

The Privacy Act of 1974

An Overview

Presenter
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Historical Framework

- Brandeis/Warren definition of privacy:
 - “the right to be let alone,” 4 Harvard Law Review 193 (1890);
- Freedom of Information Act (FOIA) of 1966;
- Watergate → Privacy Act of 1974;
- FOIA and Privacy: key differences, yet two sides of the same coin.

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Historical Framework

- **The Privacy Act of 1974**
 - Codified at 5 U.S.C. § 552a;
 - Created in response to concerns about how the use of computerized databases impacts individuals' privacy rights;
 - Balance between Government need to maintain information about individuals and individuals' right to be protected against unwarranted invasions of privacy.

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Privacy Act Policy Objectives

- Established a code of fair information practices which...
- Restricted disclosure of records about individuals to third parties;
- Increased right of access to records about YOU;
- Granted individuals right to seek amendment of records that are not accurate; and
- Granted individuals private right of action for agency violations of the Act.

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Privacy Act Basics

■ Fair information practices:

- Transparency;
- Individual Participation;
- Purpose Specification;
- Minimization;
- Use Limitation;
- Data Quality and Integrity;
- Security; and
- Accountability and Auditing.

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Privacy Act Basics Cont'd.

■ Who is covered by the Privacy Act?

- Applies to records kept about individual U.S. citizens and legal permanent residents in a "system of records."

■ What is covered by the Privacy Act?

- Any item, collection, or grouping of information about an individual 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.

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Privacy Act Basics Cont'd.

- **What entities** must comply with the Privacy Act?
 - Federal agencies;
 - Government contractors operating system(s) of records to perform agency functions; and
 - Section 7 provisions.
- **Records** covered by the Privacy Act:
 - Must be about an individual;
 - Must identify an individual; and
 - Must be maintained by an agency.

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Privacy Act Basics Cont'd.

- **What people** must comply with the Privacy Act?
 - Federal agency employees; and
 - Government contractors.
- **Criminal penalties:**
 - Willful and knowing disclosure;
 - Prohibition on operating unpublished system of records;
 - Obtaining record under false pretenses;
 - Misdemeanor & fine of not more than \$5,000.

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Privacy Act Basics Cont'd.

- What is **not covered** by the Privacy Act?
- Under the Privacy Act definition, **individuals** are covered:
 - U.S. Citizens
 - Lawful Permanent residents.
- Not covered:
 - Deceased persons;
 - Corporations and organizations; and
 - Non-citizens.

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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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System of Records Cont'd.

- **OMB Guidelines**
- A system of records exists if:
 - There is an indexing or retrieval capability using identifying particulars built into the system; and
 - The agency does, in fact, retrieve records about individuals by reference to some personal identifier.
- Standard = actual retrieval.

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System of Records Cont'd.

- **System of records = key definition.**
- Most of the rights and requirements addressed in the Privacy Act depend on whether this definition is met.
 - Wrongful disclosure suits;
 - Access and amendment rights;
 - Notice Requirements;
 - Must publish system of records notices 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.

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System of Records Notice (SORN)

■ Requirements:

- 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;

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SORNs Cont'd.

■ Requirements:

- 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.

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Privacy Act Disclosures

- General rule: no disclosure without consent of the individual subject of the record.

- "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)

- 12 exceptions permit disclosure absent consent.

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Privacy Act Disclosures

■ 12 exceptions to “no disclosure without consent” rule

- 1. Intra-agency disclosures/Need to know;
- 2. Required by 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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Privacy Act Disclosures

■ 12 exceptions to “no disclosure without consent” 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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Privacy Act Disclosures

■ First-party access rights

- Privacy Act provides the record subject with an independent right of access to records in a “system of records.”
- Privacy Act access rights are independent of – and in addition to – access rights available under FOIA.

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Privacy Act Exemptions

■ 10 exemptions limit first-party access 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 doctrine.
 - Not limited to information compiled for judicial proceedings, but also covers administrative hearings.

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Privacy Act Exemptions Cont'd

■ 10 exemptions limit first-party access rights

- Subsection (j) – regulation required.
- (j)(1) – information maintained by the CIA; and
- (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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Privacy Act Exemptions Cont'd

■ 10 exemptions limit first-party access rights

- 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)?
 - 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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Privacy Act Exemptions Cont'd

■ 10 exemptions limit first-party access rights

- Subsection (k) – regulation required.
- (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;

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Privacy Act Exemptions Cont'd

■ 10 exemptions limit first-party access rights

- Subsection (k) – regulation required.
- (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 or 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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Accounting for 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; and
 - Under (b)(2) – FOIA.
- Make the accounting available to the record subject, except for disclosures made:
 - 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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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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Agency Requirements

- (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;
- (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;

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Agency Requirements Cont'd.

- (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;
- (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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Agency Requirements Cont'd.

- **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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Privacy Act Rights

■ Recap:

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

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Privacy Act – Civil Remedies

- Amendment lawsuits;
- Access lawsuits;
- Accuracy lawsuits for damages;
- Other damages lawsuits:
 - wrongful disclosure;
 - wrongful maintenance;
 - any other violation of the Privacy Act that results in an adverse effect on an individual.

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Privacy Act Resources

- Statute:
 - Privacy Act of 1974, as amended – 5 U.S.C. § 552a.
- Agency SAOPs, CPOs, Privacy Act Officers.
- Published Privacy Act system of records notices (SORNs).
- Implementing FOIA and Privacy Act regulations.
- DOJ/OPCL Guidance on Privacy Act:
 - <https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition>
- OMB privacy guidance:
 - <https://www.whitehouse.gov/omb/information-regulatory-affairs/privacy/>

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