



January 27, 2009

Gregory B. Craig, Esq.
Office of the White House Counsel
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Re: WhiteHouse.gov and User Privacy Questions

Dear Mr. Craig:

I write with regard to the White House website (WhiteHouse.gov) and the protection of the privacy of its users. As you may know, this issue has been the subject of news media coverage in the first week of the new Administration. This early attention to the policies and practices of WhiteHouse.gov reflects the concern of millions of citizens who wish to obtain timely and important information about their government without having to sacrifice their personal privacy. The Electronic Frontier Foundation (“EFF”) has long been committed to the protection of citizens’ right to know, as well as the fundamental right to personal privacy. We write with a specific transparency request concerning the waiver that your office recently issued concerning cookies on the website, as well as to ask you to address some related issues in conjunction with both the WhiteHouse.gov technical staff and third party service providers.

We were pleased to learn that, following initial reports concerning the use of “cookies” that enable the tracking of visitors to the website, WhiteHouse.gov has been upgraded with a “technical fix” that limits to some extent the ability of a third-party content provider (in this case YouTube) to track the activities of users. While we applaud this fast response to some of the privacy concerns that have been raised, it is our understanding that the recent change does not eliminate all of the issues associated with the use of cookies on a government website and also does not address privacy concerns that are not specific to cookies.

Overall, we believe visitors to government websites should be able to view official information securely, without fear of being tracked either by the government itself or by third parties such as YouTube. If the government uses the services of private companies, it should make sure that those companies employ the same privacy-protective standards that the government sets for itself. Specifically, it should never be the case that government websites may be used by third party vendors to retain personally identifiable information about what visitors are viewing or to use that information for purposes other than support of the government website.

Cookies: Waiver Information

The privacy issues arising from the use of cookies are substantial and were addressed in a memorandum issued on June 22, 2000, by then-OMB Director Jacob J. Lew and entitled, “Privacy Policies and Data Collection on Federal Web Sites.” Noting that “[p]articlar

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privacy concerns may be raised when uses of web technology can track the activities of users over time and across different web sites,” Mr. Lew directed that “the presumption should be that ‘cookies’ will not be used at Federal web sites.”

We understand that your office has specifically considered the issues surrounding the use of cookies on WhiteHouse.gov and, according to the Privacy Policy posted on the site, has granted a “waiver” permitting their use with video content. The policy states:

For videos that are visible on WhiteHouse.gov, a “persistent cookie” is set by third party providers when you click to play a video.

This persistent cookie is used by some third party providers to help maintain the integrity of video statistics. A waiver has been issued by the White House Counsel's office to allow for the use of this persistent cookie.

Given the substantial public interest in this issue, and the fact that your office has apparently decided to deviate from established Executive Branch policy with respect to the use of cookies on WhiteHouse.gov, we are requesting the disclosure of all information and analysis that forms the basis for the decision to waive the generally-applicable prohibition against the use of cookies on Federal websites. While we are cognizant that your office is not subject to mandatory disclosure requirements under the Freedom of Information Act, 5 U.S.C. § 552, we ask that you disclose the requested information as a matter of discretion in keeping with the President's January 21 memoranda concerning transparency and open government. The President noted that “[a] democracy requires accountability, and accountability requires transparency,” and thus directed that “[a]ll agencies should adopt a presumption in favor of disclosure . . . to usher in a new era of open Government.” I hope you will agree that disclosure of the requested information would be consistent with the President's assurance that his “Administration is committed to creating an unprecedented level of openness in Government.”

Cookies: Specific Suggestions

Additionally, we have several specific suggestions for how to better protect the privacy of visitors, which we hope you will discuss with the technical staff at WhiteHouse.gov:

- Work with YouTube to end the retention of cookie data for any video embedded on a government site, including so-called “flash cookies.” We see no reason why YouTube needs to retain this information and every reason why it can use this opportunity to make a solid commitment to the public good.
- The White House has already taken the helpful step of providing visitors with a direct-download link to a high definition MP4 of most video. To build on this, the site could embed the low definition videos using its own Flash-player and stream the video directly from the White House's own server, rather than relying on YouTube.
- Add a link to privacy information near each video embed specifically identifying third parties that may have access to the data, so that users will be fully informed of their risks and options.

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Privacy Issues Beyond Cookies

Finally, as noted above, it appears that the WhiteHouse.gov website also utilizes other third party services that raise similar privacy concerns to cookies, including:

1. An "invisible pixel" style webbug/tracker on every page on the site, hosted by WebTrends.com.
2. The entire WhiteHouse.gov domain appears to utilize edge-caching technology provided by Akamai, Inc.
3. Access to direct-download MP4s of video content appears to be hosted by Amazon S3.

Each of these three cases allows a third-party providers to log the IP addresses and other personally identifiable information about some or all visitors to WhiteHouse.gov.

Given the privacy principles articulated by the OMB memorandum referenced above, which specifically noted the risk of the technologies that "can track the activities of users over time and across different websites," we have a specific question for you: What is the White House willing to do to continue to protect the privacy of visitors to government websites, even as it utilizes technologies other than cookies that can do similar tracking?

There is no question that President Obama has led the way in using technology in government. EFF believes President Obama can continue to lead in this area by taking steps to protect the privacy of visitors to government sites regardless of the underlying technologies used. You and your colleagues may find specific ideas and suggestions in our White Paper, "Best Practices for Online Service Providers," available at <<http://www.eff.org/wp/osp>>.

I thank you in advance for your consideration of this request and ask that you respond by February 6, 2009. Should your staff wish to discuss this matter in more detail, I can be reached at (415)436-9333 x 108 or at Cindy@eff.org.

Sincerely,

ELECTRONIC FRONTIER FOUNDATION



CINDY A. COHN
Legal Director

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