



UNITED STATES DEPARTMENT *of* JUSTICE

# Freedom of Information Act (FOIA) and Privacy Act Interface



# *OIP Guidance: Interface Between the FOIA and Privacy Act*

## OIP Guidance, The Interface Between the FOIA and Privacy Act (September 2022):

- Defines key terms and differences between the statutes
- Explains how to analyze Privacy Act records for disclosure
- Addresses Annual FOIA Reporting requirements related to Privacy Act requests

## Slide 2

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**A8**

added this new slide to highlight our guidance. Since we cover so much of the guidance in the training, I didn't add individual references throughout but thought calling it out up front and adding a reference at the end would work.

Author, 11/30/2022



## *Purpose of the Privacy Act*

Protect<sup>A1</sup> the privacy of the individuals about whom the government maintains records by:

1. Limiting the collection, maintenance, use, and disclosure of personally identifiable information.
2. Allowing individuals to request access to, amendment of, and an accounting of disclosures concerning records about themselves.

***General Presumption is Protection***

**Slide 3**

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**A1**

**added notes**

Author, 10/19/2022



## *Purpose<sup>A2</sup> of the FOIA*

- Facilitates government transparency and accountability.
- Provides a means for the public to “know what the government is up to.”
- Permits agencies to protect certain records that fall within any of the nine FOIA exemptions.

***General Presumption is Disclosure***

**Slide 4**

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**A2**

**added notes**

Author, 10/19/2022



## *Records Covered*

### Privacy Act

Records must be:

1. About an individual,
2. Stored in a system of records, and
3. Accessed by personal identifier.

### FOIA

All agency records.

*Privacy Act Record = Agency Record*  
*Agency Record  $\neq$  Privacy Act Record*



# *Records Covered*

Agency  
Records

**Privacy  
Act  
Records**



## *Privacy Act Definitions*

- Individual
- Record
- System of Records
- System of Records Notice

**Slide 7**

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**A3**

**added notes**

Author, 10/19/2022



## *Privacy Act Definitions*

### **Individual:**

A citizen of the United States or a lawfully admitted permanent resident.

5 U.S.C. § 552a(a)(2)

### **Does not include:**

- Organizations
- Deceased individuals



## *Privacy Act Definitions*

### Record:

“any item, collection, or grouping of information **about an individual** that is maintained by an agency...”

5 U.S.C. § 552a(a)(4)

Generally, “must both be ‘about’ an individual and include his name or other identifying particular.”

Tobey v. NLRB, 40 F.3d 469, 471 (D.C. Cir. 1994),



## *Privacy Act Definitions*

### **System of Records:**

“a group of records under the control of any agency from which information is retrieved by [personal identifier]”

5 U.S.C. § 552a(a)(5)

The record must be locatable using a personal identifier and the agency must in fact access the records using a personal identifier.

OMB Guidelines, 40 Fed. Reg. 28,948 (July 9, 1975)



## *Privacy Act Definitions*

### **System of Records Notice (SORN):**

- Provides notice to the public about a system of records.
- Includes, among other items, the agency's purposes for collecting and routine uses of the information.
- If you have questions about whether disclosing records is appropriate, or whether a Privacy Act exemption applies, consult the SORN.



## *Q&A*

Which of the following are examples of Privacy Act records?

- A. Federal student aid application
- B. Government personnel records
- C. Emails<sup>A4</sup> containing PII
- D. FOIA request and appeal files

A4

added notes about emails and FOIA requests

Author, 10/19/2022



## *Privacy Act: General Rule*

- Generally, agencies cannot disclose Privacy Act records without the prior written consent of the individual.
- Records may be disclosed without prior written consent under certain conditions.



## *Privacy Act Conditions of Disclosure*

An agency can disclose Privacy Act records without prior written consent in the following circumstances:

(b)(1) Need to know within agency

**(b)(2) If required under the FOIA**

(b)(3) Routine use published in SORN

(b)(4) Census Bureau

(b)(5) Statistical research (if de-identified)

(b)(6) National Archives



## *Privacy Act Conditions of Disclosure*

- (b)(7) Law enforcement request
- (b)(8) Compelling circumstances for the health and safety of an individual
- (b)(9) Congress
- (b)(10) Government Accountability Office
- (b)(11) Court order
- (b)(12) Pursuant to Debt Collection Act



## *Access under Privacy Act and FOIA*

- Both the Privacy Act and FOIA provide rights of access to records.
- However, there are differences in the extent of access depending on the statute.



## *Who has a right of access?*

### Privacy Act

- U.S. Citizens
- Lawful Permanent Residents

Note: Citizens of a “covered country” may have access rights pursuant to the Judicial Redress Act of 2015.

### FOIA

- U.S. Citizens
- LPRs
- Non-U.S. Citizens
- Organizations

**ANYONE**



## *First Party v. Third Party Requests*

### **1<sup>st</sup> Party Request**

- When an individual asks for records about him/herself.

### **3<sup>rd</sup> Party Request**

- When someone seeks records about another individual.



## *Processing Requests*

### **1<sup>st</sup> Party Requests**

- Process first under the Privacy Act, then under the FOIA for the greatest disclosure.

### **3<sup>rd</sup> Party Requests**

- Process only under FOIA



## *How to Process <sup>A5</sup> First Party Requests*

1. Is the record a Privacy Act record?
  - If **no**, continue to FOIA analysis.
  - If **yes**, continue to next question.
2. Does a Privacy Act exemption apply?
  - If **no**, release.
  - If **yes**, continue to FOIA analysis.
3. Does a FOIA exemption apply?
  - If **no**, release.
  - If **yes**, withhold.

*Information can only be withheld when both Privacy Act and FOIA exemptions apply.*

A5

added notes

Author, 10/19/2022



## *How to Process Third Party Requests*

- Process third party requests for Privacy Act records under the FOIA only.
- Release records if FOIA requires disclosure:
  - FOIA requires disclosure if no FOIA exemption applies.
- Agency generally needs a FOIA request in hand to release Privacy Act records.

Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984).



## *Q&A*

A U.S. Citizen seeks records about their criminal investigation. These records are part of a Privacy Act system of records that is exempt from the access provision of the Privacy Act. The response letter may contain which of the following:

A. FOIA Exemptions

B. Privacy Act Exemptions

C. FOIA and Privacy Act Exemptions



## *Q&A*

A U.S. Citizen seeks records about their neighbor's criminal investigation. The response letter may contain which of the following:

A. FOIA Exemptions

B. Privacy Act Exemptions

C. FOIA and Privacy Act Exemptions



## *Privacy Act Exemptions*

### 10 Exemptions

- One special
- Two general (apply to entire record)
- Seven specific (require segregation)

The exemptions apply to certain Privacy Act provisions, such as those concerning access and amendment.



## *One Special Exemption*

Section 552a(d)(5) exempts from disclosure:

**“Any information compiled in reasonable anticipation of a civil action or proceeding.”**

Self-executing exemption.

FOIA Exemption: 5 (attorney work-product)



## *Two General Exemptions*

**(j)(1): CIA systems of records.**

FOIA Exemption: 3

**(j)(2): Systems of records maintained by a principal function criminal law enforcement agency and the records were compiled for criminal law enforcement purposes.**

FOIA Exemption: 7



## *Seven Specific Exemptions*

Agency may exempt a system of records if it contains:

**(k)(1): Classified information**

FOIA Exemption: 1



## *Seven Specific Exemptions*

**(k)(2): Generally applies to **investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2).****

**FOIA Exemption: 7**

**NOTE:** (k)(2) is limited if the record resulted in a denied right, privilege, or benefit that the individual would otherwise be entitled, or for which he or she would otherwise be eligible.



## *Seven Specific Exemptions*

**(k)(3): U.S. Secret Service information**

**(k)(4): required by statute to be maintained and used solely as **statistical records.****



## *Seven<sup>A6</sup> Specific Exemptions*

**(k)(5): Source-identifying investigatory material** compiled solely for the purpose of determining suitability, eligibility, or **qualifications for Federal civilian employment**, military service, Federal contracts, or access to classified information.

FOIA Exemption: 7(C), 7(D)

**A6**

added notes

Author, 10/19/2022



## *Seven Specific Exemptions*

**(k)(6): Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service.**

**(k)(7): Evaluation material used to determine potential for promotion in the armed services, but only to the extent it would reveal the identity of a confidential source who was granted an express promise of confidentiality.**



## *FOIA and Privacy Act Exemptions*

- FOIA and Privacy Act exemptions are not exact matches.
- Be clear about which statute to apply.



## *Third<sup>A7</sup> Party Information Within a Privacy Act Record*

- There is no PA equivalent to FOIA Exemptions 6 or 7(C).
- Third parties may have a legitimate privacy interest in the information, but the Privacy Act may require disclosure.

A7

added notes

Author, 10/19/2022



## *How have courts addressed this gap?*

- Some courts hold that certain third party information is not part of the requesters “record.”
  - FBI agents and phone numbers. (Nolan)
  - Non-government info where there is some potential for harassment or harm. (DePlanche)

Nolan v. DOJ, 1991 WL 36547, \*9 (D. Colo. 1991), *aff'd* 973 F.2d 843.

DePlanche v. Califano, 549 F. Supp. 685, 693, 696-98 (W.D. Mich. 1982).



## *Summary*

- Understand how to identify a Privacy Act record.
- Process records using one statute and one set of exemptions at a time.
- Seek guidance on the interface between Privacy Act and FOIA when needed.



## *Resources*

### OIP Guidance, The Interface Between the FOIA and Privacy Act (September 2022)

#### **Privacy Act**

- OMB has primary responsibility for Privacy Act guidance
- Agency Privacy Officer
- Office of Privacy and Civil Liberties (DOJ Components)

#### **FOIA**

- Agency FOIA Officer
- DOJ Office of Information Policy



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**Questions?**