

## Skills Your Law School Didn't Teach, But that Every Federal Attorney Should Have

### FOIA and the Privacy Act

#### FREEDOM OF INFORMATION ACT ISSUES

##### I. ELECTRONIC RECORD PROVISIONS

- A. Definition of "record" -- subsection (f)(2): "'record' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."
- B. Format of disclosure -- subsection (a)(3)(B): "an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."
- C. Electronic searches -- subsection (a)(3)(C): "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with operation of the agency's automated information system."
- D. Reading room treatment for selected FOIA-disclosed records -- subsection (a)(2)(D), (E): released records, "which because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records" and an index.
- E. Electronic reading room -- subsection (a)(2)
  - applies to records created on or after 11/1/96
- F. Computer redaction/deletion specification -- subsection (b) (final two sentences)
  - 1. Applies to both electronic and paper forms
  - 2. Similar to new volume-estimation requirement in subsection (a)(6)(F)

##### II. TIME LIMIT/BACKLOG PROVISIONS

- A. Initial time limit -- subsection (a)(6)(A)(i): 20 business days

- B. Multitrack processing -- subsection (a)(6)(D)
- C. Unusual circumstances -- subsection (a)(6)(B)
- D. Exceptional circumstances -- subsection (a)(6)(C)
- E. Expedited Processing -- subsection (a)(6)(E)
  - 1. "Immediate threat to life or personal safety" or
  - 2. When "made by a person primarily engaged in disseminating information" and there is "urgency to inform the public concerning actual or alleged Federal Government activity"

### III. RECENT POLICY ISSUES

- A. Attorney General's Memorandum for Heads of All Departments and Agencies Regarding the Freedom of Information Act, October 12, 2001
- B. White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security, with an accompanying memorandum from the Acting Director of the Information Security Oversight Office and the Co-Directors of the Department of Justice's Office of Information and Privacy, March 19, 2002

## PRIVACY ACT ISSUES: WRONGFUL DISCLOSURE

### I. INTRODUCTION

### II. SCOPE OF THE ACT -- KEY DEFINITIONS

- A. Agency
  - 1. Adopts Freedom of Information Act definition -- "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552a(a)(1) incorporating 5 U.S.C. § 552(f).

2. Government contractors operating a system of records are covered by the Act if provided for by the contract. 5 U.S.C. § 552a(m).

B. Individual

1. "[A] citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2).
2. Deceased individuals not covered.
3. Corporations and organizations not covered.

C. Record

1. "[A]ny 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." 5 U.S.C. § 552a(a)(4).
2. Entrepreneurial information.
3. Personal notes -- *Chapman v. NASA*, 682 F.2d 526 (5<sup>th</sup> Cir. 1982).

D. System of Records

1. "[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." 5 U.S.C. § 552a(a)(5).
2. Publication in Federal Register.
  - I. Contents of system notice -- 5 U.S.C. § 552a(c)(4).
  - II. Notice to Congress and OMB of new or altered systems -- 5 U.S.C. § 552a(r).

III. DISCLOSURE OF INFORMATION FROM SYSTEMS OF RECORDS

A. General disclosure prohibition:

"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)

1. Actual retrieval from a system of records.
2. Independent knowledge.

B. Twelve exceptions permit disclosure absent consent of the individual subject of the record.

1. Disclosure to "officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1).
2. Disclosure required by the Freedom of Information Act, 5 U.S.C. § 552. 5 U.S.C. § 552a(b)(2).
  - I. Agency must be in receipt of an actual FOIA request for the information. *Bartel v. FAA*, 725 F.2d 1402 (D.C. Cir. 1984).
  - II. Only information that is not subject to a FOIA exemption (usually Exemption 6 or 7(C)) will be required to be released.
  - III. No discretionary release.
3. Disclosure pursuant to a published routine use. 5 U.S.C. § 552a(b)(3).
  - I. Routine uses must be published in the system notice and include categories of users and the purpose of the use. 5 U.S.C. § 552a(e)(4)(D).
  - II. "Routine use" means "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7).

"Compatibility" encompasses:

I. Functionally equivalent uses

II. Necessary and proper uses

OMB Guidelines, 51 Fed. Reg. 18,982, 18,985 (1986).

4. Disclosure to the Bureau of the Census. 5 U.S.C. § 552a(b)(4).
5. Disclosure for statistical research or reporting. 5 U.S.C. § 552a(b)(5).
6. Disclosure to the National Archives and Records Administration as a record having sufficient historical or other value to warrant its continued preservation, or for evaluation by the Archivist to determine whether the record has such value. 5 U.S.C. § 552a(b)(6).
7. Disclosure "to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought." 5 U.S.C. § 552a (b)(7).
8. Disclosure "to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual." 5 U.S.C. § 552a(b)(8).
9. Disclosure "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." 5 U.S.C. § 552a(b)(9).
10. Disclosure to the Comptroller General in the course of the performance of the duties of the General Accounting Office. 5 U.S.C. § 552a(b)(10).
11. Disclosure "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11).
12. Disclosure to a consumer reporting agency in accordance with the Debt Collection Act. 5 U.S.C. § 552a(b)(12).