Privacy Act of 1974: A Basic Overview

Cindy Allard, Department of Defense
Timothy Graham, Department of Veterans Affairs

PURPOSE OF THE PRIVACY ACT

To regulate the collection, maintenance, use, and dissemination of personal information held by the Executive Branch of Government
– Been in effect since Sep 27, 1975. That's over 36 years!
– Public Law 93-579
– Codified as 5 U.S.C. 552a

CONGRESS’ GOAL

To curb the illegal surveillance and investigation of individuals by federal agencies that was exposed during the Watergate scandal

Concerned with potential abuses presented by the Government’s increasing use of computers to store and retrieve personal data by means of a universal identifier
Basic Policy Objectives of the Privacy Act

- To restrict disclosure of personally identifiable records maintained by Executive branch agencies
- To grant individuals increased rights of access to agency records maintained on themselves
- To grant individuals the right to seek amendment of agency records that are not accurate, relevant, timely, or complete
- To establish a code of "fair information practices" which regulates the collection, use, maintenance and disclosure of personally identifiable information

Key Definitions

Why are definitions important?
- The Privacy Act is a technical statute and the definitions can bring an agency in or out of the reach of the statute.
- Who has to comply with the Privacy Act?
- Who can use the Privacy Act?
- What does the Privacy Act apply to?

Who has to comply?

An Agency

- Agency
  - Adopts the FOIA definition
  - Agencies under the Federal Executive Branch
  - Section 7 applies to state and local agencies
    - Unlawful for any Federal, state, or local agency to deny a right, benefit or privilege because an individual refuses to provide a SSN
  - Any Federal, state or local agency requesting an SSN must inform: if disclosure is mandatory or voluntary; by what statute or authority; and the uses
Who can use the Privacy Act?

An Individual

- An individual
  - United States citizens or an alien lawfully admitted for permanent residence
  - Deceased individuals are not covered
    - FOIA may protect next of kin
  - Corporations and organizations not covered
    - FOIA may protect sole proprietors

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Government Contractors

- Subsection (m) makes provisions of the Act binding on contractors who operate a system of record to accomplish an agency function
- For the purposes of criminal penalties, subsection (m) contractors are considered agency employees

What does the Privacy Act Pertain to?

Records in a System of Records

- Privacy Act protects information on individuals that is in a "system of records"
  - This is any group of records from which information is retrieved by the name of an individual or by some other identifying particular assigned to the individual
    - Must identify the individual
    - Must be retrieved by an identifier
  - Excludes
    - purely personal notes
    - supervisory notes (memory refreshers)
Retrieved vs. Retrievable

OMB guidelines explain that 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 references to some personal identifier.

Henke v. Department of Commerce, 83 F. 3d 1453 (D.C. Cir. 1996), capability to retrieve is not sufficient.

System of Records

Notice Requirements: Must Publish a System of Records Notice in the Federal Register. 5 USC 552a(e)(4)

Why is this important?

- Most of the rights and requirements of the Privacy Act depend on whether the definition is met.

No Disclosure Without Consent

General Rule - NO disclosure unless you have:

- (1) Written request from the subject or
- (2) Prior written consent from the subject authorizing a 3rd party to gain access
- (3) One of the 12 Exceptions established in 5 U.S.C. 552a(b)
Accounting of Certain Disclosure

- Each agency must maintain an accounting of disclosures from a system of record except when disclosure are made under:
  - (b)(1)
  - (b)(2)

- Agencies must make the accounting available to the subject except for those made under (b)(7)

Individual Rights

- Access rights
- Amendment rights
- Private right of actions for violations
  - Criminal and civil penalties

10 Exemptions

1. (d)(5) – exempts information compiled in the reasonable anticipation of a civil action or proceeding from the access provisions of the Privacy Act.
   - Most similar to attorney work product
   - Not limited to purely judicial proceedings, but also covers administrative hearings
Exemptions (cont.)

2. (j)(1) information maintained by the CIA
3. (j)(2) information maintained by a principal function criminal law enforcement agency and compiled for a criminal law enforcement purpose
   - Threshold question – Is the agency a criminal law enforcement agency?
   - Once threshold is met – was the information compiled for a criminal law enforcement purpose?

Exemptions (cont.)

4. (k)(1) classified information
5. (k)(2) investigatory material compiled for law enforcement purposes, other than material within the scope of (j)(2)
   - 2 elements
     1. Is the material investigatory not covered by (j)(2)
     2. Was an individual denied a right, privilege, or benefit as a result of the maintenance of the record?

Exemptions (cont.)

6. (k)(3) maintained in connection with providing protective services for the President of the United States or other individuals
7. (k)(4) required by statute to be maintained and used solely as a statistical record
8. (k)(5) information that reveals a source who was provided an express promise of confidentiality in the context of background investigation materials
   - Includes determinations for Federal civilian employment, military service, Federal contracts or access to classified records
Exemptions (cont.)

9. (k)(6) testing materials used solely to determine an individual’s qualifications for appointment or promotions in the Federal service
   - Disclosure would compromise the objectivity or fairness of the examination process
   - Typically exempt under FOIA (b)(2)

10. (k)(7) evaluation materials used to determine potential for promotion in the military
    - Only in instances where disclosure would reveal the identity of a confidential source
    - Typically exempt under FOIA (b)(2)

Agency Requirements

- Maintain only relevant and necessary information
- Collect information directly from the source
- At the time of collection disclose: authority, principle purpose for collection, how records will be used and disclosed, and the effects, if any, of not providing the information.
- Publish new or altered notice in the Federal Register:
  - Required for each system of records. Describes categories of individuals, categories of records, routine uses, access procedures, etc.
  - Publish at least 30 days prior to using a new routine use
- Maintain only accurate, complete, relevant, and timely information to ensure fairness to the individual
- Make reasonable efforts to ensure that records are accurate, complete, timely, and relevant for agency purposes prior to providing to any person other than the agency (other than for FOIA)
- Maintain no record regarding an individual’s exercise of their First Amendment rights unless expressly authorized by statute, the individual, or unless pertinent to and within the scope of an authorized law enforcement activity
Agency Requirements

- Make reasonable efforts to notify an individual when their record is made available under compulsory legal process when it becomes a matter of public record
- Establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records
- Establish administrative and technical safeguards to ensure confidentiality and security of records
  - Rules reinforced with issuance of OMB Memos concerning the protection of PII

Civil Remedies

- Amendment lawsuits
- Access lawsuits
- Accuracy lawsuits for damages
- Other damages lawsuits

Criminal Penalties

- Misdemeanor and fine not to exceed $5,000
  - Any officer or employee who knowingly and willingly discloses identifiable information to any person who is not entitled to receive it
  - Any officer or employee who willfully maintains a "secret" system of records
  - Knowingly and willingly requests or obtains Privacy Act protected records under false pretenses.
Privacy Act Resources

- Under subsection (v), OMB has primary responsibility for Privacy Act oversight
  - Office of Information and Regulatory Affairs
  - OMB Privacy Act guidelines - 40 Fed Reg. 28,948-78 (July 1975)
  - [http://www.whitehouse.gov/omb/inforeg/infotech.html](http://www.whitehouse.gov/omb/inforeg/infotech.html)

→ Privacy Act Officer

→ Implementing regulations and Privacy Act issuances

→ Text of the Privacy Act and 2010 Privacy Act Overview are available online at [http://www.justice.gov/opcl/prr.htm](http://www.justice.gov/opcl/prr.htm)