

Freedom of Information Act (FOIA) and Privacy Act Interface



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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



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Purpose of the Privacy Act

Protect 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



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Purpose 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



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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 ≠ Privacy Act Record

Records Covered

**Agency
Records**

**Privacy
Act
Records**



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Privacy Act Definitions

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



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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



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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)



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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)



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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.



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Knowledge Check

Which of the following are examples of Privacy Act records?

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



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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.



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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



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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



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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



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First Party v. Third Party Requests

1st Party Request

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

3rd Party Request

- When someone seeks records about another individual.



Processing Requests

1st Party Requests

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

3rd Party Requests

- Process only under FOIA



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How to Process 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.



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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).



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Knowledge Check

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



Knowledge Check

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



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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.



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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)



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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



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Seven Specific Exemptions

Agency may exempt a system of records if it contains:

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

FOIA Exemption: 1



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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.



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Seven Specific Exemptions

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

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



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Seven 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)**



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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.



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Third 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.



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?



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