how to shift school culture towards using data as a civil rights tool.
 - This same concern applies to law enforcement.