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LITIGATION APPENDIX: EXAMPLES OF RECORDS IN CONTROVERSY

The Freedom of Information Act and The Privacy Act of 1974 can both be subsumed under a larger rubric -- the management of information resources. FOIA tries to allow the "public" greater participation in the making of public policy; the privacy legislation tries to allow the "person" greater participation in the making of decisions that affect his own life. FOIA, originally passed in 1966, was an effort to curb the government's growing monopoly over information resources, and it attempted, through a specific exemption, to coordinate the interests of both the "public" and the "person." The mesh proved unsatisfactory because the determination of the privacy rights of the "person" was left largely in the hands of government agencies. Privacy legislation has been viewed by some as an effort to articulate and expand these rights.

The sixth exemption to the coverage of FOIA, subsection 552 (b) (6), permits agencies to withhold from the public "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Efforts to invoke this exemption have gone to the courts 12 times. Although a perusal of the decisions provides few patterns, it is instructive to note the kinds of records that have been involved in the controversies: medical records secured in the process of determining the dangerousness of a chemical substance; the names and addresses of employees eligible to vote in specified union elections; Bureau of Customs declaration forms; survey reports made by the Environmental Protection Agency of radiation levels in private homes; copies of case summaries of Air Force Academy disciplinary adjudications; and the names and addresses of all persons required to file registration forms for the production of wine for family use.

These kinds of records are interesting because they do not, clearly and automatically, fall within the categories of (1) information that must be released to the public and (2) information that is obviously so sensitive and personal that the public's interest in disclosure cannot be satisfied. These records fall into the gray area that lies between these two extremes. And despite the enactment of the 1974 FOIA amendments and the enactment of a privacy bill with stricter definitions of what is private, there will undoubtedly continue to be litigation over the future analogues of these gray-area records.



One of the few clear patterns that does emerge from the litigation is that the sixth exemption forces the courts to undergo a delicate balancing for each and every specific controversy -- an awkward procedure for those who hope to see a clearer definition of the limits of individual privacy.

The case-by-case approach has led the courts to come down on both sides of the question. Most recently, in the Wine Hobby case, the U. S. Court of Appeals for the Third Circuit reversed a district court order requiring the Treasury Department to disclose the names and addresses of persons who produce wine for family use. On the other hand, the Fourth Circuit ruled in 1973 that the Environmental Protection Agency must disclose the results of a survey it conducted of radiation levels in homes in areas where uranium tailings had been used as clean fill dirt, despite the agency's explicit promises to homeowners that the results would not be disclosed to anyone other than the owner or occupier and federal officials working on the problem.

On even the relatively straightforward question of whether U. S. Customs declaration forms are exempted or not, the courts have found sufficient grounds to hold diametrically opposed views. In Levine the court said that the files in the third category of exemption six (... and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy) must have the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files and held that the customs forms do not, therefore, fall within the exemption relating to invasions of privacy. But in Ditlow v. Shultz, a more recent decision, the court concluded that customs declaration forms contain "intimate details" of a "highly personal nature" and were therefore within the meaning of the "similar files" category of the sixth exemption. The Ditlow court held that disclosure was unnecessary and the privacy interests of the individuals involved outweighed the public interest argument for disclosure.

The court's reference to the "privacy interests of the individuals involved" is worthy of note because, in fact, the subjects of the records in all of the sixth exemption cases were never consulted on their views about what should happen to the "intimate details" of a "highly personal nature" that were recorded in government files. Instead, up to the present time it has been the agencies and the courts (and also the plaintiffs) who have been making the decisions about what is public and what is private.

The Privacy Act of 1974 with its complex provisions for access, consent, correction and conditions of disclosure, may expand the role of the subjects in relation to some of these proceedings, but will not necessarily make it determining in any of them.

Ninety-third Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday, the twenty-first day of January,
one thousand nine hundred and seventy-four*

An Act

To amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Act of 1974".

~~Sec. 552~~ (a) The Congress finds that—

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

~~Sec. 552~~ Title 5, United States Code, is amended by adding after section 552 the following new section:



“§ 552a. Records maintained on individuals

“(a) DEFINITIONS.—For purposes of this section—

“(1) the term ‘agency’ means agency as defined in section 552(e) of this title;

“(2) the term ‘individual’ means a citizen of the United States or an alien lawfully admitted for permanent residence;

“(3) the term ‘maintain’ includes maintain, collect, use, or disseminate;

“(4) the term ‘record’ means any 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) the term ‘system of records’ means 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;

“(6) the term ‘statistical record’ means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

“(7) the term ‘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.

“(b) CONDITIONS OF DISCLOSURE.—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, unless disclosure of the record would be—

“(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

“(2) required under section 552 of this title;

“(3) for a routine use as defined in subsection (a) (7) of this section and described under subsection (e) (4) (D) of this section;

“(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

“(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

“(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

“(7) 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;

"(8) 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;

"(9) 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;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system records under its control, shall—

"(1) except for disclosures made under subsections (b) (1) or (b) (2) of this section, keep an accurate accounting of—

"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b) (7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

"(2) permit the individual to request amendment of a record pertaining to him and—

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

"(B) promptly, either—

"(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason



for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g) (1) (A) of this section;

"(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

"(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

"(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

"(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information;

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

"(A) the name and location of the system;

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system;

"(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

"(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b) (2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

"(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

"(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

"(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

"(11) at least 30 days prior to publication of information under paragraph (4) (D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

"(1) establish procedures whereby an individual can be notified

in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e) (4) of this section in a form available to the public at low cost.

"(g) (1) CIVIL REMEDIES.—Whenever any agency

"(A) makes a determination under subsection (d) (3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d) (1) of this section;

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

"(2) (A) In any suit brought under the provisions of subsection (g) (1) (A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

"(3) (A) In any suit brought under the provisions of subsection (g) (1) (B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of



any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

“(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

“(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

“(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

“(B) the costs of the action together with reasonable attorney fees as determined by the court.

“(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

“(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

“(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

“(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.

“(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.

“(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(1)(A) through

(F), (e) (6), (7), (9), (10), and (11), and (i) if the system of records is—

- “(1) maintained by the Central Intelligence Agency; or
- “(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

“(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c) (3), (d), (e) (1), (e) (4) (G), (H), and (I) and (f) of this section if the system of records is—

- “(1) subject to the provisions of section 552(b) (1) of this title;
- “(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

“(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

“(4) required by statute to be maintained and used solely as statistical records;

“(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

“(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the

Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

"(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553 (c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

"(1) (1) ARCHIVAL RECORDS.—Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

"(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e) (4) (A) through (G) of this section) shall be published in the Federal Register.

"(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e) (4) (A) through (G) and (e) (9) of this section.

"(m) GOVERNMENT CONTRACTORS.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

"(n) MAILING LISTS.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

"(o) REPORT ON NEW SYSTEMS.—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such



proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

"(p) ANNUAL REPORT.—The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) EFFECT OF OTHER LAWS.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section."

~~SEC. 5~~ The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552a. Records about individuals."

immediately below:

"552. Public information; agency rules, opinions, orders, and proceedings."

~~SEC. 5~~ (a) (1) There is established a Privacy Protection Study Commission (hereinafter referred to as the "Commission") which shall be composed of seven members as follows:

- (A) three appointed by the President of the United States,
- (B) two appointed by the President of the Senate, and
- (C) two appointed by the Speaker of the House of Representatives.

Members of the Commission shall be chosen from among persons who, by reason of their knowledge and expertise in any of the following areas—civil rights and liberties, law, social sciences, computer technology, business, records management, and State and local government—are well qualified for service on the Commission.

(2) The members of the Commission shall elect a Chairman from among themselves.

(3) Any vacancy in the membership of the Commission, as long as there are four members in office, shall not impair the power of the Commission but shall be filled in the same manner in which the original appointment was made.

(4) A quorum of the Commission shall consist of a majority of the members, except that the Commission may establish a lower number as a quorum for the purpose of taking testimony. The Commission is authorized to establish such committees and delegate such authority to them as may be necessary to carry out its functions. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information necessary to the performance of their functions, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or a member designated by the Chairman to be acting Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, other persons, and the public, and, on behalf of the Commission, shall see to the faithful execution of the administrative policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct.



(5) (A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that request to Congress.

(B) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(b) The Commission shall—

(1) make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information; and

(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of section 552a of title 5, United States Code, should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.

(c) (1) In the course of conducting the study required under subsection (b) (1) of this section, and in its reports thereon, the Commission may research, examine, and analyze—

(A) interstate transfer of information about individuals that is undertaken through manual files or by computer or other electronic or telecommunications means;

(B) data banks and information programs and systems the operation of which significantly or substantially affect the enjoyment of the privacy and other personal and property rights of individuals;

(C) the use of social security numbers, license plate numbers, universal identifiers, and other symbols to identify individuals in data banks and to gain access to, integrate, or centralize information systems and files; and

(D) the matching and analysis of statistical data, such as Federal census data, with other sources of personal data, such as automobile registries and telephone directories, in order to reconstruct individual responses to statistical questionnaires for commercial or other purposes, in a way which results in a violation of the implied or explicitly recognized confidentiality of such information.

(2) (A) The Commission may include in its examination personal information activities in the following areas: medical; insurance; education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing.

(B) The Commission shall include in its examination a study of—
(i) whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual;

(ii) whether the Internal Revenue Service should be prohibited from transferring individually identifiable data to other agencies and to agencies of State governments;

(iii) whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a (g) (1) (C) or (D) of title 5, United States Code; and

(iv) whether and how the standards for security and confidentiality of records required under section 552a (e) (10) of such title should be applied when a record is disclosed to a person other than an agency.

(C) The Commission may study such other personal information activities necessary to carry out the congressional policy embodied in this Act, except that the Commission shall not investigate information systems maintained by religious organizations.

(3) In conducting such study, the Commission shall—

(A) determine what laws, Executive orders, regulations, directives, and judicial decisions govern the activities under study and the extent to which they are consistent with the rights of privacy, due process of law, and other guarantees in the Constitution;

(B) determine to what extent governmental and private information systems affect Federal-State relations or the principle of separation of powers;

(C) examine the standards and criteria governing programs, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information; and

(D) to the maximum extent practicable, collect and utilize findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and private bodies, institutions, organizations, and individuals which pertain to the problems under study by the Commission.

(d) In addition to its other functions the Commission may—

(1) request assistance of the heads of appropriate departments, agencies, and instrumentalities of the Federal Government, of State and local governments, and other persons in carrying out its functions under this Act;

(2) upon request, assist Federal agencies in complying with the requirements of section 552a of title 5, United States Code;

(3) determine what specific categories of information, the collection of which would violate an individual's right of privacy, should be prohibited by statute from collection by Federal agencies; and

(4) upon request, prepare model legislation for use by State and local governments in establishing procedures for handling, maintaining, and disseminating personal information at the State and local level and provide such technical assistance to State and local governments as they may require in the preparation and implementation of such legislation.

(e) (1) The Commission may, in carrying out its functions under this section, conduct such inspections, sit and act at such times and places, hold such hearings, take such testimony, require by subpoena the attendance of such witnesses and the production of such books, records, papers, correspondence, and documents, administer such oaths, have such printing and binding done, and make such expenditures as the Commission deems advisable. A subpoena shall be issued only upon an affirmative vote of a majority of all members of the Com-



mission. Subpenas shall be issued under the signature of the Chairman or any member of the Commission designated by the Chairman and shall be served by any person designated by the Chairman or any such member. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(2) (A) Each department, agency, and instrumentality of the executive branch of the Government is authorized to furnish to the Commission, upon request made by the Chairman, such information, data, reports and such other assistance as the Commission deems necessary to carry out its functions under this section. Whenever the head of any such department, agency, or instrumentality submits a report pursuant to section 552a (o) of title 5, United States Code, a copy of such report shall be transmitted to the Commission.

(B) In carrying out its functions and exercising its powers under this section, the Commission may accept from any such department, agency, independent instrumentality, or other person any individually identifiable data if such data is necessary to carry out such powers and functions. In any case in which the Commission accepts any such information, it shall assure that the information is used only for the purpose for which it is provided, and upon completion of that purpose such information shall be destroyed or returned to such department, agency, independent instrumentality, or person from which it is obtained, as appropriate.

(3) The Commission shall have the power to—

(A) appoint and fix the compensation of an executive director, and such additional staff personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

The Commission may delegate any of its functions to such personnel of the Commission as the Commission may designate and may authorize such successive redelegations of such functions as it may deem desirable.

(4) The Commission is authorized—

(A) to adopt, amend, and repeal rules and regulations governing the manner of its operations, organization, and personnel;

(B) to enter into contracts or other arrangements or modifications thereof, with any government, any department, agency, or independent instrumentality of the United States, or with any person, firm, association, or corporation, and such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5);

(C) to make advance, progress, and other payments which the Commission deems necessary under this Act without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529); and

(D) to take such other action as may be necessary to carry out its functions under this section.



(f) (1) Each [the] member of the Commission who is an officer or employee of the United States shall serve without additional compensation, but shall continue to receive the salary of his regular position when engaged in the performance of the duties vested in the Commission.

(2) A member of the Commission other than one to whom paragraph (1) applies shall receive per diem at the maximum daily rate for GS-18 of the General Schedule when engaged in the actual performance of the duties vested in the Commission.

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(g) The Commission shall, from time to time, and in an annual report, report to the President and the Congress on its activities in carrying out the provisions of this section. The Commission shall make a final report to the President and to the Congress on its findings pursuant to the study required to be made under subsection (b) (1) of this section not later than two years from the date on which all of the members of the Commission are appointed. The Commission shall cease to exist thirty days after the date on which its final report is submitted to the President and the Congress.

(h) (1) Any member, officer, or employee of the Commission, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

(2) Any person who knowingly and willfully requests or obtains any record concerning an individual from the Commission under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.

The Office of Management and Budget shall—

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

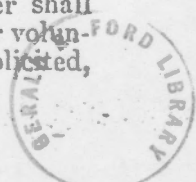
(a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.



SEC. 3. The provisions of this Act shall be effective on and after the date of enactment, except that the amendments made by sections 3 and 4 shall become effective 270 days following the day on which this Act is enacted.

SEC. 4. There is authorized to be appropriated to carry out the provisions of section 5 of this Act for fiscal years 1975, 1976, and 1977 the sum of \$1,500,000, except that not more than \$750,000 may be expended during any such fiscal year.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*



DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

January 7, 1975

MEMORANDUM FOR: GERALD WARREN

FROM: DOUGLAS W. METZ *DWM*

SUBJECT: Relationships Between Freedom of Information Act and Privacy Act of 1974

This is in response to your request for this office's current views on the relationship between the new Privacy Act of 1974 (P.L. 93-579), which will be codified as 5 U.S.C. 552a, and the Freedom of Information Act, 5 U.S.C. 552, as amended by P.L. 93-502. I am sure you recognize that our views on the matter should be treated cautiously and preferably without attribution. We are not the appropriate source of a definitive legal interpretation and our views may change somewhat as we consult further with the Office of Management and Budget, the Justice Department, and the respective congressional staffs who had a hand in drafting the two laws.

Of most immediate interest and concern to you, I suspect, is Orr Kelly's contention in his January 5, 1975 Star News article that there is an inherent conflict between the disclosure prohibitions of the Privacy Act and the disclosure requirements of the Freedom of Information Act. The Kelly article is being widely read and commented on, but in our view the several problems it identifies, including the alleged FoIA conflict, are more apparent than real.

The principal difficulty arises from the fact that the Congress, in enacting the privacy bill, consciously and explicitly chose not to treat it as guidance to the agencies in interpreting the "clearly unwarranted invasion of privacy" clause in exemption (b) (6) of the Freedom of Information Act. That choice is reflected in subsection (b) (2) of the Privacy Act which permits an agency to disclose a record about an individual without first obtaining the individual's consent when disclosure "is required under section 552 of this title," which is to say, under the Freedom of Information Act. In explaining subsection (b) (2), the report of the House/Senate staff conference on the privacy bill states that subsection (b) (2) "is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information" under the FoIA. (Congressional Record, December 17, 1974 pp. S21817 and H12244.)



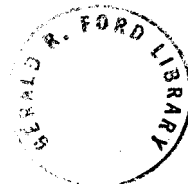
What this means, in effect, is that because court interpretations of the status quo under FoIA vary, the agencies are no better armed to interpret the "clearly unwarranted invasion of privacy" exemption in the FoIA than they were before the enactment of the privacy bill. But they are also no worse off, at least in our view.

The disclosure prohibition in the Privacy Act, and the exception to it, applies to records maintained in a system of records. A "record" is defined, minimally, as an item of information which contains the name of an individual or an identifying number or symbol or some identifying particular assigned to him. A "system of records" is defined as a group of records from which information is retrieved by reference to the individual's name or identifying number or the identifying particular assigned to him. Thus, what is forbidden to be disclosed, except as required under the FoIA (and under other specified conditions not germane to this analysis) is information about an individual which contains his name or some identifying number or particular assigned to him and which also, as a matter of practice, is retrieved from a system of records maintained by the disclosing agency by reference to the individual's name or some identifying number or particular assigned to him.

Consider two illustrations:

Case A

- Agency Z maintains a file on the ABC Corporation which lists among the other information in it, the titles and salaries of the ABC Corporation's officers. The disclosure prohibition in the Privacy Act does not apply to such a file unless Agency Z normally retrieves the title and salary information by reference to the officers' names, Social Security numbers, fingerprints, voice prints, or some other similar identifying particular assigned to them. If title or salary information is not retrieved that way but rather by reference to the name of the ABC Corporation, Agency Z's decision to disclose or not disclose under the FoIA will be made without any reference to the Privacy Act.



Case B

- Agency X is confronted with an FoIA request for copies of forms filled out by individuals applying for benefits under some Federal program. The information on the forms is not confidential by statute. The Privacy Act forbids Agency X to make the forms available without expunging names, Social Security numbers, fingerprints, voice prints, etc. unless disclosure of the names, SSNs, etc. is required by the FoIA. The FoIA requires, as it has always done, that the forms be made available without expunging the identifying data unless such disclosure would constitute a clearly unwarranted invasion of personal privacy. In other words, nothing is changed. Agency X must still consider whether a court would uphold its decision not to disclose in identifiable form on the grounds that such disclosure would invade someone's privacy.

In some cases, the Privacy Act could simplify an agency's situation in complying with an FoIA request if the agency could readily obtain the consent of the individual to whom a requested record pertains, or if compliance with an FoIA request for a record could be considered compatible with the purpose for which the requested record was originally created. In the latter case, the agency would have to identify compliance with specified types of FoIA requests as a "routine use" of a system of records in its annual public notice describing the system, but forethought is all that would be required.

Note also that there seems to be little danger that an agency, or an agency employee, would be subjected to any of the sanctions in the Privacy Act for failing to invoke the "clearly unwarranted invasion of privacy" exemption in the FoIA, i. e., for disclosing records requested under the FoIA. The Privacy Act provides criminal penalties only when an officer or employee discloses information that he knows for sure should not be disclosed (an unlikely circumstance if the FoIA (b) (6) exemption is at issue). And it permits civil suits to recover damages resulting from improper disclosure only if the individual to whom a disclosed record pertains (a) is adversely affected as a consequence of the disclosure and (b) can demonstrate that in making the disclosure the disclosing agency intentionally or wilfully ignored the withholding possibilities in the FoIA or in regulations that it has promulgated pursuant to the FoIA. Indeed, the possibility that the Privacy Act will have no substantial effect on agency behavior under the FOIA explains why the President, in signing the privacy bill, lamented its failure to protect the individual against unnecessary disclosures of personal information.



By this analysis I do not want to minimize the problems that occasional discontinuities between the two laws could create. Certainly the agencies will want to harmonize their administrative arrangements for meeting privacy and FoIA requirements and may find it difficult to do so until both laws are in effect. We may even discover that a few technical amendments here and there will make the implementation task much easier. However, I think that our greatest need at the moment is for some careful thought, a little imagination, and above all, calm.

All the other "problems" cited in Orr Kelly's article, for example, strike us as either specious or easily resolved. To volunteer information to the Justice Department for law enforcement purposes, an agency need only declare in its public notice on a system of records that it intends to make information in the system "routinely" available to Justice when it suspects fraud or some other violation pertinent to the purpose for which the information is maintained. Similarly, the assertion that agencies are not authorized to make their records available to the Privacy Commission is simply wrong; subsection 5 (e) (2) (A) provides such authority expressly. And while I see how the Privacy Act could be read as applying to my secretary's "rolodex" file of names and telephone numbers, the legislative history and the examples offered in the definition of a "record" clearly show that the Congress did not intend to encompass the office rolodex.

I hope that this brief analysis is helpful. The staff continues to discuss and analyze the relationships between the two laws and always welcomes new thoughts and questions.

Attachments:

Freedom of Information Amendments
Privacy Act of 1974
Litigation Appendix





Public Law 93-502
93rd Congress, H. R. 12471
November 21, 1974

An Act

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the fourth sentence of section 552(a) (2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication."

(b) (1) Section 552(a) (3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

"(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown."

Public information.

Indexes, publication and distribution.

Publication in Federal Register.

Records, availability to public.

Document search and duplication fees, regulations.

88 STAT. 1561
88 STAT. 1562

Withheld agency records, court examination.

Complaints, response by defendant.



Attorney fees
and costs.

CSC proceeding
against officer
or employee.

Noncompliance,
penalty.

Administrative
deadlines.

88 STAT. 1562
88 STAT. 1563

"Unusual cir-
cumstances."

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

"(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member."

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

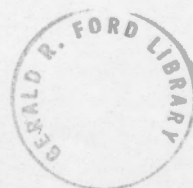
"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or



"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request."

Time extension
for agency
review.

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

National defense
and foreign poli-
cy, exemption.

"(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;"

(b) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

Investigatory
records for law
enforcement pur-
poses, exemption.

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"

88 STAT. 1563
88 STAT. 1564

(c) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Segregable por-
tions of
records.

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

Reports to
Speaker of the
House and
President of
the Senate.
Contents.

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

Ante, p. 1562.

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;



"(4) the results of each proceeding conducted pursuant to subsection (a) (4) (F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

Annual report.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

Ante, p. 1561.

"Agency."
5 USC 551.

"(e) For purposes of this section, the term 'agency' as defined in section 551 (1) of this title includes 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."

Effective
date.
5 USC 552
note.

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

CARL ALBERT

Speaker of the House of Representatives.

JAMES O. EASTLAND

President of the Senate pro tempore.

88 STAT. 1564
88 STAT. 1565

IN THE HOUSE OF REPRESENTATIVES, U.S.,

November 20, 1974.

The House of Representatives having proceeded to reconsider the bill (H.R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS

Clerk.

By W. Raymond Colley



I certify that this Act originated in the House of Representatives.

W. PAT JENNINGS

Clerk.

By W. Raymond Colley

IN THE SENATE OF THE UNITED STATES,

November 21, 1974.

The Senate having proceeded to reconsider the bill (H. R. 12471) entitled "An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act", returned by the President of the United States with his objections to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO

Secretary.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-876 (Comm. on Government Operations)
and No. 93-1380 (Comm. of Conference).

SENATE REPORTS: No. 93-854 accompanying S. 2543 (Comm. on the
Judiciary) and No. 93-1200 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 120 (1974):

Mar. 14, considered and passed House.

May 30, considered and passed Senate, amended in lieu of
S. 2543.

Oct. 1, Senate agreed to conference report.

Oct. 7, House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 42:

Oct. 17, vetoed; Presidential message.

CONGRESSIONAL RECORD, Vol. 120 (1974):

Nov. 20, House overrode veto.

Nov. 21, Senate overrode veto.



DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

January 8, 1975

MEMORANDUM FOR: PHIL BUCHEN
FROM: DOUG METZ *D.M.*
SUBJECT: Relationships Between Freedom of
Information Act and Privacy Act of 1974

You may recall our discussing a memorandum we were preparing on the above subject. Yesterday, on short notice, Jerry Warren asked us for some background information for his use in a meeting with agency public information officers. We sent him the attached information which was pulled together from various in-house drafts.

You had mentioned that Phil Areeda and John Marsh were concerned with this subject and thought they might like to have any memoranda emanating from this office. I leave it to your discretion to pass the material on if you think it would be useful to them.

Attachment



APPENDIX

Case Summaries

Ackerly v. Ley
420 F. 2d 1336 (D.C. Cir. 1969)

Agency:
Food and Drug Administration (Commissioner of Food and Drug in
HEW).

Record(s) involved:
On proposal by Commissioner to bar carbon tetrachloride from
interstate commerce as hazardous substance, documents re-
lative to degree and nature of hazard contained in proposal.

Section of the Act:
Sec. 552(b) (5) - Exemption for inter- and intra-agency
memoranda.
Sec. 552(b) (6) - Exemption for personnel, medical and similar
files.

Judgment:
Order of District Court denying request of petitioner invali-
dated and sent back for reconsideration.
Appellant's complaint in the District Court sought equitable relief,
in the form of compelled disclosure of documents, against appellee
Commissioner of Food and Drugs in the United States Department of Health,
Education and Welfare.

The Commissioner gave notice in the Federal Register of a proposal
on his part to bar from inter state commerce, as a "banned hazardous
substance" within the purview of the Federal Hazardous Substances
Act carbon tetrachloride and mixtures containing it.

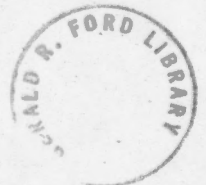
Appellant, by letter sought permission "to review and inspect and/or
copy all of the records" in the possession of the Commissioner "which
relate in any way to the degree or nature of the hazard" referred to
in the Commissioner's proposal.

After reviewing the documents in camera, the District Court rendered
summary judgment for the Commissioner.

HELD: Vacated and remanded for further consideration.
Whereas District Court only stated that the documents were internal
records based on medical reports secured in confidential capacity, it
did not detail the nature of the documents nor give reference to their
exemptions enumerated in the Freedom of Information Act.

The fact that the information sought under the Freedom of Information
Act might be ferreted out by intuition and diligent search by persons
seeking information is no reason for failure to disclose or refusal
to compel disclosure.

The District Court's ruling was not susceptible of an appellate re-
view which would generate confidence in either a reversal or an affirmance.



Agency:

Bureau of Customs, Treasury Dept.

Record(s) Involved:

U.S. Customs Declaration Forms 6059-B

Section of the Act:

Sec. 552 (b) (4)

Sec. 552 (b) (6)

Judgment:

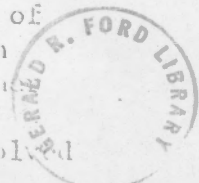
All persons entering the United States are required to complete the U.S. Customs Declaration form 6059-B containing questions about personal identification and some financial information about articles acquired abroad and money or negotiable instruments carried back. These forms are kept by the Treasury Department when completed.

The plaintiff seeks the names and addresses appearing on the declaration forms for use in a class action anti-trust suit against Pan American and nine other airlines. He requested this information for the period between May 1, 1973 and September 1, 1974 for all persons who entered the U.S. by air from points in Asia/Australia/Australasia.

Plaintiff first requested these names and addresses from the Assistant Commissioner, Office of Regulations and Rulings, Department of the Treasury, Bureau of Customs. The request was denied on the grounds that the declarations contain privileged or confidential financial and commercial information which is exempt from disclosure under 552 (b) (4) of the FOIA. The Commissioner affirmed this denial on appeal on the additional ground that the disclosure was exempt on the privacy provisions of 552 (b) (6). Plaintiff reappealed this decision requesting reconsideration in the light of decisions subsequent to the initial appeal. This request was denied, but this time solely on the basis of 552 (b) (6). The Plaintiff filed suit to compel disclosure under the FOIA.

HELD: The Court held that while the information recorded on these forms would be exempt from disclosure under 552 (b) (4), (citing *National Parks and Conservation Ass'n v. Morton*, D.C. Cir., 498, F. 2d 765 (1974)), bare disclosure of names and addresses is not precluded by exemption (4).

Finding that the information required on the form includes "intimate details" of a "highly personal" nature were "similar files" within the meaning of 552 (b) (6), the court went on to consider whether or not disclosure would constitute a clearly unwarranted invasion of personal privacy. Citing *Getman v. N.L.R.B.*, 146 U.S. App. D.C. 209, 450 F. 2d 670, 674 (1971), the Court stated that Exemption 6 was unique in requiring judicial discretion in balancing the interests of the parties and consideration of plaintiffs reasons for requesting disclosure. It held that even bare disclosure of names and addresses would constitute a a substantial invasion of privacy. The Court noted that if the plaintiff was successful in appealing dismissal of his anti trust suit that he would have other available sources for this information and held that disclosure was unnecessary and the privacy interests of the individuals involved outweighed the public interest purpose for disclosure.



Agency:

National Labor Relations Board

Record(s) involved:

List of names and home addresses of employees eligible to vote in certain elections.

Sections of the Act:

Sec. 552(b) (4) - Exemption for information given in confidence.

Sec. 552(b) (6) - Exemption for personnel, medical and similar files.

Sec. 552(b) (7) - Exemption for investigatory files.

Judgment:

For petitioner.

Two law professors undertaking a study of labor representation elections, applied for and obtained an order from the District Court requiring the NLRB to provide them with names and addresses of employees eligible to vote in approximately 35 elections to be designated by them. The claim was based upon 5 U.S.C. 552(a) (3) of the Freedom of Information Act.

The Board argued that the Freedom of Information Act does not require it to furnish the information because such information falls within Exemptions (4), (6) and (7) of the Act.

The District Court granted relief and the Board appealed.

HELD: Affirmed.

Exemption 4. Obviously, a bare list of names and addresses of employees which employers are required by law to give the Board, without any express promise of confidentiality, and which cannot be fairly characterized as "trade secrets" or "financial" or "commercial information" is not exempted from disclosure by sub-section (b) (4).

Exemption 6. We find that, although a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. Exemption (6) requires a court de novo to balance the right of the public to be informed; and the statutory language "clearly unwarranted" instructs the court to tilt the balance in favor of disclosure.

Exemption 7. The "excelsior" lists are not files prepared primarily or even secondarily to prosecute law violators, and even if they ever were to be used for law enforcement purposes, it is impossible to imagine how their disclosure could prejudice the Government's case in court.

"The board was created by Congress and Congress has seen fit to make identifiable records of the board and other Government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the board to refuse promptly to turn over the requested records."

Justice Black.



Kreindler v. Dept. Of The Navy Of The United States Of America
F. Supp. 611 (1973)

Agency:

Department of the Navy

Record(s) involved:

Aircraft Accident Report (AAR)

JAG Manual Investigation Report (JAG REPORT)

Sections of the Act:

- Sec. 552(b) (5) - Exemption for inter- and intra-agency memoranda.
- Sec. 552(b) (4) - Exemption for information given in confidence.
- Sec. 552(b) (6) - Exemption for personnel, medical and similar files.

Judgment:

Held in abeyance.

Order entered for in camera inspection of the entire AAR and the withheld portions of the JAG REPORT.

Plaintiff brought action in District Court to enjoin the withholding of a naval aircraft accident report and a Judge Advocate General Report under the Freedom of Information Act. The plaintiff was an attorney engaged to determine whether a meritorious claim could be asserted for the wrongful death of a civilian occupant of a naval aircraft which crashed. He requested the AAR and JAG Report from the office of the Judge Advocate General. Plaintiff was granted selected portions of the JAG Report and the remainder of his request was denied. On appeal to the Secretary of the Navy, plaintiff was granted medical documents from the JAG Report but the prior decision was otherwise affirmed. The material denied was the entire AAR and the portion of the JAG Report which gave the name of the investigating officer, and the opinions and recommendations of the investigating officer and his superiors.

Plaintiff commenced a suit under the Freedom of Information Act to enjoin the withholding of these documents. Defendant contended that this material was exempt from disclosure because:

1. it was within the exemption of 552(b) (5) and;
2. any statements from witnesses are within the exemption of 552(b) (4) or 552(b) (6) and;
3. even if the AAR is not within any of the statutory exemptions, the Court, as a court of equity, should refuse to order disclosure since any beneficial effects of such disclosure are outweighed by the concomitant injury to the public interest in improving air safety.

Plaintiff then moved for summary judgment.

Held: The Court ordered an in camera inspection to determine what portions of the AAR and JAG Report were justifiably exempt from disclosure and whether there are instances where, as defendant claimed, disclosed material was so inextricably intertwined with privileged matter that these portions must be entirely exempted from disclosure. The Court



recognized that there may be instances in which an agency can demonstrate by means of affidavits or oral testimony that the documents sought clearly come within the purview of one or more of the statutory exemptions, but that this was not such a case.

Levine v. U.S.
42 L. Week 2526

Agency:

Bureau of Customs

Record(s) involved:

Customs declarations forms

Sections of the Act:

Sec. 552(a)

Sec. 552(b) (4) - Exemption for information given in confidence.

Sec. 552(b) (6) - Exemption for personnel, medical and similar files.

Judgment:

In favor of plaintiff.

Plaintiff's complaint requested, pursuant to the Freedom of Information Act, production of all customs declarations forms filed in Miami during May and June of 1972. The District Director of the Bureau of Customs contended that the forms were not proper items for disclosure under the Act because:

1. the requested forms were not sufficiently identified to fall within Sec. 552(a) which requires disclosure of "identifiable records" upon request and;
2. the forms were within the exemption of 552(b) (4) and;
3. the forms were within the exemption of 552(b) (6) since they were so extensive in data that they qualified as personnel files

HELD: The forms were identified, the Bureau knew exactly what forms were subject to the request and did not succeed in demonstrating otherwise. Bulk or difficulty in finding doesn't justify denial.

The information on the declaration forms was certainly not privileged or confidential even if the listing of articles purchased abroad may be considered commercial or financial.

Citing *Robles v. EPA*, 484 F 2d 843 (CA4 1973), the Court said that the files in the third category of 552(b) (6) must have the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files and held that the customs forms do not fall within the exemption relating to invasions of privacy.



Robles, Trujillo, Trujillo v. E.P.A.
Civ. A. No. 72-2470 (4 Cir. 1973)

Agency:

Environmental Protection Agency.

Record(s) involved:

Results of survey conducted by E.P.A. to measure radiation levels in homes in area where uranium tailings had been used as clean fill dirt for construction of buildings.

Sections of the Act:

Sec. 552(b) (6) - Exemption for personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.

Judgment:

In favor of plaintiffs.

Plaintiffs filed action in District Court to compel disclosure of survey report made by E.P.A. of monitoring it conducted of radiation levels in homes in areas where uranium tailings had been used as clean fill dirt in construction. Survey involved the placing of air samplers in homes and some homeowners were promised that the results would not be disclosed to anyone other than the owner or occupier and federal officials working on the problem. Government claimed in District Court that material was exempt under section 552(b) (4) and section 552(b) (6). District Court ruled that the material did not fall under section 552(b) (4) but was exempt under section 552(b) (6). Plaintiffs appealed.

HELD: Reversed. District Court is ordered to grant disclosure to plaintiffs.

Because of the District Court's ruling; on plaintiffs' appeal, Defendants claimed exemption entirely on section 552(b) (6) and therefore the determination of whether the District Court's ruling as to that exemption was correct is the sole issue before the Court. Results of survey were not personnel or medical files but the basis of the Government's claim rests on the remainder of the exemption which protects "similar files" the disclosure of which would be a clear invasion of privacy. "Similar" means of the same confidentiality as medical or personnel files containing "intimate details" of a "highly personal" nature. Material at issue involved effect of radiation levels only on health of specific occupants and therefore was of a "highly personal" nature. However, in addition; confidentiality must be proven. Promise to homeowner of confidentiality is not by itself sufficient grounds for claiming exemption. Agency argued that plaintiffs' need for the information was negligible.

Court rejects this factor as being irrelevant to a claim for material under the F.O.I.A. Court also rejects the argument that disclosure would do more harm than good. Such a balancing test is used only in the exercise of the court's equity power and the weight of authority has held that the F.O.I.A. precludes the Court from exercising equity powers in disposing of actions under the Act. The Court too complex for the general public to understand. The court finds no reasons for holding that disclosure of the material would constitute a clearly unwarranted invasion of privacy.



Rose v. Department of the Air Force
495 F. 2d 261 (1974)

Agency:

Department of the Air Force

Record(s) involved:

Copies of case summaries of Air Force Academy Honor and Ethics Code adjudications. Case summaries are extracts of significant facts in each case heard by the Academy's Honor and Ethics committees; summaries are distributed to Cadets and to those Academy personnel with a "need to know," names of the accused are not deleted when guilt is determined

Sections of the Act:

Sec. 552(b) (2) - Exemption for internal personnel rules and practices of an agency.

Sec. 552(b) (6) - Exemption for personnel, medical and similar files.

Judgment:

For Plaintiff.

Plaintiff brought this action to compel production of disciplinary system case summaries to provide documentation for a law review survey of Service Academy disciplinary systems.

Defendant refused disclosure by authority of a Sec. 552(b) (6) exemption for unwarranted invasion of privacy.

District Court rejected defendant's claim, but ruled for defendant on grounds of Sec. 552(b) (2) which shields from required disclosure all "matters that are... related solely to the internal personnel rules and practices of an agency."

The Second Circuit over-ruled the District Courts reliance on Sec. 552(b) (2) finding that the requested case summaries did not relate solely to internal personnel rules and practices, but must be differentiated from matters of daily routine by their future effect on cadets and their legitimate public interest; further, the Court found that disclosure would pose no danger to the effective operation of the Codes at the Academy.

HELD: Reversed and remanded with instructions to the District Court to conduct an in camera inspection of case summaries to reduce the potential for an unwarranted and serious invasion of personal privacy.

The Court concluded that Exemption 6 requires a court to exercise a large measure of discretion. The Court noted that "no other exemption specifically requires balancing. In view of the Act's basic purpose to limit discretion and encourage disclosure, we believe that Exemption (6) should be treated as unique..." Further, the Court was of the view that each Sec. 552(b) (6) case involved an "essential unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in light of contemporary moves and sensibilities as applied to the particular facts".



Rural Housing Alliance v. U.S. Department of Agriculture
498 F. 2d 73 (1974)

Agency:

Department of Agriculture, Office of Inspector General

Record(s) involved:

Investigatory report of allegations that the Farmers Home Administration practiced racial and national origin discrimination in arranging governmental loans under the Rural Housing Program.

Section of the Act:

- Sec. 552(b) (4) - Exemption for information given in confidence.
- Sec. 552(b) (5) - Exemption for inter- and intra-agency memoranda.
- Sec. 552(b) (6) - Exemption for personnel, medical and similar files.
- Sec. 552(b) (7) - Exemption for investigatory files.

Judgment:

For defendant.

Plaintiff brought action to compel production of investigatory report into charges of governmental housing discrimination.

Defendant refused disclosure of the full report and claimed Exemptions 4, 5, 6 and 7.

District Court granted plaintiff's motion for summary judgment after conducting an in camera inspection and finding no exemption to apply; further the Court ordered that identifying names and details be deleted.

HELD: Reversed as to the application of Exemption 6 to the requested reports, and remanded with instructions to balance the interests of individuals in their privacy against the interests of the public in being informed. The "balancing" was to include: 1. a determination of whether disclosure constitutes an invasion of privacy, and how severe an invasion, 2. a weighing of the public interest purpose of disclosure and whether it could be achieved otherwise.

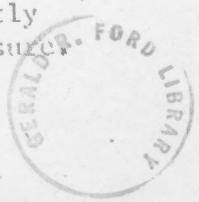
The Court concluded that Exemption 6 was designed to protect individuals from disclosure of intimate details of their lives, and should be read in conjunction with Sec 552(a) (2).

The Court reversed as to the application of Exemption 4, and remanded for reconsideration of the sufficiency of defendant's claim of confidentiality.

The Court reversed as to the application of Exemption 7, and remanded for a determination of whether defendant's investigatory report had been compiled for the purpose of determining whether a law enforcement proceeding should be brought, as might be distinguished from a report resulting from government surveillance or oversight of the performance of its employees.

Defendant did not appeal District Court's rejection of its Exemption 5 claim.

Upon remand, the District Court was instructed to determine the factual issue of whether the requested report involved sufficiently intimate details concerning individuals to be exempt from disclosure.



Tuchinsky v. Selective Service System
294 F. Supp. 803 (N.D. Ill. 1969), aff'd 418 F 2d 155 (7th Cir. 1969)

Agency:

The Selective Service System of the United States.

Record(s) involved:

- (a) Names, home addresses, occupations, dates of birth and appointments of all local board members, government appeal agents and associates, medical advisors, registrant advisors, and members of advisory bodies in Illinois.
- (b) Current state memoranda on occupational deferments and related material.

Sections of the Act:

Sec. 552(b) (6) - Exemption for personnel, medical and similar files.

Judgment:

For petitioner (in part).

Action brought in the United States District Court by a draft counselor under the Public Information Act against the Illinois State Director of the Selective Service System to have certain personnel information as to members of the Selective Service System and appeal board made available to him. The plaintiff also desires copies of current Illinois State memoranda on deferments, exemptions, and associated procedures.

HELD: As to the State memoranda, the defendant's motion to dismiss is granted since the issue was mooted by the defendant's agreement to permit inspection and copying provided the plaintiff pay the reasonable expense.

In view of the violence that has been directed at Local Board officers and members, plaintiff would be entitled to only the names of the local Selective Service Board officials, but not personal information in regard to such things as their home addresses, occupations, races, dates of appointment, military affiliations, and citizenships, under the Public Information Act, 5 U.S.C. sec. 552(b) (6); such information being available only if the local board chairman, after consultation with the persons involved consents and it is determined that such disclosure would not harm the person and would not be an unwarranted invasion of that person's personal privacy. However, this aspect of plaintiff's complaint was dismissed because he had not appropriately exhausted his administrative remedies by requesting this information from any of the local boards.



Vaughn v. Rosen
Civ. A. No. 73-1039 (D.C. Cir. 1973)

Agency:

Civil Service Commission.

Record(s) involved:

Civil Service reports evaluating certain agencies' personnel management programs.

Sections of the Act:

Sec. 552(b) (2) - Exemption for internal personnel files, rules and practices.

Sec. 552(b) (5) - Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (6) - Exemption for personal and medical files.

Judgment:

Reversed and remanded for further consideration.

Plaintiffs sought disclosure of reports evaluating certain agencies' personnel management programs. Civil Service Commissioner denied access to the reports and plaintiffs filed action in District Court seeking injunctive relief and an order requiring disclosure. District Court Defendants' motion for summary judgment and plaintiffs appealed.

HELD: On remand, Government directed to justify its refusal in less conclusory terms and to index the material in order to assist the court in its review. Trial Court may, if necessary, appoint a special master to evaluate the information.

Exemption must be construed narrowly. The burden is on the Government to prove that the material falls under any of the exemptions in the Act. The government is in a better position to prove that the material falls under an exemption than the plaintiff is in proving that it does not because plaintiff has never seen the material. Where there is a dispute as to the nature of the information, the Court points out difficulties in carrying out its own inspection to resolve the dispute where the material is voluminous. There is no incentive under the F.O.I.A. for an agency to voluntarily disclose information. Since the burden of determining a government claim of exemption falls on the courts, there is an impetus for agencies to automatically claim the broadest possible grounds for exemption for the greatest amount of information so that the efficiency of court review will be decreased. To remedy the situation courts should:

1. No longer accept conclusory allegations of exemption but rather require detailed analysis of the material.
2. Require specificity as to which portions of large documents are disclosable and which are exempt. Agencies could develop a system of indexing that would correlate with the government's statement justifying refusal thus reducing the court's workload.
3. Where review of material is too burdensome, trial judge should designate a special master to inspect and evaluate the material and report back to the court.



Agency:

Department of Health, Education, and Welfare
(National Institute of Mental Health)

Record(s) involved:

Grant applications submitted to National Institute of Mental Health; specifically including: narrative statements and related exhibits describing applicants' research design, and progress reports for those projects seeking continuation, renewal, or supplemental funding.

Site visit reports.

Summary Statements (pink sheets) prepared by NIMH staff persons to describe grant requests, to report substantive considerations, supporting recommendations to discuss applicant's background and competence, to assess the risks involved to any human subjects, and evaluate the appropriateness of the applicant's proposed budget.

Sections of the Act:

Sec. 552(a) (2) (A)

Sec. 552(a) (3)

Sec. 552(b) (4) - Exemption for information given in confidence.

Sec. 552(b) (5) - Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (6) - Exemption for personnel, medical and similar files.

Judgment:

For plaintiff.

Plaintiff brought this action to compel production of documents relating to designated research grants for studies on the drug treatment of children with learning difficulties or behavioral disorders.

Defendant contends that 1. Sec. 552(b) (4) exempts disclosure of an applicant's proposed research design as confidential material; 2. Site visit reports and summary statements are inter- and intra-agency memoranda exempt under Sec. 552(b) (5); and 3. Disclosure of defendant's reference to the professional qualifications or competence of an applicant would constitute a clearly unwarranted invasion of personal privacy exempt under Sec. 552(b) (6).

HELD: The Court ordered defendant to produce documents and to promptly modify grant application instructions and regulations to conform to the Court's findings of fact and conclusions of law.

The Court concluded that the Government could delete only the minimum amount of information necessary to conceal the identity of those individuals whose privacy might be threatened by disclosure of statements of opinion concerning an applicant's professional qualifications or competence. However, the Court qualified its conclusion by barring an application of Sec. 552(b) (6) to applications which have actually been granted and to requests for the identity of an institutional applicant;



the Court limited Sec. 552(b) (6) by concluding that the "public's interest in knowing how its funds are disbursed surpasses the privacy interests involved," and that "the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association".

In considering Plaintiff's case, the Court construed the requirement of disclosure broadly and the exemptions narrowly. The Court found the requested grant applications to be "identifiable records" subject to disclosure under Sec 552(a) (3), and the requested summary statements and site visit reports to be "final opinions... made in adjudication of cases" subject to disclosure under Sec. 552(a) (2) (A). The Court dismissed all three of defendant's arguments as without merit, finding that: 1. Scientific research procedures to be undertaken by non-profit educational or medical institutions are not exempt under Sec. 552(b) (4) which shields only trade secrets and other confidential information that is either "commercial" or "financial" in nature; 2. since summary statements and site visit reports constitute final agency opinions, they are not exempt under Sec. 552(b) (5); and 3. Sec. 552(b) (6) was intended to protect detailed government records on an individual and could not be extended to shield an analysis of professional competence written into final agency opinion.

Wine Hobby, USA, Inc. v. U.S. Bureau
of Alcohol, Tobacco and Firearms
363 F. Supp. 231 (1973)

Agency:

Bureau of Alcohol, Tobacco and Firearms

Record(s) involved:

Names and addresses of all persons who filed Bureau of Alcohol,
Tobacco and Firearms Form 1541

Sections of the Act:

Sec. 552(a) (2)

Sec. 552(b) (6) - Exemption for personnel, medical and similar
files.

Judgment:

Plaintiff brought action under the Freedom of Information Act to compel disclosure of the names and addresses of all persons filing U.S. Bureau of Alcohol, Tobacco and Firearms Form 1541 (registration for production of wine for family use) in the Mid-Atlantic region of the United States. Plaintiff wished to obtain this information for the purpose of forwarding catalogues and other promotional material from the plaintiff's business. Defendant contends that these names and addresses are within the privacy exemption of 552(b) (6).



Wine Hobby, USA, Inc. v. U.S. Bureau
of Alcohol, Tobacco and Firearms
continued

HELD: Plaintiff's motion for summary judgment granted the Court that it had no equitable jurisdiction to permit withholding of information which does not fall within one of the specific exemptions, and thus could not weigh the conflicting interests involved. Though the Court expressed doubt as to the conformity of the conclusion with Congressional intent in enacting the Freedom of Information Act, it held that because the information in question was not within the 552(b) (6) exemption it was compelled to order disclosure and thus expose the registrants involved to solicitation by the plaintiff.

Wine Hobby USA, Inc. v. IRS
502 F. 2d 133 (3rd Cir. 1974)

Agency:

Internal Revenue Service

Record(s) Involved:

Names and addresses of all persons who have registered with the U.S. Bureau of Alcohol, Tobacco and Firearms to produce wine for family use.

Sections of Act:

Sec 552 (b) (6) - Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Sec 552 (a) (3)

Judgment:

For the agency.

The government claimed a Sec. 552 (b) (6) exemption in appealing a court order of disclosure. Wine Hobby declined to participate in the appeal, either in filing briefs or in oral argument. The Court examined whether the sixth exemption requires both an inquiry into the alleged invasion of privacy and the alleged public purpose to be served by disclosure. The Court took exception to *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973), and concluded that Sec. 552 (a) (3) did not preclude a balancing of interests to determine the application of the sixth exemption.

HELD: Reversed.

In the absence of any direct or indirect public purpose to be served by disclosure, and upon a finding that disclosure of facts concerning the home and private activities within it constitutes an invasion of personal privacy; the court held that the names and addresses sought were within the sixth exemption.



Please give copy ~~of it~~ to
Phil A, along with rest of file,
because a question may come
up in my absence
P.



THE WHITE HOUSE
WASHINGTON

February 19, 1975

*Freedom of
Information
Act*

MEMORANDUM FOR: BRENT SCOWCROFT
FROM: PHILIP W. BUCHEN *P.W.B.*
SUBJECT: Legal Assistance Under the
Amended Freedom of
Information Act

Your memorandum poses a number of questions concerning the management of your legal defense in dealing with requests for release of classified material. The answers to your numbered questions are as follows:

1. Once a request has come before a court, the Department of Justice is the appropriate representative of the Government to make all requests or other presentations. Your own draft regulations provide in Part II. C. 5 that formal approaches to courts for time extensions will be conducted by the Department of Justice. No approach other than a formal one should ever be made to a court. The NSC Staff's contact with the Department of Justice should be through White House Counsel.
2. All requests by the NSC Staff for legal opinions should be addressed to White House Counsel.
3. As noted in the answer to your first question, all representations in court will be by the Department of Justice. White House Counsel will supervise the conduct of litigation by Justice and we do not anticipate any lack of cooperation. The support required of NSC personnel will depend on the circumstances of individual cases. In general, occasional affidavits, answers to written interrogatories and possibly personal testimony may be required.



4. The Justice Department would be responsible for any litigation needed to collect fees. As to expenses, including attorney fees, that may be awarded against NSC, we are advised by OMB that no final decision has been made, but that probably such expenses will come out of your appropriation.

5. The Counsel to the President must reserve judgment as to what litigating position he believes is defensible before a court in a particular case. We do, of course, adhere to the view, already expressed by the President, that the judgment as to whether particular information is required to be protected for reasons of national defense or foreign policy is an executive function, and that judicial review should be limited to the propriety of the decision to classify in any given case.

Thank you for the draft of your regulations under the Freedom of Information Act. We will want to review them in detail after public comments have been received on these and other regulations applicable to the Executive Office of the President.



Feb. 14, 1975

*Freedom of
Information
Act*

To: Dudley Chapman

From: Phil Buchen

For prompt contact with
me.

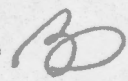


February 13, 1975

MEMORANDUM FOR:

PHILIP W. BUCHEN

FROM:

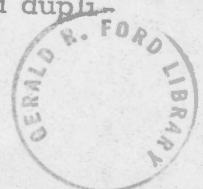
BRENT SCOWCROFT 

SUBJECT:

Amended Freedom of Information
Act

The amended Freedom of Information Act becomes effective on February 19, 1975. It will have a major impact on the NSC Staff since, on complaint, a federal district court shall determine de novo whether a request for the release of classified NSC material was properly denied. This raises a number of problems, indicated below, to which I would like to draw your attention.

1. Under the Act, a court can, upon request by an agency, grant a time extension for responding to a request for release of classified material. If the NSC Staff should wish to make such a request, who should be charged with actually approaching the Court?
2. To whom should the NSC Staff approach for a legal opinion as to whether a final denial of a request for classified material will be sustained if the matter is taken to a court? The Staff will want to have such a legal opinion prior to making a final decision on a request.
3. Related to the above is the question of who will represent the NSC Staff in a court action. The best candidate is, of course, the Department of Justice. But if that Department determines that it will not accept a particular case (Justice currently holds the view that it will defend only those FOI Act cases it judges to be acceptable), what recourse is left to the NSC Staff? In addition, what would be the nature of the support the NSC Staff would likely be required to provide legal counsel?
4. If the NSC Staff loses a court appeal, who will pay the litigant's lawyer and court fees as required by the Act? How will the NSC Staff go about collecting unpaid fees for search and duplication as allowed under the Act?



5. Should the NSC Staff be the final authority on the release of classified "Presidential or White House" material relating to "national defense or foreign policy" matters. It is our judgment that it should. (This matter is currently under consideration by Mr. Dudley Chapman of your office in connection with the NSC Staff's review of draft regulations submitted by the National Archives and Records Service.)

The above listing is not meant to be all inclusive. It consists only of those major problem areas which appear to us to require immediate resolution. We would appreciate being made aware of any others which occur to you.

All available material relating to the above questions -- including the initial guidance on the Act received from the Department of Justice -- has been provided to Mr. Dudley Chapman of your office. Attached is a copy of the most recent draft of the proposed NSC Staff procedure for responding to Freedom of Information Act requests for classified material.

Thank you for your assistance in this matter. Please let me know if you need any additional information from us.

