Sister Statutes:
Freedom of Information Act & Privacy Act

Karen Finnegan Meyers
Department of Defense
&
Ramona Branch Oliver
U.S. Department of Labor

The Statutes

- **FOIA**
  - Codified at 5 U.S.C. 552.
  - Act passed after protracted legislative efforts, including a decade of hearings.

- **Privacy Act**
  - Passed in 1974, became effective September 27, 1975.
  - Act passed in haste as an outgrowth of Watergate reforms and the growing use of computers.

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.
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.**

Access Provisions

- **FOIA**
  - “Any person” can gain access to any record.
  - Exemptions may apply.

- **Privacy Act**
  - Applies only to U.S. citizens and aliens lawfully admitted for permanent residency.
  - 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.”

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.
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.

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."

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.
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**

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

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<tr>
<th>Privacy Act Exemption</th>
<th>Exemptions Will Likely Apply</th>
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<tr>
<td>(k)(5) Investigatory material used for suitability purposes</td>
<td>(b)(7)(D) – confidential sources</td>
</tr>
<tr>
<td>(k)(6) Testing materials</td>
<td>(b)(2) – internal personnel rules</td>
</tr>
<tr>
<td>(k)(7) Confidential Sources</td>
<td>(b)(7)(D) – confidential sources</td>
</tr>
<tr>
<td>(d)(5) Anticipated non-criminal legal proceeding</td>
<td>(b)(5) – deliberative process</td>
</tr>
<tr>
<td>(c)(3) Certain accounting of disclosures</td>
<td>(b)(7)(A) – (b)(7)(F) records compiled for law enforcement purposes</td>
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Denial letters should cite both the Privacy (k) and the FOIA (b) exemptions. Do not withhold unless data is exempt from release under both statutes.

### 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.

### 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.
Processing an Access Request
Under the Privacy Act

- Ensure that you have an appropriate request.
  - US Citizen or Permanent Resident.
  - 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.

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.

Interface Scenario 1

- Charlotte Hayes writes and asks for all records relating to her. Under which statute do we process and why?
- Records exist in a non-exempt Privacy Act system. Does she get access? Why?
- Records exist in an exempt Privacy Act system. Does that change the result? Should the agency process under FOIA?
Interface Scenario 2

- After processing under both statutes, you determine that no exemptions apply. Does the requester get access to the records?
- What happens when there is both an exemption under the Privacy Act and an exemption under FOIA?

Interface Scenario 3

- How should you process a FOIA request for Privacy Act records of another individual?
  - The second “exception” permits disclosure of only those records required to be disclosed under the FOIA.
  - The only records required to be disclosed are those that are not exempt under the FOIA (no discretionary disclosures).

Interface Scenario 4

- There is a request for records about one of your employees by another federal agency which states a reasonable basis for needing such records. Should you provide them?
- No, unless the employee provided his or her consent, or one of the “exceptions” apply, particularly any of the routine uses.
FOIA/Privacy Act Toolkit

- Statutes:
- 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/OPC Guidance on FOIA:
- DOJ/OPC Guidance on Privacy Act:
- OMB guidance on Privacy Act:
  - [https://www.whitehouse.gov/omb/privacy_general](https://www.whitehouse.gov/omb/privacy_general)