

## Privacy Act – Right of Access (Conditions of Disclosure) September 6-8, 2023

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*Thanks to Tracy Rogers for use of the slides*

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### Overview

Key Terms

Privacy Act Right of Access

Provisions Barring Disclosure

Privacy Access Analysis

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### Key Terms

#### *The Act applies to "Records"*

"Record" means:

- ☐ any item, collection, or grouping of
- ☐ information about an **individual**
- ☐ that is maintained by an agency,
  - including, but not limited to, his education, financial transactions, medical history, and criminal or employment history,
- ☐ and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Source: 5 U.S.C. 552a(a)(4)

To qualify as a Privacy Act record, the information must identify an individual. It can include as little as one descriptive item of information about an individual.

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## Key Terms

*The Act applies to information  
about an "Individual"*

"Individual" means:

- a citizen of the United States or
- an alien lawfully admitted for permanent residence

Source: 5 U.S.C. 552a(a)(2)

Deceased individuals do not have Privacy Act rights, nor do executors or next-of-kin.

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## Key Terms

*The Act applies to Records in a "System of Records"*

"System of Records" means:

- ☐ 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

Source: 5 U.S.C. 552a(a)(5)

"System" does not mean IT system. A System of Records can be comprised of records that are electronic, paper, or both.

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## What is a SORN?

### System of Records Notice (SORN)

- ✓ Required by the Privacy Act
- ✓ Describes each agency system of records
- ✓ Is a public notice by the agency
- ✓ Subject to public notice & comment in the *Federal Register*
- ✓ Has a legal effect

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## Privacy Act Right of Access

5 U.S.C. § 552a(d). Individuals have a right to:

- ☐ (d)(1) – Access their PA records upon request
  - Request does not need to cite the PA or identify the SORN
  - Only applies to individuals seeking their own records (retrieved by their name/identifier) in a system of records
  - Unlike FOIA – no third-party right of access

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## Provisions Barring Disclosure

The Privacy Act provides “exemptions” that can interfere with (either limit or prevent) the individual’s ability to access their records in a system of records. These exemptions operate in two different ways.

- ☐ One type prevents access to qualified records in an **exempt system of records**
- ☐ The second type is a **general statutory bar** preventing access to certain privileged records in any system of records.



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## Exemptions J and K

- ☐ **“Exempt System of Records” (threshold requirement)**
  - J and K exemptions must be formally claimed for a SOR; unlike FOIA they are not automatically available to apply.
  - Any SOR that may contain exempt records must claim the exemption(s) through notice & comment rulemaking.
- ☐ **“Qualified Records”**
  - Records (or information within those records) must match the Privacy Act exemption description to deny access.
  - Similar to how a FOIA exemption works.

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## Exemptions J and K

*"Said another way..."*

Subsection (j) and (k) exemptions can't be used to deny access to a Privacy Act record unless:

- The records are maintained in a System of Records that is exempt per the SORN,
- and
- The agency successfully completed a notice and comment rulemaking to exempt that SORN (*see* 32 CFR part 310),
- and
- The information in the records actually qualifies under the (j) or (k) exemption(s) in question.

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## Exemptions J and K

☐ To claim an exemption in a SORN, the system of records must *actually* or *possibly* contain material within scope of (j) or (k).

☐ Common (k) exemptions:

- (k)(1) Classified information (FOIA B1 exempt)
- (k)(2) Law enforcement investigatory information.
- (k)(5) Confidential sources in background check records for Federal employment, contracts, clearances
- (k)(6) Testing or examination material for Federal appointments or promotions
- (k)(7) Promotion for armed services

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## Exemptions J and K

☐ Other (k) exemptions

- (k)(3) United States Secret Service protective services records.
- (k)(4) Records maintained and use solely as statistical records, by law.

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## Exemptions J and K

- ❑ (j)(1) – exclusive use by CIA
- ❑ (j)(2) For agencies or components thereof which performs as its principal function any activity pertaining to criminal law enforcement, but only for these materials:
  - (A) “rap sheet” type data.
  - (B) material compiled for the purpose of a criminal investigation.
  - (C) reports compiled at any stage of process from arrest to indictment to parole.

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## Exemptions

### IS THE SORN EXEMPT?

During the SORN process, Privacy Officers evaluate and claim exemptions for individual SORN, as appropriate.

Here’s exemption language for an exempt DoD SORN.

What do the highlighted portions tell us?

\* Privacy Act exemptions must be properly published in order for an agency to use it to deny access, except in the case of (d)(5) which is self-executing.

that the foregoing is true and correct.  
Executed on (date). (Signature).”

#### EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The DoD has exempted records maintained in this system from 5 U.S.C. 552a(c)(3) and (d) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1) and (k)(6). In addition, when exempt records received from other systems of records become part of this system, the DoD also claims the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here. An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), and (c), and published in 32 CFR part 310.

**HISTORY:**  
None

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## Exemptions

**Title 32 – National Defense**

Subtitle A – Department of Defense

Chapter 1 – Office of the Secretary of Defense

Subchapter O – Privacy Program

**Part 310 – Protection of Privacy and Access to and Amendment of Individual Records under the Privacy Act of 1974**

**Subpart C – Exemption Rules**

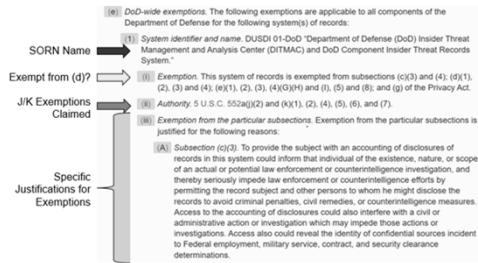
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## Exemptions

Subpart C, Exemption Rules:

<https://ecfr.federalregister.gov/current/title-32/subtitle-A/chapter-I/subchapter-O/part-310/subpart-C>



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## Exemptions

DoD, PCLTD SORN Website

| System ID   | System Name   | FR Citation<br><small>Hyperlink to FR Notice</small> | Exemptions<br><small>Hyperlink to FR Implementation Rule</small> |
|-------------|---|--|--|
| DAFIS 01    | Visual Information Management System (VIMS)                         | July 18, 2004<br>69 FR 41232                         |  |
| DAU 06      | Defense Acquisition University (DAU), Visual Arts and Press Records | October 20, 2016<br>81 FR 72575                      |  |
| DAU 07      | Acquisition Community Connection (ACC) Members Records              | November 12, 2008<br>73 FR 66651                     |  |
| DAU 08      | Defense Acquisition University Student Information System (SIS)     | December 30, 2014<br>79 FR 78412                     |  |
| DCIO 01     | Defense Industrial Base (DIB) Cybersecurity (CS) Activities Records | May 17, 2015<br>84 FR 22477                          |  |
| DCIO 02 DoD | Enterprise Mass Warning and Notification System (EMNNS)             | March 30, 2020<br>85 FR 17545                        |  |
| DCMO 01 DoD | DoD Federal Docket Management System (DoD FDMS)                     | July 27, 2015<br>80 FR 44333                         |  |
| DCMO 02     | Civil Liberties Program Case Management System                      | February 11, 2016<br>81 FR 7337                      | (b)(2), (b)(1) (b)(2), (b)(5) ←                                  |
| DFMP 06     | DoD Priority Placement Program (STOPPER LIST)                       | February 22, 1993<br>58 FR 10227                     |  |
| DGC 02      | Private Relief Legislation File                                     | SORN RESCINDED<br>April 4, 2017<br>82 FR 16382       |  |

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## One General Bar to Access

- ☐ Individuals CANNOT access information compiled in reasonable anticipation of a civil action or proceeding.
- ☐ This is an across-the-board bar to disclosure under the Privacy Act.
- ☐ (d)(5) applies to all Privacy Act records. No need to include anything special in the SORN or publish a rule.
- ☐ (d)(5) applies even if records are from a non-exempt system of records (SOR).

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## One General Bar to Access

- ☐ (d)(5) = FOIA Exemption 5's Work Product Privilege
- ☐ May even extend to work product prepared by non-attorneys
- ☐ Does not apply to criminal proceedings
- ☐ Does apply to civil litigation or other civil proceedings, even in quasi-judicial contexts
- ☐ Consult with your legal counsel on application/scope

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## Privacy Act Access Analysis

**Threshold Question:** Is the person seeking records the individual entitled to access under the Act?

Requester seeks access to records "about" them.

- ☐ Are those "records" about an "individual" in a "system of records"?
- ☐ If not, process under FOIA.

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## Privacy Act Access Analysis

**Threshold Question:** Is the person seeking records the individual entitled to access under the Act?

- ☐ Is the requester entitled to Privacy Act access or is their information just included in the file?
  - Does the agency actually retrieve their records from a system of records using their name or identifier?
  - If not, although the file may contain information about them, their access rights are limited to FOIA.

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## Privacy Act Access Analysis

Step 1: Are the Records d5 material?

Look for markings such as "Work-Product" or "Attorney Work Product"

Step 2: Which SORN covers the Records?

FOIA Office may need to ask the program Office: Where did the paper files come from? What IT system were the records retrieved from? Were these materials from a System of Records?

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## Privacy Act Access Analysis

Step 3: Is the SORN Exempt?

Some SORNs are exempt, some aren't!

Step 4: Do some/all of the records themselves fall within the claimed (j) or (k) exemptions?

Record-by-record review - Withhold part or all

- Example: Document containing classified and unclassified material

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## One more thing...

❑ Why don't agencies just claim (j) and (k) exemptions for all SORs?

- May not be legal
- Records in a SOR must contain or have the potential to contain info described in (j) or (k)

❑ If records are in a non-exempt SORN, all records must be disclosed unless the (d)(5) Bar applies.

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## One more thing...



Someone else's records were misfiled in this person's Privacy Act file!

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## One more thing...

### What do you do?

- ☐ **Misfiled records:** Have the program office correct the misfiling – do not process the records with the request
- ☐ **Other people's PII:** Redact - not a Privacy Act "record" because the information is "not about the individual" under 552a(a)(4)
  - Remember – sometimes the other person's name should be in a record, such as when there is a complaint or incident between two individuals.

Always consult with legal counsel and/or your FOIA supervisor before invoking these remedies!

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## Exemptions

| Privacy Act*   | FOIA  |
|--|---|
| (j)(1) Records held by the CIA   | (b)(3) Exempt from disclosure by statute  |
| (j)(2) Investigatory records held by a criminal law enforcement agency                               | (b)(7)(A) – (b)(7)(F) Exempts various records compiled for law enforcement purposes   |
| (k)(1) Classified<br>Exempts properly classified information; expressly references FOIA (b)(1)       | (b)(1) Classified – pursuant to E.O.<br>Exempts properly classified information pursuant to prevailing executive order on classification                      |
| (k)(2) Investigatory records for law enforcement purposes (including criminal, civil, or regulatory) | (b)(7)(A) – (b)(7)(F) Exempts various records compiled for law enforcement purposes<br>– including (b)(7)(D), re: protecting identity of confidential sources |

\* Privacy Act exemptions must be properly published in order for an agency to use it to deny access, except in the case of (d)(5) which is self-executing.

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## Exemptions

| Privacy Act*   | FOIA   |
|--|--|
| (k)(3) Material associated with protecting the President                             | (b)(3) Exempt from disclosure by statute<br>OR<br>(b)(7)(E) Investigative techniques or procedures         |
| (k)(4) Required by statute to be used solely as a statistical record                 | No comparable FOIA exemption, except (b)(3) protects certain information exempt from disclosure by statute |
| (k)(5) Investigatory material used for suitability purposes – confidential sources   | (b)(7)(D) Law enforcement material – protecting identity of confidential sources                           |
| (k)(6) Testing and evaluation materials for appointment/promotion in Federal service | (b)(2) Internal personnel rules and practices  |
| (k)(7) Evaluation material for promotion in armed services – confidential sources    | (b)(7)(D) Law enforcement material – protecting identity of confidential sources                           |

\* Privacy Act exemptions must be properly published in order for an agency to use it to deny access, except in the case of (d)(5) which is self-executing.

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## Exemptions

| Privacy Act*   | FOIA  |
|--|---|
| (d)(5) Reasonable anticipation of a civil action or proceeding (non-criminal)<br>- Similar to attorney-work product<br>- Not limited to attorneys  | (b)(5) Deliberative process, attorney work product, attorney-client privilege   |
| No comparable Privacy Act exemption  | (b)(4) Trade secrets, commercial or financial information<br>(b)(8) Stability reports (financial institutions)<br>(b)(9) Geological data concerning wells   |
| No comparable Privacy Act exemptions<br>- But consider <b>No Disclosure Without Consent Rule Itself</b> , 5 U.S.C. § 552a(b)<br>- Also consider (k)(5) (Investig. material for Federal suitability determinations if it <u>would</u> reveal identity of confidential source) | (b)(6) Clearly unwarranted invasion of personal privacy<br>(b)(7)(C) Law enforcement information which if produced could reasonably be expected to constitute an unwarranted invasion of personal privacy |

\* Privacy Act exemptions must be properly published in order for an agency to use it to deny access, except in the case of (d)(5) which is self-executing.

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## Knowledge Check



### SCENARIO

Sgt. Sham is currently the subject of a pending criminal investigation by Army Criminal Investigation Command (CID). Sgt. Sham met twice with investigators and he also heard that several subordinate members of his unit have provided statements against him. Sgt. Sham is curious about what information CID has compiled on him so far.

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## Knowledge Check



### QUESTION

Q1: May Sgt. Sham make a first-party request under the Privacy Act for all records pertaining to him in the identified investigative file?

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## Knowledge Check



### QUESTION

Q2: Assuming Sgt. Sham may properly make a request, what information (ideally) would he wish to know before making his request?

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## Knowledge Check



### QUESTION

Q3: Assuming Sgt. Sham makes a proper request, must CID provide him all of the documents?

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## Knowledge Check



### QUESTION

Q4: If CID does not have an exemption rule, must it provide the documents requested?

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## Knowledge Check



### QUESTION

Q5: Even without an exemption rule, may CID claim a (d)(5) exemption and argue that the investigative documents were compiled in reasonable anticipation of a criminal proceeding?

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## Knowledge Check



### QUESTION

Q6: Assuming CID has a properly published exemption rule that claims a (j)(2) exemption from access requests under (d)(1) of the Privacy Act, may CID claim an exemption and withhold the documents?

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## Processing Under Privacy Act

- **Ensure that you have an appropriate request**
  - U.S. citizens and lawful permanent residents
  - 1<sup>st</sup> party or authorized representative of 1<sup>st</sup> party  
(plus notarization or declaration under penalty of perjury)
- **Check the System of Records Notice for access requirements and exemptions**
  - Properly published exemptions under (j) or (k)
  - Check for (d)(5) which is self-executing (i.e. was record prepared in anticipation of a civil action or proceeding?)
- **Continue to process under FOIA**
  - Records must contain both a Privacy Act and FOIA exemption to be withheld
- **Provide appropriate appeal rights, including notice**

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## Processing Under Privacy Act

- Requester doesn't always know which statute applies to his or her request or won't cite a statute. Inform them in the response.
- Review the threshold requirements of each statute in conjunction with the subject of the request.
- Once a decision is made on which statute(s) applies, follow agency's regulations to process the request. ***If PA applies, apply FOIA if there are PA exemptions.***
- Know your Component's published Privacy Act System of Records Notices:  
**<http://dpcl.d.defense.gov/Privacy/SORNs/>**

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## Resources

- The Privacy Act of 1974
- OMB "Privacy Act Implementation-Guidelines and Responsibilities," 40 FR 29849-28978
- OMB Circular No. A-108
- Department of Justice "Overview of the Privacy Act of 1974"

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## Questions?

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