

The Privacy Act of 1974

An Overview

5 U.S.C. §552a

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What is the purpose of the Privacy Act?



To balance the Government's need to maintain information about individuals with the rights of those individuals to be protected from unwarranted invasions of their privacy

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Basic Policy Objectives of the Privacy Act

1. Restrict disclosure of personally identifiable records maintained by agencies
2. Grant individuals an increased right of access and a right of amendment
3. Establish a "code of fair information practices" that regulates collection, maintenance, use, and disclosure
4. Grant individuals private rights of action for agency violations of the Act

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Key Definitions



- The Privacy Act is a technical statute
- Definitions dictate whether the statute applies

For Example

- Who is required to comply with the Privacy Act?
- Who can utilize the Privacy Act?
- What does the Privacy Act pertain to?

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Who Must Comply? Federal Agencies

Also ⇨ Subsection (m) government contractors

- PA requirements apply if contract is for operation of a system of records to accomplish an agency function
- For purposes of criminal penalties, subsection (m) contractors are considered to be agency employees
- Federal Acquisition Regulation sets forth language that must be inserted in solicitations and contracts for design, development, or operation of a system of records (48 C.F.R. § 24.104)

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Section 7 applies to State and local agencies - SSNs

- Unlawful for any Federal, State, or local agency to deny a right, benefit, or privilege provided by law because of an individual's refusal to provide his/her SSN.
 - EXCEPT where disclosure is required by Federal statute, or
 - agency system operated before 1975 to verify identity per statute or regulation.
- Any Federal, State, or local agency requesting SSN is required to inform
 - whether disclosure is mandatory or voluntary,
 - under what statute or authority SSN is solicited
 - what uses will be made of the SSN

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Who is covered by the Privacy Act?

Under the Privacy Act's Definition
Individual = U.S. Citizen or Lawful Permanent Resident

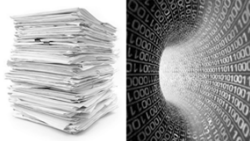
NOT covered by the Privacy Act?

- Deceased persons
- Corporations and organizations
- Non-citizens or non-lawful permanent residents

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What does the Privacy Act pertain to?

Records in a System of Records



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Privacy Act Records



Any item, collection, or grouping of information about an individual that is maintained by an agency and that contains his/her name or an identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint, voiceprint, or photograph

KEY POINTS

- Must be about the individual
- Must identify the individual
- Must be maintained by an agency

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Personal Notes



Purely personal notes – generally, NOT considered to be covered by the Privacy Act

Supervisor’s personal notes – memory refreshers

- To remain personal:
 - Must be kept and maintained only for personal use of the supervisor
 - Must NOT be circulated to anyone
 - Must NOT be under the control of the agency or required by the agency to be maintained
- Duty to incorporate personal notes if used in an adverse determination about an individual

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Privacy Act Records in a SYSTEM OF RECORDS



*SYSTEM OF RECORDS – A group of any records under the control of any agency from which information **is retrieved by** the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.*

Coverage under the Privacy Act depends on the method of retrieval, rather than solely the content of the record.

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Standard: Actual Retrieval

OMB Guidelines

A system of records exists if:

- 1) there is an indexing or retrieval capability using identifying particulars built into the system and
- 2) the agency does, in fact, retrieve records about individuals by reference to some personal identifier



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System of Records – Why is this definition so important?

Most of the rights and requirements of the Privacy Act depend on whether this definition is met
◦ For ex., wrongful disclosure suits, access and amendment rights



Notice Requirements

- Must publish a system of records notice in the Federal Register (5 U.S.C. § 552a(e)(4))
- OMB Circular A-108, Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act

System of Records Notice (SORN)

- ❖ System name
- ❖ Security classification
- ❖ System location
- ❖ System manager(s)
- ❖ Authority for maintenance
- ❖ Purpose(s) of the system
- ❖ Categories of individuals
- ❖ Categories of records
- ❖ Record Source Categories
- ❖ Routine uses, including categories of users and purposes of uses



SORNs (continued)

- ❖ Policies and practices for storage of records
- ❖ Policies and practices for retrieval of records
- ❖ Policies and practices for retention and disposal of records
- ❖ Administrative, technical, and physical safeguards
- ❖ Record access procedures
- ❖ Contesting record procedures
- ❖ Notification procedures
- ❖ Exemptions
- ❖ History



2. DISCLOSURE OF RECORDS

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Rule: No Disclosure without Consent



"No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b)

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12 Exceptions to the Rule

1. **Intra-agency disclosures:** "Need to know"
2. **Required by the FOIA**
 - FOIA request in hand
 - No discretionary disclosures
3. **Routine Use**
 - Published in agency SORN
 - Disclosure compatible with purpose for collection
4. **Bureau of the Census**
5. **For statistical research or reporting**
6. **National Archives and Records Administration (NARA)**

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12 Exceptions to the Rule (cont'd)

- 7. **Written request** by the head of a **government agency** or instrumentality within/under the control of the **U.S.** for an authorized civil or criminal **law enforcement** activity
- 8. **Compelling circumstances** affecting the **health or safety** of an individual (notice required)
- 9. **Congress**
- 10. **Comptroller General/GAO**
- 11. **Court Order**
- 12. **Debt Collection Act**

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Accounting of Certain Disclosures

Each agency shall:

Maintain an accounting of disclosures from a system of records except for disclosures made:

- Under (b)(1) – need to know within the agency
- Under (b)(2) – FOIA

Make the accounting available to the record subject, except for disclosures under (b)(7) – law enforcement.

Use accountings to inform any person or agency to which a record has been disclosed about any correction to the record or notation of dispute.

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Access to Records



- Privacy Act provides the record subject with an **independent right of access** to records in a SOR
- Privacy Act access is **independent of, and in addition to,** access rights available under **FOIA**

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Amendment of Records

- Individuals may request amendment of their records
- Standard = such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual about making a determination about him/her
- Appeal and statement of disagreement
- Notification of subsequent disclosures
- Notification to prior recipients
- Facts versus opinions



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3. AGENCY REQUIREMENTS

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What are agencies required to do under the Privacy Act?

- (e)(1) – Maintain only relevant and necessary information
- (e)(2) – Collect information from the record subject when information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs
- (e)(3) – Inform each individual when collecting information of: the authority, the principal purpose(s) for which the information is to be used, routine uses, and effects, if any, of not providing the information

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Agency Requirements (cont'd)

- (e)(4) – Publish system notice in the Federal Register
- (e)(5) – Maintain all records which are used in making any determination about an individual with such accuracy, relevance, timeliness, and completeness to assure fairness to the individual
- (e)(6) – Prior to disseminating any record to any person other than an agency, unless required by FOIA, make reasonable efforts to assure records are accurate, complete, timely, and relevant for agency purposes

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Agency Requirements (cont'd)

- (e)(7) – Maintain no record describing how an individual expresses 1st Amendment rights unless expressly authorized by statute or by the individual or unless pertinent to and within the scope of an authorized law enforcement activity
- (e)(8) – Make reasonable efforts to serve notice when any record is made available to any person under compulsory legal process when such process becomes a matter of public record

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Agency Requirements (cont'd)

- (e)(9) – Establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and provide instruction for each such person regarding the rules, the Privacy Act's requirements, and the penalties for noncompliance
- (e)(10) – Establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained

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Agency Requirements (cont'd)

- (e)(11) – At least 30 days prior, publish in the Federal Register notice of any new use or intended use of the information, and provide an opportunity for interested persons to submit comments
- (e)(12) – At least 30 days prior to establishing or revising a computer matching program with a non-Federal agency, publish notice of such establishment or revision in the Federal Register

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Computer Matching

- Privacy Act sections (a)(8)-(13), (e)(12), (o), (p), (q), (r), and (u).
- What is a “matching program”?
- *Federal Register* notice
- Matching agreements
- Due process
- Data Integrity Boards



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Rights Under the Privacy Act

- Access rights
- Amendment rights
- Right to proper maintenance
- Private rights of action for agency violations of the Act



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10 Exemptions: Limitations of Rights

(d)(5) – exemption from **access only** of information compiled in reasonable anticipation of a civil action or proceeding (self-executing)

- Similar in some respects to attorney work product privilege
- Not limited to information compiled for judicial proceedings, but also covers administrative hearings

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10 Exemptions (cont'd)

Subsection (j) – regulation required

(j)(1) – information maintained by the CIA

(j)(2) – information maintained by a principal function criminal law enforcement agency and compiled for criminal law enforcement purposes

- Is the agency a criminal law enforcement agency?
- If so, was the information compiled for criminal law enforcement purposes?

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10 Exemptions (cont'd)

Subsection (k) – regulation required

(k)(1) – classified information

(k)(2) – investigatory material compiled for law enforcement purposes, other than material within scope of (j)(2)

2 elements

- Is the material investigatory material not covered by (j)(2), for example, civil or regulatory enforcement
- Was an individual denied a right, privilege, or benefit as a result of the maintenance of the records? If so, then the exemption only protects information that would reveal a source provided an express promise of confidentiality.

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10 Exemptions (cont'd)

- (k)(3) – maintained in connection with providing protective services to the President or other individuals
- (k)(4) – required by statute to be maintained and used solely as statistical records
- (k)(5) – information that reveals a source provided an express promise of confidentiality in the context of background investigatory material to determine eligibility for Federal employment, military service, Federal contracts, or access to classified information
- (k)(6) – testing material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing process
- (k)(7) – information that reveals a source provided an express promise of confidentiality in the context of evaluation material used to determine potential for promotion in the armed services

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Civil Remedies



1. Amendment lawsuits
2. Access lawsuits
3. Accuracy lawsuits for damages
4. Other damages lawsuits
 - wrongful disclosure, wrongful maintenance, or any other violation of the Privacy Act that results in an adverse effect on an individual

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Criminal Penalties



- Misdemeanor and fine up to \$5000:
- Any officer or employee who knowingly and willfully discloses individually identifiable information to any person not entitled to receive it
 - Any officer or employee who willfully maintains a SOR without meeting the notice requirement
 - Any person who knowingly and willfully requests or obtains a record concerning an individual under false pretenses

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Privacy Act Resources

- ✓ Agency SAOPs, CPOs, Privacy Act Officers
- ✓ OMB privacy guidance and reference materials, including its Privacy Act Implementation Guidelines, available at: <https://www.whitehouse.gov/omb/information-regulatory-affairs/privacy/>
- ✓ DOJ/Office of Privacy and Civil Liberties, "Overview of the Privacy Act of 1974," available at: <https://www.justice.gov/opcl>
- ✓ Federal Privacy Council

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