OFFICE OF MANAGEMENT AND BUDGET

IMPLEMENTATION OF THE PRIVACY ACT OF 1974

Supplementary Guidance

NOVEMBER 21, 1975.

This material is provided to address comments and questions of general interest raised since the release of the Office of Management and Budget's guidelines for implementing section 3 of the Privacy Act of 1974. (FEDERAL REGISTER, Volume 40, Number 132, dated July 9, 1975, pp. 28949-28978.)

Additional supplements will be issued as necessary.

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Director.

1. *Definition of System of Records* (5 U.S.C. 552a(a)(5)). On page 28952, third column, after line 27, add:

"Following are several examples of the use of the term 'system of records':

"Telephone directories. Agency telephone directories are typically derived from files (e.g., locator cards) which are, themselves, systems of records. For example, agency personnel records may be used to produce a telephone directory which is distributed to personnel of the agency and may be made available to the public pursuant to 5 U.S.C. 552a(b) (1) and (2), (intra-agency and public disclosure, respectively). In this case the directory could be a disclosure from the system of records and, thus, would not be a separate system. On the other hand, a separate directory system would be a system of records if it contains personal information. A telephone directory, in this context, is a list of names, titles, addresses, telephone numbers, and organizational designations. An agency should not utilize this distinction to avoid the requirements of the Act including the requirement to report the existence of systems of records which it maintains.

"Mailing lists. Whether or not a mailing list is a system of records depends on whether the agency keeps the list as a separate system. Mailing lists derived from records compiled for other purposes (e.g., licensing) could be considered disclosures from that system and would not be systems of records. If the system from which the list is produced is a system of records, the decision on the disclosability of the list would have to be made in terms of subsection (b) (conditions of disclosure) and subsection (n) (the sale or rental of mailing lists). A mailing list may, in some instances, be a stand-alone system (e.g., subscription lists) and could

be a system of records subject to the Act if the list is maintained separately by the agency, it consists of records (i.e., contains personal information), and information is retrieved by reference to name or some other identifying particular.

"Libraries. Standard bibliographic materials maintained in agency libraries such as library indexes, Who's Who volumes and similar materials are not considered to be systems of records. This is *not* to suggest that all published material is, by virtue of that fact, not subject to the Act. Collections of newspaper clippings or other published matter about an individual maintained other than in a conventional reference library would normally be a system of records."

2. *Routine Uses—Intra-agency disclosures* (5 U.S.C. 552a(a)(7))

On page 28953, first column, after line 17, add:

"Intra-agency transfer need not be considered routine uses. Earlier versions of House privacy bills, from which the routine use concept derives, permitted agencies to disclose records within the agency to personnel who had a need for such access in the course of their official duties thus permitting intra-agency disclosure without the consent of the individual. The concept of routine use was developed to permit other than intra-agency disclosures after it became apparent that a substantial unnecessary workload would result from having to seek the consent of the subject of a record each time a transfer was made for a purpose '. . . compatible with the purpose for which [the record] was collected' (5 U.S.C. 552a(a)(7)). To deter promiscuous use of this concept, a further provision was added requiring that routine uses be subject to public notice. (5 U.S.C. 552a(e)(11).) It is our view that the concept of routine use was devised to cover disclosures other than those to officers or employees who have a need to for the record in the performance of their official duties within the agency.

"It is not necessary, therefore, to include intra-agency transfers in the portion of the system notice covering routine uses (5 U.S.C. 552a(e)(4)(D)) but agencies may, at their option, elect to do so. The portion of the system notice covering storage, retrievability, access controls, retention and disposal (5 U.S.C. 552a(e)(4)(E)) should describe the categories of agency officials who have access to the system."

3. *Consent for access in response to congressional inquiries* (5 U.S.C. 552a(b)(9))

On page 28955, third column, after line 18, add:

To assure that implementation of the Act does not have the unintended effect of denying individuals the benefit of congressional assistance which they request, it is recommended that each agency establish the following as a routine use for all of its systems, consistent with subsections (a)(7) and (e)(11) of the Act:

Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

The operation of this routine use will obviate the need for the written consent of the individual in every case where an individual requests assistance of the Member which would entail a disclosure of information pertaining to the individual.

In those cases where the congressional inquiry indicates that the request is being made on behalf of a person other than the individual whose record is to be disclosed, the agency should advise the congressional office that the written consent of the subject of the record is required. The agency should not contact the subject unless the congressional office requests it to do so.

In addition to the routine use, agencies can, of course, respond to many congressional requests for assistance on behalf of individuals without disclosing personal information which would fall within the Privacy Act, e.g., a congressional inquiry concerning a missing Social Security check can be answered by the agency by stating the reason for the delay.

Personal information can be disclosed in response to a congressional inquiry without written consent or operation of a routine use—

If the information would be required to be disclosed under the Freedom of Information Act (Subsection (b)(2));

If the Member requests that the response go directly to the individual to whom the record pertains;

In "compelling circumstances affecting the health or safety of an individual * * *" (Subsection (b)(8)); or

To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof * * *" (Subsection (b)(9)).

The routine use recommended above and disclosures thereunder are, of course, subject to the 30 day prior notice requirement of the Act (Subsection (e)(11)). In the interim, however, it should be possible to respond to most inquiries by using the provisions cited in the previous paragraph. Furthermore, when the congressional inquiry indicates that the request is being made on the basis of a written request from the individual to whom the record pertains, consent can be inferred even if the constituent letter is not provided to the agency.

"*This standard for implied consent does not apply to other than congressional inquiries.*"

4. *Describing the purpose in the accounting of disclosures* (Subsection (c)(1))

On page 28956, first column, after line 42, add:

"Agencies which submit inquiries to other agencies in connection with law enforcement or pre-employment investigations (e.g., record checks) are reminded to include the purpose in their record check in order to preclude having record checks returned to them to ascertain the purpose of the check. It is noted that this is necessary whether the inquiry is made pursuant to the subsection (b)(3) or (b)(7) ('routine use' or law enforcement disclosures). At a minimum, the inquiring agency must describe the purpose as either a background or law enforcement check."

5. *Agency procedures for review of appeals of denials of requests to amend a record* (Subsection (d)(3))

On page 28959, second column, after line 39, add:

"This does *not* mean that the officer on appeal must be a justice or judge. Rather, the reviewing official designated by the agency head may be a justice or judge (unlikely in this case) or any other agency official who meets the criteria in 5 U.S.C. 2104a (1), (2), and (3)."

6. *Correcting records released to an individual* (Subsection (e)(6))

On page 28965, second column, after line 6, add:

"While this language requires that agencies make reasonable efforts to assure the accuracy of a record before it is disclosed, when an individual requests access to his or her record, pursuant to subsection (d)(1), above, the record must be disclosed without change or deletion except as permitted by subsections (j) and (k), exemptions. To avoid requiring individuals to file unnecessary requests for amendment, however, the agency should review the record and annotate any material disclosed to indicate that which it intends to amend or delete."

7. *Rights of parents and legal guardians* (Subsection (h))

On page 28970, second column, after line 59, add:

"This is not intended to suggest that minors are precluded from exercising rights on their own behalf. Except as otherwise provided in the Act (e.g., general or specific exemptions) a minor does have the right to access a record pertaining to him or herself. There is no absolute right of a parent to have access to a record about a child absent a court order or consent."

8. *Relationships to the Freedom of Information Act* (Subsection (q))

On page 28978, third column, after the last line, add:

"In some instances under the Privacy Act an agency may (1) exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)); or (2) deny a request for access to records compiled in reasonable anticipation of a civil action or proceeding or archival records (subsection (d)(5) or (1)). In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act.

"Whether a request by an individual for access to his or her record is to be

processed under Privacy Act or Freedom of Information Act procedures involves several considerations. For example, while agencies have been encouraged to reply to requests for access under the Privacy Act within ten days wherever practicable, consistent with the Freedom of Information Act (FOIA), the Privacy Act does not establish time limits for responding to requests for access. (See discussion of subsection (d)(1).) The Privacy Act also does not require an administrative appeal on denial of access comparable to that under FOIA although agencies are encouraged to permit individuals to request an administrative review of initial denials of access to avoid, where possible, the need for unnecessary judicial action. It can also be argued that requests filed under the Privacy Act can be expected to be specific as to the system of records to which access is sought whereas agencies are required to respond to an FOIA request only if it 'reasonably describes' the records sought. Further, the Freedom of Information Act permits charging of fees for search as well as the making of copies while the Privacy Act permits charging only for the direct cost of making a copy upon request.

"It is our view that agencies should treat requests by individuals for information pertaining to themselves which specify either the FOIA or the Privacy Act (but not both) under the procedures established pursuant to the Act specified in the request. When the request specifies, and may be processed under, both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the differences, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals.

"The net effect of this approach should be to assure the individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment."

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