

Freedom of Information Act & Privacy Act Interface

Presenters
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The Statutes

■ **FOIA**

- Codified at 5 U.S.C. 552.
- Passed in 1966, became effective July 5, 1967.
- Act passed after protracted legislative efforts, including a decade of hearings.

■ **Privacy Act**

- Codified at 5 U.S.C. 552a.
- Passed in 1974, became effective September 27, 1975.
- Act passed in haste as an outgrowth of Watergate reforms and the growing use of computers.

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Policy Objectives

■ **FOIA**

- Ensures an informed citizenry.
- Opens government to public scrutiny.

■ **Privacy Act**

- Establishes a code of fair information practices which...
- Restricts disclosure to others of records about individuals.
- Increased right of access to records about them.
- Allows individuals the right to seek amendment of records that are not accurate.

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Records

■ FOIA

Records are either:

1. Created or maintained by the agency and under agency control.
2. Maintained by a contractor for purposes of agency records management

■ Privacy Act

Records are:

Any item, collection or grouping of information about an individual that contains his or her name or personal identifier and is maintained by an agency in a "system of records."

****No requirement to create records that do not exist under either statute.**

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Access Provisions

■ FOIA

- "Any person" can gain access to any record.
- Exemptions may apply.

■ Privacy Act

- Applies to U.S. citizens and lawfully admitted permanent residents and "covered persons."*
- Access rights to the subject of the record or authorized designee; exemptions may apply.
- Access to other entities may be granted through "exceptions," including a properly published "routine use."

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Judicial Redress Act of 2015, 5 U.S.C. §552a note

- Extends certain rights of judicial redress to citizens of certain foreign countries or regional economic organizations.
- Enables "covered person" to bring suit in same manner, to same extent, and subject to the same limitations, including exemptions and exceptions, as an "individual."
- Covers:
 - Intentional or willful unlawful disclosure of a covered record
 - Improper refusal to grant access to or amendment of a covered record

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Judicial Redress Act of 2015, 5 U.S.C. §552a note

- Access/amendment action may only be brought against a "designated Federal agency or component."
 - "Covered person" means natural person (other than an "individual") who is a citizen of a covered country.
 - "Covered country" is a country or regional economic integration organization, or member country of such organization, that has been designated by the Attorney General to have met certain protections outlined in Section 2(d)(1) of the Act.
- Before designating a covered country, the Attorney General must receive the concurrences of the Secretary of State, the Secretary of the Treasury, and the Secretary of Homeland Security.

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Judicial Redress Act of 2015, 5 U.S.C. §552a note

- Extends certain rights of
"Covered persons" from the European Union (except Great Britain, Ireland and Denmark) applies to
- Department of Justice
 - Department of Homeland Security
 - Securities and Exchange Commission
 - Commodity Futures Trading Commission
 - Parts of the Departments of the Treasury and State

**Only applies to:
access, amendment, and wrongful disclosure provisions.**

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Exercise

■ ***Under which Act would you process these requests?***

- A request from an individual who wants access to his own personnel file.
- A request from a company seeking access to a copy of the winning contract for IT support services.
- A request from an individual seeking access to the arrest record of her neighbor.

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Conducting a Search

■ FOIA

- Reasonable search of all records created or maintained by the agency, including those in Privacy Act systems of records.

■ Privacy Act

- Search is limited to records contained in a system of record maintained by the agency – retrieved by name or personal identifier.

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Processing Time Limits

■ FOIA

- Processing times outlined in statute.
- 20 working days.
- 10 additional days for “unusual circumstances.”

■ Privacy Act

- Statute does not specify processing time limit on requests for access.
- Processing times are defined by agency regulation.
- Time lines on requests for amendments are outlined in the statute.
 - 10 days to acknowledge an initial request – “respond promptly.”
 - 30 days to conduct a second review or “appeal.”

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Appeal Rights

■ FOIA

- Failure to comply with time limits.
- Denial of fee waiver or expedited processing.
- Adequacy of search.
- Denial of information in full or part pursuant to an exemption.
- Process included in statute and implementing regulation.

■ Privacy Act

- Denial of access: process established by agency regulation.
- Denial of amendment: process established by statute.

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Fees

- **FOIA**

■ Uniform fee schedule prescribed by OMB.

■ Sets search, review and duplication costs based on identity of the requester.

■ Provision for fee waivers

■ Must resolve fee matters prior to processing.
- **Privacy Act**

■ Fees limited to duplication costs.

■ Costs outlined in implementing regulations.

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FOIA/Privacy Act Exemptions

- The FOIA Exemptions

■ Allow agencies to withhold information from the public as records are processed for disclosure.

■ FOIA exemptions are self executing.
- The Privacy Act Exemptions

■ Should be published in the Federal Register before an agency can legally invoke the exemption.

■ Exemptions should be codified in the agency's implementing regulations.

■ Exemptions are published in the governing Privacy Act System of Records Notice (SORN).

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Comparison – Exemptions

Privacy Act Exemption	FOIA Exemption
(j)(1) Records held by the CIA	(b)(3) Exempt from disclosure by statute
(j)(2) Investigatory records held by an criminal law enforcement agency	(b)(7)(A) – (b)(7)(F) – records compiled for law enforcement purposes
(k)(1) Classified	(b)(1) Classified – pursuant to EO
(k)(2) Investigatory Records of civil or regulatory nature	(b)(7)(D) – protects the identity of confidential sources
(k)(3) Material involved with the protection under 18 USC 3056	(b)(3) – Exempt from disclosure by statute <u>OR</u> (b)(7)(E) Investigative techniques or procedures
(k)(4) Required by statue to be use as a statistical record	(b)(3) – Exempt from disclosure by statute

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Comparison – Exemptions

Privacy Act Exemption	Exemptions Will Likely Apply
(k)(5) Investigatory material used for suitability purposes	(b)(7)(D) – confidential sources
(k)(6) Testing materials	(b)(2) – Internal personnel rules
(k)(7) Confidential Sources	(b)(7)(D) – confidential sources
(d)(5) Anticipated non-criminal legal proceeding	(b)(5) – deliberative process
(c)(3) Certain accountings of disclosures	(b)(7)(A) – (b)(7)(F) records compiled for law enforcement purposes

Do not withhold unless data is exempt from release under both statutes.

Denial letters should cite both the Privacy (k) and the FOIA (b) exemptions.

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Litigation

■ FOIA

- Judicial review after exhausting administrative remedies.
 - Denials or procedural matters.
- Option for immediate judicial review in timeliness cases.
- Attorney fees and litigation costs.

■ Privacy Act

- Judicial review for access or amendment cases (attorney fees only).
- Damages and attorney fees for other violations.
- Criminal penalties.

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Processing an Access Request Under the FOIA

- Any person.
- Reasonable description of records sought.
- Conduct a reasonable search for responsive records.
- Conduct a line by line review.
- Release segregable portions of otherwise exempt documents.
- Provide appropriate appeal rights.

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Processing an Access Request Under the Privacy Act

- Ensure that you have an appropriate request.
 - US Citizen, Permanent Resident or "Covered Person."
 - 1st party or authorized representative.
 - Disclosure under an exception.
- Go to the system notice to determine if any exemptions apply.
 - Properly published exemptions, except (d)(5) which is self executing.
- Continue to process under FOIA.
 - Records must be subject to both a FOIA and a Privacy Act exemption to be withheld.
- Provide appropriate appeal rights.

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Rules for Responding

- Requester doesn't always know which statute applies to his or her request.
- Review the threshold requirements of each statute in conjunction with the subject of the request.
- Once a decision is made on which statute applies, follow your agency's regulations as a guide to process the request.
- Know your agency's published Privacy Act system notices.

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Interface Scenario

- George Timmeo, a foreign national, makes a request for access to records relating to himself. Under which statute do we process this request?
- The responsive records are maintained in a Privacy Act System of Records. How does this factor into your review?

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Interface Scenario

- What if you located responsive records that are not maintained in a Privacy Act System of Records? Would that change the result?
- If you process this request under the FOIA, how would you handle details of Mr. Timmeo's personal life that are contained in the responsive documents?

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Interface Scenario

- What happens if there is an exemption under both the FOIA and the Privacy Act that applies?
- What happens if there are no exemptions under either statute that applies?
 - Does Mr. Timmeo get access to the records?
 - Do FOIA requesters get access to the same information?

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FOIA/Privacy Act Toolkit

- Statutes:
 - Freedom of Information Act, as amended – 5 U.S.C. § 552.
 - Privacy Act of 1974, as amended – 5 U.S.C. § 552a.
- Published Privacy Act system of records notices.
- Implementing FOIA and Privacy Act regulations.
- Other agency issuances or procedural guidance concerning FOIA and Privacy Act.
- DOJ/OIP Guidance on FOIA:
 - <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>
- DOJ/OPCL Guidance on Privacy Act:
 - <https://www.justice.gov/opcl/overview-privacy-act-1974-2015-edition>
- OMB guidance on Privacy Act:
 - https://www.whitehouse.gov/omb/privacy_general

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