Union Calendar No. 30

106th Congress, 1st Session - - - - - - - - - - - House Report 106–50

A CITIZEN'S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS

FIRST REPORT

BY THE

COMMITTEE ON GOVERNMENT REFORM

MARCH 11, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, March 11, 1999.

Hon. J. DENNIS HASTERT,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Reform, I submit herewith the committee's first report to the 106th Congress. The committee's report is based on a study conducted by its Subcommittee on Government Management, Information, and Technology.

DAN BURTON,
Chairman.

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Mr. BURTON, from the Committee on Government Reform submitted the following

FIRST REPORT

On March 10, 1999, the Committee on Government Reform approved and adopted a report entitled "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records." The chairman was directed to transmit a copy to the Speaker of the House.

I. PREFACE

In 1977, the House Committee on Government Operations issued the first *Citizen's Guide* on how to request records from Federal agencies.[1] The original *Guide* was reprinted many times and widely distributed. The Superintendent of Documents at the Government Printing Office reported that almost 50,000 copies were sold between 1977 and 1986 when the *Guide* went out of print. In addition, thousands of copies were distributed by the House Committee on Government Operations, Members of Congress, the Congressional Research Service, and other Federal agencies. The original *Citizen's Guide* is one of the most widely read congressional committee reports in history.

In 1987, the committee issued a revised *Citizen's Guide.*[2] The new edition was prepared to reflect changes to the Freedom of Information Act made during 1986. As a result of special efforts by

[1] *A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents,* H. Rept. 95–796, 95th Cong., 1st sess. (1977).

[2] *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records,* H. Rept. 100–199, 100th Cong., 1st sess. (1987).

the Superintendent of Documents at the Government Printing Office, the availability of the new *Guide* was well publicized. The 1987 edition appeared on GPO's "Best Seller" list in the months following its issuance.

During the 100th Congress, major amendments were made to the Privacy Act of 1974. The Computer Matching and Privacy Protection Act of 1988[3] added new provisions to the Privacy Act and changed several existing requirements. None of the changes affects citizen's rights to request or see records held by Federal agencies, but some of the information in the 1987 *Guide* became outdated as a result, and a third edition was issued in 1989.[4]

During the 101st Congress, the Privacy Act of 1974 was amended through further adjustments to the Computer Matching and Privacy Protection Act of 1988. The changes did not affect access rights. A fourth edition of the *Citizen's Guide* reflected all changes to the FOIA and Privacy Act made through the end of 1990.[5] A fifth edition of the *Guide,* produced in 1993, included an expanded bibliography and editorial changes.[6]

A sixth edition contained bibliography additions and editorial changes and represented the first report issued by the new Government Reform and Oversight Committee.[7]

In the closing days of the 104th Congress, the Senate and the House of Representatives completed action on the Electronic Freedom of Information Act Amendments of 1996. The President signed this legislation into law on October 2, 1996, when it became Public Law 104–231. With the exception of one provision pertaining to electronic indexes, these amendments became effective at various times during 1997 necessitating the issuance of the seventh edition of the *Guide.*[8] The 1996 amendments change some FOIA access rights, and this eighth edition of the *Guide* reflects these modifications. It also contains bibliography additions and editorial changes.[9]

II. Introduction

> A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.—James Madison[10]

The Freedom of Information Act (FOIA) establishes a presumption that records in the possession of agencies and departments of

[3] 102 Stat. 2507.

[4] *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records,* H. Rept. 101–193, 101st Cong., 1st sess. (1989).

[5] *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records,* H. Rept. 102–146, 102d Cong., 1st sess. (1991).

[6] *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records,* H. Rept. 103–104, 103d Cong., 1st sess. (1993).

[7] *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records,* H. Rept. 104–156, 104th Cong., 1st sess. (1995).

[8] *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records,* H. Rept. 105–37, 105th Cong., 1st sess. (1997).

[9] The committee wishes to acknowledge the assistance of Harold C. Relyea, Specialist, Government and Finance Division, Congressional Research Service, in the preparation of this report.

[10] Letter to W.T. Barry, Aug. 4, 1822, in G.P. Hunt, ed., IX *The Writings of James Madison* 103 (1910).

the executive branch of the U.S. Government are accessible to the people. This was not always the approach to Federal information disclosure policy. Before enactment of the FOIA in 1966, the burden was on the individual to establish a right to examine these government records. There were no statutory guidelines or procedures to help a person seeking information. There were no judicial remedies for those denied access.

With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the "need to know" standard has been replaced by a "right to know" doctrine. The government now has to justify the need for secrecy.

The FOIA sets standards for determining which records must be disclosed and which records may be withheld. The law also provides administrative and judicial remedies for those denied access to records. Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public.

The Privacy Act of 1974 is a companion to the FOIA. The Privacy Act regulates Federal Government agency recordkeeping and disclosure practices. The act allows most individuals to seek access to Federal agency records about themselves. The act requires that personal information in agency files be accurate, complete, relevant, and timely. The subject of a record may challenge the accuracy of information. The act requires that agencies obtain information directly from the subject of the record and that information gathered for one purpose not be used for another purpose. As with the FOIA, the Privacy Act provides civil remedies for individuals whose rights may have been violated.

Another important feature of the Privacy Act is the requirement that each Federal agency publish a description of each system of records maintained by the agency that contains personal information. This prevents agencies from keeping secret records.

The Privacy Act also restricts the disclosure of personally identifiable information by Federal agencies. Together with the FOIA, the Privacy Act permits disclosure of most personal files to the individual who is the subject of the files. The two laws restrict disclosure of personal information to others when disclosure would violate privacy interests.

While both the FOIA and the Privacy Act support the disclosure of agency records, both laws also recognize the legitimate need to restrict disclosure of some information. For example, agencies may withhold information properly classified in the interest of national defense or foreign policy and criminal investigatory files. Other specifically defined categories of information may also be withheld.

The essential feature of both laws is that they make Federal agencies accountable for information disclosure policies and practices. While neither law grants an absolute right to examine government documents, both laws establish the right to request records and to receive a response to the request. If a record cannot be released, the requester is entitled to be told the reason for the denial. The requester also has a right to appeal the denial and, if necessary, to challenge it in court.

These procedural rights granted by the FOIA and the Privacy Act make the laws valuable and workable. As a result, the disclo-

sure of Federal Government information cannot be controlled by arbitrary or unreviewable actions.

III. Recommendations

The committee recommends that this *Citizen's Guide* be made widely available at low cost to anyone who has an interest in obtaining documents from the Federal Government. The Government Printing Office and Federal agencies subject to the Freedom of Information Act and the Privacy Act of 1974 should continue to distribute this report widely.

The committee also recommends that this *Citizen's Guide* be used by Federal agencies in training programs for government employees who are responsible for administering the Freedom of Information Act and the Privacy Act of 1974. The *Guide* should also be used by those government employees who only occasionally work with these two laws.

In following these recommendations, however, agencies are not relieved of their obligation to comply with the provisions of the 1996 FOIA amendments requiring agencies to make publicly available, upon request, reference material or an agency guide for requesting records or information. This agency guide should include an index and description of all major information systems of the agency, and guidance for obtaining various types and categories of public information from the agency.

The agency guide is intended to be a short and simple explanation for the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each agency should explain, in clear and simple language, the types of records that can be obtained from the agency through FOIA requests; why some records cannot, by law, be made available; and how the agency makes the determination of whether or not a record can be released.

Each agency guide should explain how to make a FOIA request, and how long a requester can expect to wait for a reply from the agency. In addition, the guide should explain the requester's rights under the law to appeal to the courts to rectify agency action. The guide should give a brief history of recent litigation the agency has been involved in, and the resolution of those cases. If an agency requires that certain requests, such as applications for expedited access, be completed on agency forms, then the forms should be part of the guide.

The agency guide is intended to supplement other information locator systems, like the Government Information Locator System (GILS) mandated by the Paperwork Reduction Act of 1995.[11] Thus, the guide should reference systems and explain how a requester can obtain more information about them. Any agency specific locator systems should be similarly referenced in the guide.

All agency guides should be available through electronic means, and should be linked to agency annual reports on FOIA administration. A citizen examining an agency guide should learn how to access the agency's annual reports, and any potential requester

[11] 109 Stat. 163; 44 U.S.C. §§3501–3520 (1995).

reading an annual report should learn about the agency guide, and how to access it.

IV. How To Use This Guide

This report explains how to use the Freedom of Information Act and the Privacy Act of 1974. It reflects all changes to the laws made since 1996. Major amendments to the Freedom of Information Act passed in 1974, 1986, and 1996. A major addition to the Privacy Act of 1974 was enacted in 1988.

This *Guide* is intended to serve as a general introduction to the Freedom of Information Act and the Privacy Act.[12] It offers neither a comprehensive explanation of the details of these acts nor an analysis of case law. The *Guide* will enable those who are unfamiliar with the laws to understand the process and to make a request. In addition, the complete text of each law is included in an appendix.

Readers should be aware that FOIA litigation is a complex area of law. There are thousands of court decisions interpreting the FOIA.[13] These decisions must be considered in order to develop a complete understanding of the principles governing disclosure of government information. Anyone requiring more details about the FOIA, its history, or the case law should consult other sources. There has been less controversy and less litigation over the Privacy Act, but there is, nevertheless, a considerable body of case law for the Privacy Act as well. There are also other sources of information on the Privacy Act.

However, no one should be discouraged from making a request under either law. No special expertise is required. Using the Freedom of Information Act and the Privacy Act is as simple as writing a letter. This *Citizen's Guide* explains the essentials.

V. Which Act To Use

The access provisions of the FOIA and the Privacy Act overlap in part. The two laws have different procedures and different exemptions. As a result, sometimes information exempt under one law will be disclosable under the other.

In order to take maximum advantage of the laws, an individual seeking information about himself or herself should ordinarily cite

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[12] This *Guide* is primarily intended to help the general public. It includes a complete explanation of the basics of the two laws. In the interest of producing a guide that would be both simple and useful to the intended audience, the committee deliberately avoided addressing some of the issues that are highly controversial. The committee cautions against treating the neutrally written descriptions contained in this report as definitive expressions of the committee's views of the law or congressional intent.

The committee has expressed its views on some of these issues in other reports. See, for example, *Security Classification Policy and Executive Order 12356,* H. Rept. 97–731, 97th Cong. 2d sess. (1982); *Who Cares About Privacy? Oversight of the Privacy Act of 1974 by the Office of Management and Budget and by the Congress,* H. Rept. 98–455, 98th Cong., 1st sess. (1983); *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview,* H. Rept. 99–560, 99th Cong., 2d sess. (1986); *Freedom of Information Act Amendments of 1986,* H. Rept. 99–832, 99th Cong., 2d sess. (1986) (report to accompany H.R. 4862). The latter report is a legislative report for a bill reforming the business procedures of the FOIA. The bill did not become law. The 1986 amendments to the FOIA were made by the Freedom of Information Reform Act of 1986, Public Law 99–570. *The Electronic Freedom of Information Act Amendments of 1996,* H. Rept. 104–795, 104th Cong., 2d sess. (1996).

[13] See, e.g., U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Case List* (published biennially) and *Freedom of Information Act Guide & Privacy Act Overview* (published annually).

both laws. Requests by an individual for information that does not relate solely to himself or herself should be made only under the FOIA.

Congress intended that the two laws be considered together in the processing of requests for information. Most government agencies will automatically handle requests from individuals in a way that will maximize the amount of information that is disclosable. However, a requester should still make a request in a manner that is most advantageous and that fully protects all available legal rights. A requester who has any doubts about which law to use should always cite both the FOIA *and* the Privacy Act when seeking documents from the Federal Government.

VI. THE FREEDOM OF INFORMATION ACT

A. THE SCOPE OF THE FREEDOM OF INFORMATION ACT

The Federal Freedom of Information Act applies to documents held by agencies of the executive branch of the Federal Government. The executive branch includes cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other establishments in the executive branch.

The FOIA does not apply to elected officials of the Federal Government, including the President,[14] Vice President, Senators, and Representatives.[15] The FOIA does not apply to the Federal judiciary. The FOIA does not apply to private companies; persons who receive Federal contracts or grants[16]; private organizations; or State or local governments.

All States and some localities have passed laws like the FOIA that allow people to request access to records. In addition, there are other Federal and State laws that may permit access to documents held by organizations not covered by the Federal FOIA.[17]

B. WHAT RECORDS CAN BE REQUESTED UNDER THE FOIA?

The FOIA requires agencies to publish in the *Federal Register*—thereby, under the Government Printing Office Electronic Informa-

[14] The Presidential Records Act of 1978, 44 U.S.C. §§ 2201–2207 (1982), does make the documentary materials of former Presidents subject to the FOIA in part. Presidential papers and documents generated after Jan. 20, 1981, will be available—subject to certain restrictions and delays—under the general framework of the FOIA.

[15] Virtually all official records of the Congress are available to the public. The *Congressional Record,* all bills introduced in the House and the Senate, and all committee reports (except for those containing classified information) are printed and disseminated. Most committee hearings are also printed and available. Copies of most congressional publications are available at Federal depository libraries throughout the country. Historical records of the Congress are made available in accordance with procedures established by House and Senate rules.

In addition, almost all activities of the Congress take place in public. The sessions of the House and Senate are normally open to the public and televised. Most committee hearings and markups are open to the public, and some are televised.

[16] Public Law 105–277 states, ". . . Provided further, That the Director of OMB amends Section--.36 of OMB Circular A–110 to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procdedures established under the Freedom of Information Act . . .".

[17] See, e.g., the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (1982) (providing for access to files of credit bureaus), the Federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1982) (providing for access to records maintained by schools and colleges). Some States have enacted laws allowing individuals to have access to personnel records maintained by employers. See, e.g., Michigan Compiled Laws Annotated § 423.501.

tion Access Enhancement Act of 1993,[18] making such information available online—(1) descriptions of agency organization and office addresses; (2) statements of the general course and method of agency operation; (3) rules of procedure and descriptions of forms; and (4) substantive rules of general applicability and general policy statements. The act also requires agencies to make available for public inspection and copying: (1) final opinions made in the adjudication of cases; (2) statements of policy and interpretations adopted by an agency, but not published in the *Federal Register;* (3) administrative staff manuals that affect the public; (4) copies of records released in response to FOIA requests that an agency determines have been or will likely be the subject of additional requests; and (5) a general index of released records determined to have been or likely to be the subject of additional requests.[19] The 1996 FOIA amendments require that these materials which an agency must make available for inspection and copying without the formality of a FOIA request and which are created on or after November 1, 1996, must be made available by computer telecommunications and in hard copy.[20]

All other "records" of a Federal agency may be requested under the FOIA. The form in which a record is maintained by an agency does not affect its availability. A request may seek a printed or typed document, tape recording, map, photograph, computer printout, computer tape or disk, or a similar item. The 1996 FOIA amendments affirm the general policy that any record, regardless of the form in which it is stored, that is in the possession and control of a Federal agency is usually considered to be an agency record under the FOIA. Although the FOIA occasionally uses terms other than "record," including "information" and "matter," the definition of "record" made by the 1996 amendments should leave no doubt about the breadth of the policy or the interchangability of terms.

Of course, not all records that can be requested under the FOIA must be disclosed. Information that is exempt from disclosure is described below in the section entitled "Reasons Access May Be Denied Under the FOIA."

The FOIA, it should be noted, provides that a requester may ask for *records* rather than information. This means that an agency is only required to look for an existing record or document in response to a FOIA request. An agency is not obliged to create a new record to comply with a request. An agency is neither required to collect information it does not have, nor must an agency do research or analyze data for a requester.[21]

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[18] 44 U.S.C. §4101 (1993); the Government Printing Office Access website may be accessed at *http://www.access.gpo.gov/su_*docs/aces/aaces001.html.

[19] The 1996 amendments to the FOIA require that, by December 31, 1999, this general index should be made available by computer telecommunications. Since not all individuals have access to computer networks or are near agency public reading rooms, requesters would still be able to access previously released FOIA records through the normal FOIA process. 110 Stat. 3048.

[20] 110 Stat. 3048; the 1996 FOIA amendments were signed into law by the President on October 2, 1996.

[21] When records are maintained in a computer, an agency is required to retrieve information in response to a FOIA request. The process of retrieving the information may result in the creation of a new document when the data is printed out on paper or written on computer tape or disk. Since this may be the only way computerized data can be disclosed, agencies are required to provide the data even if it means a new document must be created.

Requesters must ask for existing records. Requests may have to be carefully written in order to obtain the desired information. Sometimes, an agency will help a requester identify a specific document that contains the information being sought. Other times, a requester may need to be creative when writing a FOIA request in order to identify an existing document or set of documents containing the desired information.

There is a second general limitation on FOIA requests. The law requires that each request must *reasonably describe* the records being sought. This means that a request must be specific enough to permit a professional employee of the agency who is familiar with the subject matter to locate the record in a reasonable period of time.

Because agencies organize and index records in different ways, one agency may consider a request to be reasonably descriptive while another agency may reject a similar request as too vague. For example, the Federal Bureau of Investigation (FBI) has a central index for its primary record system. As a result, the FBI is able to search for records about a specific person. However, agencies that do not maintain a central name index may be unable to conduct the same type of search. These agencies may reject a similar request because the request does not describe records that can be identified.

Requesters should make requests as specific as possible. If a particular document is required, it should be identified precisely, preferably by date and title. However, a request does *not* always have to be that specific. A requester who cannot identify a specific record should clearly explain his or her needs. A requester should make sure, however, that a request is broad enough to include all desired information.

For example, assume that a requester wants to obtain a list of toxic waste sites near his home. A request to the Environmental Protection Agency (EPA) for all records on toxic waste would cover many more records than are needed. The fees for such a request might be very high, and it is possible that the request might be rejected as too vague.

A request for all toxic waste sites within 3 miles of a particular address is very specific. However, it is unlikely that the EPA would have an existing record containing data organized in that fashion. As a result, the request might be denied because there is no existing record containing the information.

The requester might do better to ask for a list of toxic waste sites in his city, county, or State. It is more likely that existing records might contain this information. The requester might also want to tell the agency in the request letter exactly what information is desired. This additional explanation may help the agency to find a record that meets the request.

Many people include their telephone number with their requests. Some questions about the scope of a request can be resolved quickly when an agency employee and the requester talk. This is an efficient way to resolve questions that arise during the processing of FOIA requests.

It is to everyone's advantage if requests are as precise and as narrow as possible. The requester benefits because the request can

be processed faster and cheaper. The agency benefits because it can do a better job of responding to the request. The agency will also be able to use its resources to respond to more requests. The FOIA works best when both the requester and the agency act cooperatively.

C. MAKING A FOIA REQUEST

The first step in making a request under the FOIA is to identify the agency that has the records. A FOIA request must be addressed to a specific agency. There is no central government records office that services FOIA requests.

Often, a requester knows beforehand which agency has the desired records. If not, a requester can consult a government directory such as the *United States Government Manual.*[22] This manual has a complete list of all Federal agencies, a description of agency functions, and the address of each agency. A requester who is uncertain about which agency has the records that are needed can make FOIA requests at more than one agency.

Agencies require that FOIA requests be in writing. Letters requesting records under the FOIA can be short and simple. No one needs a lawyer to make a FOIA request. Appendix 1 of this *Guide* contains a sample request letter.

The request letter should be addressed to the agency's FOIA officer or to the head of the agency. The envelope containing the written request should be marked "Freedom of Information Act Request" in the lower left-hand corner.[23]

There are three basic elements to a FOIA request letter. First, the letter should state that the request is being made under the Freedom of Information Act. Second, the request should identify the records that are being sought as specifically as possible. Third, the name and address of the requester must be included.

Under the 1986 amendments to the FOIA, fees chargeable vary with the status or purpose of the requester. As a result, a requester may have to provide additional information to permit the agency to determine the appropriate fees. Different fees can be charged to commercial users, representatives of the news media, educational or noncommercial scientific institutions, and individuals. The next section explains the fee structure in more detail.

There are several optional items that are often included in a FOIA request. The first is the telephone number of the requester. This permits an agency employee processing a request to speak with the requester if necessary.

A second optional item is a limitation on the fees that the requester is willing to pay. It is common for a requester to ask to be

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[22] The *United States Government Manual* is sold by the Superintendent of Documents of the U.S. Government Printing Office. Virtually every public library should have a copy on its shelves. An electronic version of the *Manual* may be found on the Office of the Federal Register website at *http://nara.gov/nara/fedreg.*

[23] All agencies have issued FOIA regulations that describe the request process in greater detail. For example, large agencies may have several components each of which has its own FOIA rules. A requester who can find agency FOIA regulations in the *Code of Federal Regulations* (available in many libraries and an electronic version may be found on the Office of the Federal Register website provided in note 22) might find it useful to check these regulations before making a request. A requester who follows the agency's specific procedures may receive a faster response. However, the simple procedures suggested in this guide will be adequate to meet the minimum requirements for a FOIA request.

notified in advance if the charges will exceed a fixed amount. This allows the requester to modify or withdraw a request if the cost may be too high. Also, by stating a willingness to pay a set amount of fees in the original request letter, a requester may avoid the necessity of additional correspondence and delay.

A third optional item sometimes included in a FOIA request is a request for a waiver or reduction of fees. The 1986 amendments to the FOIA changed the rules for fee waivers. Fees must be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Decisions about granting fee waivers are separate from and different than decisions about the amount of fees that can be charged to a requester.

A fourth optional item is the specification of the form or format in which the requested material is sought. This is an important consideration if a requester desires the responsive information in a particular format. For example, should information maintained by an agency in an electronic form be provided in that same form (perhaps on a disk or CD–ROM) or in hardcopy (such as a paper printout)? The 1996 amendments to the FOIA require agencies to help requesters by providing information in the form requested, including requests for the electronic form of records, if the agency can readily reproduce it in that form. Part of this helping effort includes informing requesters of costs and delays that format preferences might engender.

A fifth optional consideration is seeking expedited processing of a request by showing a "compelling need" for a speedy response. The 1996 amendments to the FOIA require the agencies to promulgate regulations authorizing expedited access where a requester demonstrates a "compelling need" for quick response. A "compelling need" warranting faster FOIA processing exists in two categories of circumstances. In the first category, the failure to obtain the records within an expedited deadline poses an imminent threat to an individual's life or physical safety. The second category requires a request by someone "primarily engaged in disseminating information" and "urgency to inform the public concerning actual or alleged Federal Government activity." Agencies may determine other cases in which they will provide in their regulations for expedited processing.

The specified categories for compelling need are intended to be narrowly applied. A threat to an individual's life or physical safety qualifying for expedited access should be imminent. A reasonable person should be able to appreciate that a delay in obtaining the requested information poses such a threat. A person "primarily engaged in disseminating information" should not include individuals who are engaged only incidentally in the dissemination of information. The standard of "primarily engaged" requires that information dissemination be the main activity of the requester, although it need not be his or her sole occupation. A requester who only incidentally engages in information dissemination, besides other activities, would not satisfy this requirement.

The standard of "urgency to inform" requires that the information requested should pertain to a matter constituting a current exigency for the American public and that a reasonable person might conclude that the consequences of delaying a response to a FOIA request would compromise a significant recognized interest. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

A requester should keep a copy of the request letter and related correspondence until the request has been finally resolved.

D. FEES AND FEE WAIVERS

FOIA requesters may have to pay fees covering some or all of the costs of processing their requests. As amended in 1986, the law establishes three types of fees that may be charged. The 1986 law makes the process of determining the applicable fees more complicated. However, the 1986 rules reduce or eliminate entirely the cost for small, noncommercial requests.

First, fees can be imposed to recover the cost of copying documents. All agencies have a fixed price for making copies using copying machines. A requester is usually charged the actual cost of copying computer tapes, photographs, and other nonstandard documents.

Second, fees can also be imposed to recover the costs of searching for documents. This includes the time spent looking for material responsive to a request. The 1996 amendments to the FOIA define "search" as a "review, manually or by automated means," of "agency records for the purpose of locating those records responsive to a request." Under the FOIA, an agency need not create documents that do not exist. Computer records found in a database rather than a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of "search" in the amendments, the review of computerized records would not amount to the creation of records. Otherwise, it would be virtually impossible to get records maintained completely in an electronic format, like computer database information, because some manipulation of the information likely would be necessary to search the records. A requester can minimize search charges by making clear, narrow requests for identifiable documents whenever possible.

Third, fees can be charged to recover review costs. Review is the process of examining documents to determine whether any portion is exempt from disclosure. Before the 1986 amendments took effect, no review costs were charged to any requester. Review costs may be charged to commercial requesters only. Review charges only include costs incurred during the initial examination of a document. An agency may not charge for any costs incurred in resolving issues of law or policy that may arise while processing a request.

Different fees apply to different requesters. There are three categories of FOIA requesters. The first includes representatives of the news media, and educational or noncommercial scientific institutions whose purpose is scholarly or scientific research. A requester in this category who is not seeking records for commercial use can only be billed for reasonable standard document duplication charges. A request for information from a representative of the

news media is not considered to be for commercial use if the request is in support of a news gathering or dissemination function.

The second category includes FOIA requesters seeking records for commercial use. Commercial use is not defined in the law, but it generally includes profitmaking activities. A commercial user can be charged reasonable standard charges for document duplication, search, and review.

The third category of FOIA requesters includes everyone not in the first two categories. People seeking information for personal use, public interest groups, and nonprofit organizations are examples of requesters who fall into the third group. Charges for these requesters are limited to reasonable standard charges for document duplication and search. Review costs may not be charged. The 1986 amendments did not change the fees charged to these requesters.

Small requests are free for a requester in the first and third categories. This includes all requesters *except* commercial users. There is no charge for the first 2 hours of search time and for the first 100 pages of documents. A noncommercial requester who limits a request to a small number of easily found records will not pay any fees at all.

In addition, the law also prevents agencies from charging fees if the cost of collecting the fee would exceed the amount collected. This limitation applies to all requests, including those seeking documents for commercial use. Thus, if the allowable charges for any FOIA request are small, no fees are imposed.

Each agency sets charges for duplication, search, and review based on its own costs. The amount of these charges is listed in agency FOIA regulations. Each agency also sets its own threshold for minimum charges.

The 1986 FOIA amendments also changed the law on fee waivers. Fees now must be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

The 1986 amendments on fees and fee waivers have created some confusion. Determinations about fees are separate and distinct from determinations about fee waivers. For example, a requester who can demonstrate that he or she is a news reporter may only be charged duplication fees. However, a requester found to be a reporter is not automatically entitled to a waiver of those fees. A reporter who seeks a waiver must demonstrate that the request also meets the standards for waivers.

Normally, only after a requester has been categorized to determine the applicable fees does the issue of a fee waiver arise. A requester who seeks a fee waiver should ask for a waiver in the original request letter. However, a request for a waiver can be made at a later time. The requester should describe how disclosure will contribute to public understanding of the operations or activities of the government. The sample request letter in the appendix includes optional language asking for a fee waiver.

Any requester may ask for a fee waiver. Some will find it easier to qualify than others. A news reporter who is only charged duplication costs may still ask that the charges be waived because of the

public benefits that will result from disclosure. A representative of the news media, a scholar, or a public interest group are more likely to qualify for a waiver of fees. A commercial user may find it difficult to qualify for waivers.

The eligibility of other requesters will vary. A key element in qualifying for a fee waiver is the relationship of the information to public understanding of the operations or activities of government. Another important factor is the ability of the requester to convey that information to other interested members of the public. A requester is not eligible for a fee waiver solely because of indigence.

E. REQUIREMENTS FOR AGENCY RESPONSES

Under the 1996 amendments to the FOIA, each agency is required to determine within 20 days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a request whether to comply with the request.[24] The actual disclosure of documents is required to follow promptly thereafter. If a request is denied in whole or in part, the agency must tell the requester the reasons for the denial. The agency must also tell the requester that there is a right to appeal any adverse determination to the head of the agency or his or her designee.

The FOIA permits an agency to extend the time limits up to 10 days in unusual circumstances. These circumstances include the need to collect records from remote locations, review large numbers of records, and consult with other agencies. The agency is supposed to notify the requester whenever an extension is invoked.[25]

The statutory time limits for responses are not always met. An agency sometimes receives an unexpectedly large number of FOIA requests at one time and is unable to meet the deadlines. Some agencies assign inadequate resources to FOIA offices. Congress does not condone the failure of any agency to meet the law's time limits. However, as a practical matter, there is little that a requester can do about it. The courts have been reluctant to provide relief solely because the FOIA's time limits have not been met.

The best advice to requesters is to be patient. The law allows a requester to consider that his or her request has been denied if it has not been decided within the time limits. This permits the requester to file an administrative appeal or file a lawsuit in Federal District Court. However, this is not always the best course of action. The filing of an administrative or judicial appeal will not necessarily result in any faster processing of the request.

Each agency generally processes requests in the order of receipt. Some agencies will expedite the processing of urgent requests. Anyone with a pressing need for records should consult with the agency FOIA officer about how to ask for expedited treatment of requests.

The 1996 amendments to the FOIA made several changes to the response requirements. As noted, agencies have long processed FOIA requests on a "first in, first out" basis. Processing requests solely on this basis, however, has resulted in lengthy delays for

[24] The new response requirements of the 1996 amendments to the FOIA became effective on October 2, 1997.

[25] Agencies that take more than 20 days to respond to a request do not always notify each requester that an extension has been invoked.

simple requests. The prior receipt and processing of complex requests delays other requests, increasing agency backlogs. To change this situation, the 1996 amendments to the FOIA authorize agencies to promulgate regulations establishing multitrack processing systems, and make clear that agencies should exercise due diligence within each track. Under these new arrangements, agencies also may give requesters the opportunity to limit the scope of their requests to qualify for processing under a faster track.

As previously noted, the 1996 amendments also increase from 10 to 20 days (excluding Saturdays, Sundays, and legal holidays) the time allowed for an agency, after receiving a request, to determine whether to comply with the request. Moreover, the amendments provide a mechanism to deal with unusually burdensome requests which an agency would not be able to process within prescribed timeframes, including an extra 10 days for "unusual circumstances." For such requests, the 1996 amendments require an agency to inform the requester that the request cannot be processed within the statutory time limits and provide an opportunity for the requester to limit the scope of the request so that it may be processed within statutory time limits, and/or arrange with the agency a negotiated deadline for processing the request. In the event the requester refuses to reasonably limit the scope of the request or agree upon a timeframe and then seeks judicial review, that refusal shall be considered as a factor in determining whether "exceptional circum-stances" exist for a judicial extension of processing time.

The FOIA formerly provided that, in "exceptional circumstances," a court may extend the statutory time limits for an agency to respond to a FOIA request, but did not specify what those circumstances are. The 1996 amendments clarify that routine, predictable agency backlogs for FOIA requests do not constitute exceptional circumstances for purposes of the act. Routine backlogs of requests for records under the FOIA do not give agencies an automatic excuse to ignore the time limits. A court shall consider an agency's efforts to reduce the number of pending requests in determining whether exceptional circumstances exist. Agencies may also make a showing of exceptional circumstances based on the amount of material classified, based upon the size and complexity of other requests processed by the agency, based upon the resources being devoted to the declassification of classified material of public interest, or based upon the number of requests for records by courts or administrative tribunals. A court also shall consider a requester's unwillingness to reasonably limit the scope of his or her request or to agree upon a processing timeframe prior to seeking judicial review.

F. REASONS ACCESS MAY BE DENIED UNDER THE FOIA

An agency may refuse to disclose an agency record that falls within any of the FOIA's nine statutory exemptions. The exemptions protect against the disclosure of information that would harm national defense or foreign policy, privacy of individuals, proprietary interests of business, functioning of the government, and other important interests. A document that does not qualify as an "agency record" may be denied because only agency records are

available under the FOIA. Personal notes of agency employees may be denied on this basis. However, most records in the possession of an agency are "agency records" within the meaning of the FOIA.

An agency may withhold exempt information, but it is not always required to do so. For example, an agency may disclose an exempt internal memorandum because no harm would result from its disclosure. However, an agency should not disclose an exempt document that is classified or that contains a trade secret.

When a record contains some information that qualifies as exempt, the entire record is not necessarily exempt. Instead, the FOIA specifically provides that any reasonably segregable portions of a record must be provided to a requester after the deletion of the portions that are exempt. This is a very important requirement because it prevents an agency from withholding an entire document simply because one line or one page is exempt.

The ease with which in electronic form or format may be redacted (deleting part of a record to prevent disclosure of material covered by an exemption) makes the determination of whether a few words or 30 pages have been withheld by an agency at times impossible. The 1996 amendments to the FOIA require agencies to identify the location of deletions in the released portion of the record and, where technologically feasible, to show the deletion at the place on the record where the deletion was made, unless including that indication would harm an interest protected by an exemption.

1. Exemption 1.—Classified Documents

The first FOIA exemption permits the withholding of properly classified documents. Information may be classified in the interest of national defense or foreign policy.

The rules for classification are established by the President and not the FOIA or other law. The FOIA provides that, if a document has been *properly* classified under a Presidential Executive order, the document can be withheld from disclosure.

Classified documents may be requested under the FOIA. An agency can review the document to determine if it still requires protection. In addition, the Executive order on security classification establishes a special procedure for requesting the declassification of documents.[26] If a requested document is declassified, it can be released in response to a FOIA request. However, a document that is declassified may still be exempt under other FOIA exemptions.

2. Exemption 2.—Internal Personnel Rules and Practices

The second FOIA exemption covers matters that are related solely to an agency's internal personnel rules and practices. As interpreted by the courts, there are two separate classes of documents that are generally held to fall within exemption 2.

[26] At the time that this *Guide* was prepared, the current Executive order on security classification was Executive Order 12958, which was promulgated by President Clinton on Apr. 17, 1995. The text of the order can be found at 60 *Federal Register* 19825–43 (Apr. 20, 1995); an electronic version of the order may be found on the Office of the Federal Register website provided at note 22. The rules for mandatory review for declassification are in section 3.6 of the Executive order.

First, information relating to personnel rules or internal agency practices is exempt if it is a trivial administrative matter of no genuine public interest. A rule governing lunch hours for agency employees is an example.

Second, an internal administrative manual can be exempt if disclosure would risk circumvention of law or agency regulations. In order to fall into this category, the material will normally have to regulate internal agency conduct rather than public behavior.

3. Exemption 3.—Information Exempt Under Other Laws

The third exemption incorporates into the FOIA other laws that restrict the availability of information. To qualify under this exemption, a statute must require that matters be withheld from the public in such a manner as to leave no discretion to the agency. Alternatively, the statute must establish particular criteria for withholding *or* refer to particular types of matters to be withheld.

One example of a qualifying statute is the provision of the Internal Revenue Code prohibiting the public disclosure of tax returns and tax return information.[27] Another qualifying exemption 3 statute is the law designating identifiable census data as confidential.[28] Whether a particular statute qualifies under exemption 3 can be a difficult legal question.

4. Exemption 4.—Confidential Business Information

The fourth exemption protects from public disclosure two types of information: Trade secrets and confidential business information. A trade secret is a commercially valuable plan, formula, process, or device. This is a narrow category of information. An example of a trade secret is the recipe for a commercial food product.

The second type of protected data is commercial or financial information obtained from a person and privileged or confidential. The courts have held that data qualifies for withholding if disclosure by the government would be likely to harm the competitive position of the person who submitted the information. Detailed information on a company's marketing plans, profits, or costs can qualify as confidential business information. Information may also be withheld if disclosure would be likely to impair the government's ability to obtain similar information in the future.

Only information obtained from a person other than a government agency qualifies under the fourth exemption. A person is an individual, a partnership, or a corporation. Information that an agency created on its own cannot normally be withheld under exemption 4.

Although there is no formal requirement under the FOIA, many agencies will notify a submitter of business information that disclosure of the information is being considered.[29] The submitter then has an opportunity to convince the agency that the information qualifies for withholding. A submitter can also file suit to block disclosure under the FOIA. Such lawsuits are generally referred to as "reverse" FOIA lawsuits because the FOIA is being used in an at-

[27] 26 U.S.C. § 6103 (1994).
[28] 13 U.S.C. § 9 (1994).
[29] See *Predisclosure Notification Procedures for Confidential Commercial Information,* Executive Order 12600, 3 C.F.R. 235 (1988).

tempt to *prevent* rather than to *require* the disclosure of information. A reverse FOIA lawsuit may be filed when the submitter of documents and the government disagree whether the information is exempt.

5. Exemption 5.—Internal Government Communications

The FOIA's fifth exemption applies to internal government documents. An example is a letter from one government department to another about a joint decision that has not yet been made. Another example is a memorandum from an agency employee to his supervisor describing options for conducting the agency's business.

The purpose of the fifth exemption is to safeguard the deliberative policymaking process of government. The exemption encourages frank discussion of policy matters between agency officials by allowing supporting documents to be withheld from public disclosure. The exemption also protects against premature disclosure of policies before final adoption.

While the policy behind the fifth exemption is well accepted, the application of the exemption is complicated. The fifth exemption may be the most difficult FOIA exemption to understand and apply. For example, the exemption protects the policymaking process, but it does not protect purely factual information related to the policy process. Factual information must be disclosed unless it is inextricably intertwined with protected information about an agency decision.

Protection for the decisionmaking process is appropriate only for the period while decisions are being made. Thus, the fifth exemption has been held to distinguish between documents that are predecisional and therefore may be protected, and those which are post-decisional and therefore not subject to protection. Once a policy is adopted, the public has a greater interest in knowing the basis for the decision.

The exemption also incorporates some of the privileges that apply in litigation involving the government. For example, papers prepared by the government's lawyers can be withheld in the same way that papers prepared by private lawyers for clients are not available through discovery in civil litigation.

6. Exemption 6.—Personal Privacy

The sixth exemption covers personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This exemption protects the privacy interests of individuals by allowing an agency to withhold personal data kept in government files. Only individuals have privacy interests. Corporations and other legal persons have no privacy rights under the sixth exemption.

The exemption requires agencies to strike a balance between an individual's privacy interest and the public's right to know. However, since only a *clearly* unwarranted invasion of privacy is a basis for withholding, there is a perceptible tilt in favor of disclosure in the exemption. Nevertheless, the sixth exemption makes it harder to obtain information about another individual without the consent of that individual.

The Privacy Act of 1974 also regulates the disclosure of personal information about an individual. The FOIA and the Privacy Act overlap in part, but there is no inconsistency. An individual seeking records about himself or herself should cite both laws when making a request. This ensures that the maximum amount of disclosable information will be released. Records that can be denied to an individual under the Privacy Act are not necessarily exempt under the FOIA.

7. Exemption 7.—Law Enforcement

The seventh exemption allows agencies to withhold law enforcement records in order to protect the law enforcement process from interference. The exemption was amended slightly in 1986, but it still retains six specific subexemptions.

Exemption (7)(A) allows the withholding of a law enforcement record that could reasonably be expected to interfere with enforcement proceedings. This exemption protects an active law enforcement investigation from interference through premature disclosure.

Exemption (7)(B) allows the withholding of information that would deprive a person of a right to a fair trial or an impartial adjudication. This exemption is rarely used.

Exemption (7)(C) recognizes that individuals have a privacy interest in information maintained in law enforcement files. If the disclosure of information could reasonably be expected to constitute an unwarranted invasion of personal privacy, the information is exempt from disclosure. The standards for privacy protection in exemption 6 and exemption (7)(C) differ slightly. Exemption (7)(C) protects against an unwarranted invasion of personal privacy while exemption 6 protects against a *clearly* unwarranted invasion. Also, exemption (7)(C) allows the withholding of information that "could reasonably be expected to" invade someone's privacy. Under exemption 6, information can be withheld only if disclosure "would" invade someone's privacy.

Exemption (7)(D) protects the identity of confidential sources. Information that could reasonably be expected to reveal the identity of a confidential source is exempt. A confidential source can include a State, local, or foreign agency or authority, or a private institution that furnished information on a confidential basis. In addition, the exemption protects information furnished by a confidential source if the data was compiled by a criminal law enforcement authority during a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

Exemption (7)(E) protects from disclosure information that would reveal techniques and procedures for law enforcement investigations or prosecutions or that would disclose guidelines for law enforcement investigations or prosecutions if disclosure of the information could reasonably be expected to risk circumvention of the law.

Exemption (7)(F) protects law enforcement information that could reasonably be expected to endanger the life or physical safety of any individual.

8. Exemption 8.—Financial Institutions

The eighth exemption protects information that is contained in or related to examination, operating, or condition reports prepared by or for a bank supervisory agency such as the Federal Deposit Insurance Corporation, the Federal Reserve, or similar agencies.

9. Exemption 9.—Geological Information

The ninth FOIA exemption covers geological and geophysical information, data, and maps about wells. This exemption is rarely used.

G. FOIA EXCLUSIONS

The 1986 amendments to the FOIA gave limited authority to agencies to respond to a request without confirming the existence of the requested records. Ordinarily, any proper request must receive an answer stating whether there is any responsive information, even if the requested information is exempt from disclosure.

In some narrow circumstances, acknowledgement of the *existence* of a record can produce consequences similar to those resulting from disclosure of the record itself. In order to avoid this type of problem, the 1986 amendments established three "record exclusions."

The exclusions allow an agency to treat certain exempt records as if the records were not subject to the FOIA. An agency is not required to confirm the existence of three specific categories of records. If these records are requested, the agency may respond that there are no disclosable records responsive to the request. However, these exclusions do not broaden the authority of any agency to withhold documents from the public. The exclusions are only applicable to information that is otherwise exempt from disclosure.

The first exclusion may be used when a request seeks information that is exempt because disclosure could reasonably be expected to interfere with a current law enforcement investigation (exemption (7)(A)). There are three specific prerequisites for the application of this exclusion. First, the investigation in question must involve a possible violation of criminal law. Second, there must be reason to believe that the subject of the investigation is not already aware that the investigation is underway. Third, disclosure of the *existence* of the records—as distinguished from the contents of the records—could reasonably be expected to interfere with enforcement proceedings.

When all of these conditions exist, an agency may respond to a FOIA request for investigatory records as if the records are not subject to the requirements of the FOIA. In other words, the agency's response does not have to reveal that it is conducting an investigation.

The second exclusion applies to informant records maintained by a criminal law enforcement agency under the informant's name or personal identifier. The agency is not required to confirm the existence of these records unless the informant's status has been officially confirmed. This exclusion helps agencies to protect the iden-

tity of confidential informants. Information that might identify informants has always been exempt under the FOIA.

The third exclusion only applies to records maintained by the Federal Bureau of Investigation which pertain to foreign intelligence, counterintelligence, or international terrorism. When the *existence* of these types of records is classified, the FBI may treat the records as not subject to the requirements of FOIA.

This exclusion does not apply to all classified records on the specific subjects. It only applies when the records are classified and when the *existence* of the records is also classified. Since the underlying records must be classified before the exclusion is relevant, agencies have no new substantive withholding authority.

In enacting these exclusions, congressional sponsors stated that it was their intent that agencies must inform FOIA requesters that these exclusions are available for agency use. Requesters who believe that records were improperly withheld because of the exclusions can seek judicial review.

H. ADMINISTRATIVE APPEAL PROCEDURES

Whenever a FOIA request is denied, the agency must inform the requester of the reasons for the denial and the requester's right to appeal the denial to the head of the agency. A requester may appeal the denial of a request for a document or for a fee waiver. A requester may contest the type or amount of fees that were charged. A requester may appeal any other type of adverse determination, including a rejection of a request for failure to describe adequately the documents being requested or a response indicating that no requested records were located. A requester can also appeal because the agency failed to conduct an adequate search for the documents that were requested.

A person whose request was granted in part and denied in part may appeal the part that was denied. If an agency has agreed to disclose some but not all requested documents, the filing of an appeal does not affect the release of the documents that are disclosable. There is no risk to the requester in filing an appeal.

The appeal to the head of the agency is a simple administrative appeal. A lawyer can be helpful, but no one needs a lawyer to file an appeal. Anyone who can write a letter can file an appeal. Appeals to the head of the agency often result in the disclosure of some records that had been withheld. A requester who is not convinced that the agency's initial decision is correct should appeal. There is no charge for filing an administrative appeal.

An appeal is filed by sending a letter to the head of the agency. The letter must identify the FOIA request that is being appealed. The envelope containing the letter of appeal should be marked in the lower left-hand corner with the words "Freedom of Information Act Appeal."[30]

[30] Agency FOIA regulations will ordinarily describe the appeal procedures and requirements with more specificity. At most agencies, decisions on FOIA appeals have been delegated to other agency officials. Requesters who have an opportunity to review agency regulations in the *Code of Federal Regulations* (available in many libraries and on the Office of the Federal Register website provided at note 22) may be able to speed up the processing of the appeal. However, following the simple procedures described in this *Guide* will be sufficient to maintain a proper appeal.

Many agencies assign a number to all FOIA requests that are received. The number should be included in the appeal letter, along with the name and address of the requester. It is a common practice to include a copy of the agency's initial decision letter as part of the appeal, but this is not ordinarily required. It can also be helpful for the requester to include a telephone number in the appeal letter.

An appeal will normally include the requester's arguments supporting disclosure of the documents. A requester may include any facts or any arguments supporting the case for reversing the initial decision. However, an appeal letter does not have to contain any arguments at all. It is sufficient to state that the agency's initial decision is being appealed. Appendix 1 includes a sample appeal letter.

The FOIA does not set a time limit for filing an administrative appeal of a FOIA denial. However, it is good practice to file an appeal promptly. Some agency regulations establish a time limit for filing an administrative appeal. A requester whose appeal is rejected by an agency because it is too late may refile the original FOIA request and start the process again.

An agency is required to make a decision on an appeal within 20 days (excluding Saturdays, Sundays, and legal holidays). It is possible for an agency to extend the time limits by an additional 10 days. Once the time period has elapsed, a requester may consider that the appeal has been denied and may proceed with a judicial appeal. However, unless there is an urgent need for records, this may not be the best course of action. The courts are not sympathetic to appeals based solely on an agency's failure to comply with the FOIA's time limits.

I. FILING A JUDICIAL APPEAL

When an administrative appeal is denied, a requester has the right to appeal the denial in court. A FOIA appeal lawsuit can be filed in the U.S. District Court in the district where the requester lives. The requester can also file suit in the district where the documents are located or in the District of Columbia. When a requester goes to court, the burden of justifying the withholding of documents is on the government. This is a distinct advantage for the requester.

Requesters are sometimes successful when they go to court, but the results vary considerably. Some requesters who file judicial appeals find that an agency will disclose some documents previously withheld rather than fight about disclosure in court. This does not always happen, and there is no guarantee that the filing of a judicial appeal will result in any additional disclosure.

Most requesters require the assistance of an attorney to file a judicial appeal. A person who files a lawsuit and substantially prevails may be awarded reasonable attorney fees and litigation costs reasonably incurred. Some requesters may be able to handle their own case without an attorney. Since this is not a litigation guide, details of the judicial appeal process have not been included. Any-

one considering filing a FOIA lawsuit can begin by reading the provisions of the FOIA on judicial review.[31]

VII. The Privacy Act of 1974

A. THE SCOPE OF THE PRIVACY ACT OF 1974

The Privacy Act of 1974 provides safeguards against an invasion of privacy through the misuse of records by Federal agencies. In general, the act allows a citizen to learn how records are collected, maintained, used, and disseminated by the Federal Government. The act also permits an individual to gain access to most personal information maintained by Federal agencies and to seek amendment of any inaccurate, incomplete, untimely, or irrelevant information.

The Privacy Act applies to personal information maintained by agencies in the executive branch of the Federal Government. The executive branch includes cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other establishments in the executive branch. Agencies subject to the Freedom of Information Act are also subject to the Privacy Act. The Privacy Act does not generally apply to records maintained by State and local governments or private companies or organizations.[32]

The Privacy Act only grants rights to U.S. citizens and to aliens lawfully admitted for permanent residence. As a result, a nonresident foreign national cannot use the act's provisions. However, a nonresident foreign national may use the FOIA to request records about himself or herself.

In general, the only records subject to the Privacy Act are records that are maintained in a system of records. The idea of a "system of records" is unique to the Privacy Act and requires explanation.

The act defines a "record" to include most personal information maintained by an agency about an individual. A record contains individually identifiable information, including but not limited to information about education, financial transactions, medical history, criminal history, or employment history. A "system of records" is a group of records from which information is actually retrieved by name, Social Security number, or other identifying symbol assigned to an individual.

Some personal information is not kept in a system of records. This information is not subject to the provisions of the Privacy Act, although access may be requested under the FOIA. Most personal information in government files is subject to the Privacy Act.

The Privacy Act also establishes general records management requirements for Federal agencies. In summary, there are five basic requirements that are most relevant to individuals.

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[31] More information on judicial review under the FOIA and Privacy Act can be found in Allan Adler, *Litigation Under the Federal Open Government Laws* (American Civil Liberties Union Foundation) (last published in 1997).

[32] The Privacy Act applies to some records that are not maintained by an agency. Subsection (m) of the act provides that, when an agency provides by contract for the operation of a system of records on its behalf, the requirements of the Privacy Act apply to those records. As a result, some records maintained outside of a Federal agency are subject to the Privacy Act. Descriptions of these systems are published in the *Federal Register*. However, most records maintained outside of Federal agencies are not subject to the Privacy Act.

First, each agency must establish procedures allowing individuals to see and copy records about themselves. An individual may also seek to amend any information that is not accurate, relevant, timely, or complete. The rights to inspect and to correct records are the most important provisions of the Privacy Act. This *Guide* explains in more detail how an individual can exercise these rights.

Second, each agency must publish notices describing all systems of records. The notices include a complete description of personal data recordkeeping policies, practices, and systems. This requirement prevents the maintenance of secret record systems.

Third, each agency must make reasonable efforts to maintain accurate, relevant, timely, and complete records about individuals. Agencies are prohibited from maintaining information about how individuals exercise rights guaranteed by the first amendment to the U.S. Constitution unless maintenance of the information is specifically authorized by statute or by the individual or relates to an authorized law enforcement activity.

Fourth, the act establishes rules governing the use and disclosure of personal information. The act specifies that information collected for one purpose may not be used for another purpose without notice to or the consent of the subject of the record. The act also requires that each agency keep a record of some disclosures of personal information.

Fifth, the act provides legal remedies that permit an individual to seek enforcement of the rights granted under the act. In addition, Federal employees who fail to comply with the act's provisions may be subjected to criminal penalties.

B. THE COMPUTER MATCHING AND PRIVACY PROTECTION ACT

The Computer Matching and Privacy Protection Act of 1988 amended the Privacy Act by adding new provisions regulating the use of computer matching. Records used during the conduct of a matching program are subject to an additional set of requirements.

Computer matching is the computerized comparison of information about individuals for the purpose of determining eligibility for Federal benefit programs. A matching program can be subject to the requirements of the Computer Matching Act if records from a Privacy Act system of records are used during the program. If Federal Privacy Act records are matched against State or local records, then the State or local matching program can be subject to the new matching requirements.

In general, matching programs involving Federal records must be conducted under a matching agreement between the source and recipient agencies. The matching agreement describes the purpose and procedures of the matching and establishes protections for matching records. The agreement is subject to review and approval by a Data Integrity Board. Each Federal agency involved in a matching activity must establish a Data Integrity Board.

For an individual seeking access to or correction of records, the computer matching legislation provides no special access rights. If matching records are Federal records, then the access and correction provisions of the Privacy Act apply. There is no general right of access or correction for matching records of State and local agencies. It is possible that rights are available under State or local

laws. There is, however, a requirement that an individual be notified of agency findings prior to the taking of any adverse action as a result of a computer matching program. An individual must also be given an opportunity to contest such findings. The notice and opportunity-to-contest provisions apply to matching records whether the matching was done by the Federal Government or by a State or local government. Section 7201 of Public Law 101–508 modified the due process notice requirement to permit the use of statutory or regulatory notice periods.

The matching provisions also require that any agency—Federal or non-Federal—involved in computer matching must independently verify information used to take adverse action against an individual. This requirement was included in order to protect individuals from arbitrary or unjustified denials of benefits. Independent verification includes independent investigation and confirmation of information. Public Law 101–508 also modified the independent verification requirement in circumstances in which it was unnecessary.

Most of the provisions of the Computer Matching and Privacy Protection Act of 1988 were originally scheduled to become effective in July 1989. Public Law 101–56 delayed the effective date for most matching programs until January 1, 1990.

C. LOCATING RECORDS

There is no central index of Federal Government records about individuals. An individual who wants to inspect records about himself or herself must first identify which agency has the records. Often, this will not be difficult. For example, an individual who was employed by the Federal Government knows that the employing agency or the Office of Personnel Management maintains personnel files.

Similarly, an individual who receives veterans' benefits will normally find relevant records at the Department of Veterans Affairs or at the Defense Department. Tax records are maintained by the Internal Revenue Service, Social Security records by the Social Security Administration, passport records by the State Department, etc.

For those who are uncertain about which agency has the records that are needed, there are several sources of information. First, an individual can ask an agency that might maintain the records. If that agency does not have the records, it may be able to identify the proper agency.

Second, a government directory such as the *United States Government Manual*[33] contains a complete list of all Federal agencies, a description of agency functions, and the address of the agency and its field offices. An agency responsible for operating a program normally maintains the records related to that program.

Third, a Federal Information Center can help to identify government agencies, their functions, and their records. These Centers, which are operated by the General Services Administration, serve

[33] The *United States Government Manual* is sold by the Superintendent of Documents of the U.S. Government Printing Office. Virtually every public library should have a copy. An electronic version of the *Manual* may be found on the Office of the Federal Register website provided at note 22.

as clearinghouses for information about the Federal Government. There are Federal Information Centers throughout the country.

Fourth, every 2 years, the Office of the Federal Register publishes a compilation of system of records notices for all agencies. These notices contain a complete description of each record system maintained by each agency. The compilation is the most complete reference for information about Federal agency personal information practices.[34] The information that appears in the compilation also appears in various issues of the *Federal Register*.[35]

The compilation—formally called *Privacy Act Issuances*—may be difficult to find and hard to use. It does not contain a comprehensive index. Copies will be available in some Federal depository libraries and possibly some other libraries as well as the website maintained by the Office of the Federal Register (see note 22). Although the compilation is the best single source of detailed information about personal records maintained by Federal agencies, it is not necessary to consult the compilation before making a Privacy Act request. A requester is not required to identify the specific system of records that contains the information being sought. It is sufficient to identify the agency that has the records. Using information provided by the requester, the agency will determine which system of records has the files that have been requested.

Those who request records under the Privacy Act can help the agency by identifying the type of records being sought. Large agencies maintain hundreds of different record systems. A request can be processed faster if the requester tells the agency that he or she was employed by the agency, was the recipient of benefits under an agency program, or had other specific contacts with the agency.

D. MAKING A PRIVACY ACT REQUEST FOR ACCESS

The fastest way to make a Privacy Act request is to identify the specific system of records. The request can be addressed to the system manager. Few people do this. Instead, most people address their requests to the head of the agency that has the records or to the agency's Privacy Act/FOIA officer. The envelope containing the written request should be marked "Privacy Act/FOIA Request" in the bottom left-hand corner.[36]

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[34] Each system notice contains the name of the system; its location; the categories of individuals covered by the system; the categories of records in the system; the legal authority for maintenance of the system; the routine disclosures that may be made for records in the system; the policies and practices of storing, retrieving, accessing, retaining, and disposing of records; the name and address of the manager of the system; procedures for requesting access to the records; procedures for requesting correction or amendment of the records; the source of the information in the system; and a description of any disclosure exemptions that may be applied to the records in the system.

[35] Agencies are required to publish in the *Federal Register* a description of each system of records when the system is established or amended. In the past, agencies were required to publish an annual compilation in the *Federal Register*, but that requirement was eliminated in 1982. As a result, it will be difficult to find a complete list of all systems of records in the *Federal Register*. Some agencies do, however, reprint all system notices from time to time. An agency's Privacy Act/FOIA officer may be able to provide more information about the agency's publication practices. An electronic version of the most recent compilation of Privacy Act regulations and systems of records may be found on the Office of the Federal Register website provided at note 22.

[36] All agencies have Privacy Act regulations that describe the request process in greater detail. Large agencies may have several components, each of which has its own Privacy Act rules. Requesters who can find agency Privacy Act regulations in the *Code of Federal Regulations* (available in many libraries and an electronic version may be found on the Office of the Federal Reg-

Continued

There are three basic elements to a request for records under the Privacy Act. First, the letter should state that the request is being made under the Privacy Act. Second, the letter should include the name, address, and signature of the requester. Third, the request should describe the records as specifically as possible. Appendix 1 includes a sample Privacy Act request letter.

It is a common practice for an individual seeking records about himself or herself to make the request under *both* the Privacy Act of 1974 and the Freedom of Information Act. See the discussion in the front of this *Guide* about which act to use.

A requester can describe the records by identifying a specific system of records, by describing his or her contacts with an agency, or by simply asking for all records about himself or herself. The broader and less specific a request is, the longer it may take for an agency to respond.

It is a good practice for a requester to describe the type of records that he or she expects to find. For example, an individual seeking a copy of his service record in the Army should state that he was in the Army and include the approximate dates of service. This will help the Defense Department narrow its search to record systems that are likely to contain the information being sought. An individual seeking records from the Federal Bureau of Investigation (FBI) may ask that files in specific field offices be searched in addition to the FBI's central office files. The FBI does not routinely search field office records without a specific request.

An agency will generally require a requester to provide some proof of identity before records will be disclosed. Agencies may have different requirements. Some agencies will accept a signature; others may require certification of identity by a notarized signature or by a declaration by the requester under penalty of perjury. If an individual goes to the agency to inspect records, standard personal identification may be acceptable. More stringent requirements may apply if the records being sought are especially sensitive.

An agency will inform requesters of any special identification requirements. Requesters who need records quickly should first consult agency regulations or talk to the agency's Privacy Act/FOIA officer to find out how to provide adequate identification.

An individual who visits an agency office to inspect a Privacy Act record may bring along a friend or relative to review the record. When a requester brings another person, the agency may ask the requester to sign a written statement authorizing discussion of the record in the presence of that person.

It is a crime to knowingly and willfully request or obtain records under the Privacy Act under false pretenses. A request for access under the Privacy Act can only be made by the subject of the record. An individual cannot make a request under the Privacy Act for a record about another person. The only exception is for a parent or legal guardian who may request records on behalf of a minor or a person who has been declared incompetent.

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ister website provided in note 22) might read these regulations before making a request. A requester who follows the agency's specific procedures may receive a faster response. However, the simple procedures suggested in this guide are adequate to meet the minimum statutory requirements for a Privacy Act request.

E. FEES

Under the Privacy Act, fees can only be charged for the cost of copying records. No fees may be charged for the time it takes to search for records or for the time it takes to review the records to determine if any exemptions apply. This is a major difference from the FOIA. Under the FOIA, fees can sometimes be charged to recover search costs and review costs.[37] The different fee structure in the two laws is one reason many requesters seeking records about themselves cite both laws. This minimizes allowable fees.

Many agencies will not charge fees for making a copy of a Privacy Act file, especially when the file is small. If paying the copying charges is a problem, the requester should explain in the request letter. An agency can waive fees under the Privacy Act.

F. REQUIREMENTS FOR AGENCY RESPONSES

Unlike the FOIA, there is no fixed time when an agency must respond to a request for access to records under the Privacy Act. It is good practice for an agency to acknowledge receipt of a Privacy Act request within 10 days and to provide the requested records within 30 days.

At many agencies, FOIA and Privacy Act requests are processed by the same personnel. When there is a backlog of requests, it takes longer to receive a response. As a practical matter, there is little that a requester can do when an agency response is delayed. Requesters should be patient.

Agencies generally process requests in the order in which they were received. Some agencies will expedite the processing of urgent requests. Anyone with a pressing need for records should consult with the agency Privacy Act/FOIA officer about how to ask for expedited treatment of requests.

G. REASONS ACCESS MAY BE DENIED UNDER THE PRIVACY ACT

Not all records about an individual must be disclosed under the Privacy Act. Some records may be withheld to protect important government interests such as national security or law enforcement.

The Privacy Act exemptions are different than the exemptions of the FOIA. Under the FOIA, any record may be withheld from disclosure if it contains exempt information when a request is received. The decision to apply a FOIA exemption is made only after a request has been made. In contrast, Privacy Act exemptions apply not to a record but to a system of records. Before an agency can apply a Privacy Act exemption, the agency must first issue a regulation stating that there may be exempt records in that system of records.

Without reviewing system notices or agency regulations, it is hard to tell whether particular Privacy Act records are exempt from disclosure. However, it is a safe assumption that any system of records that qualifies for an exemption has been exempted by the agency.

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[37] An individual seeking records about himself or herself under the FOIA should not be charged review charges. The only charges applicable under the FOIA are search and copy charges.

Since most record systems are not exempt, the exemptions are not relevant to most requests. Also, agencies do not always rely upon available Privacy Act exemptions unless there is a specific reason to do so. Thus, some records that could be withheld will nevertheless be disclosed upon request.

Because Privacy Act exemptions are complex and used infrequently, most requesters need not worry about them. The exemptions are discussed here for those interested in the act's details and for reference when an agency withholds records. Anyone needing more information about the Privacy Act's exemptions can begin by reading the relevant sections of the act. The complete text of the act is reprinted in an appendix to this *Guide*.[38]

The Privacy Act's exemptions differ from those of the FOIA in another important way. The FOIA is a disclosure law. Information exempt under the FOIA is exempt from disclosure only. The Privacy Act, however, imposes many separate requirements on personal records. Some systems of records are exempt from the disclosure requirements, but no system is exempt from all Privacy Act requirements.

For example, no system of records is ever exempt from the requirement that a description of the system be published. No system of records can be exempted from the limitations on disclosure of the records outside of the agency. No system is exempt from the requirement to maintain an accounting for disclosures. No system is exempt from the restriction against the maintenance of unauthorized information on the exercise of first amendment rights. All systems are subject to the requirement that reasonable efforts be taken to ensure that records disclosed outside the agency be accurate, complete, timely, and relevant. Each agency must maintain proper administrative controls and security for all systems. Finally, the Privacy Act's criminal penalties remain fully applicable to each system of records.

1. General Exemptions

There are two general exemptions under the Privacy Act. The first applies to all records maintained by the Central Intelligence Agency. The second applies to selected records maintained by an agency or component whose principal function is any activity pertaining to criminal law enforcement. Records of criminal law enforcement agencies can be exempt under the Privacy Act if the records consist of (A) information compiled to identify individual criminal offenders and which consists only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) criminal investigatory records associated with an identifiable individual; or (C) reports identifiable to a particular individual compiled at any stage from arrest through release from supervision.

Systems of records subject to the general exemptions may be exempted from many of the Privacy Act's requirements. Exemption

[38] In 1975, the Office of Management and Budget (OMB) issued guidance to Federal agencies on the Privacy Act of 1974. Those guidelines are a good source of commentary and explanation for many of the provisions of the act. The OMB guidelines can be found at 40 *Federal Register* 28948 (July 9, 1975).

from the act's access and correction provisions is the most important. An individual has no right under the Privacy Act to ask for a copy of or to seek correction of a record subject to the general exemptions.

In practice, these exemptions are not as expansive as they sound. Most agencies that have exempt records will accept and process Privacy Act requests. The records will be reviewed on a case-by-case basis. Agencies will often disclose any information that does not require protection. Agencies also tend to follow a similar policy for requests for correction.

Individuals interested in obtaining records from the Central Intelligence Agency or from law enforcement agencies should not be discouraged from making requests for access. Even if the Privacy Act access exemption is applied, portions of the record may still be disclosable under the FOIA. This is a primary reason individuals should cite both the Privacy Act and the FOIA when requesting records.

2. Specific Exemptions

There are seven specific Privacy Act exemptions that can be applied to systems of records. Records subject to these exemptions are not exempt from as many of the act's requirements as are the records subject to the general exemptions. However, records exempt under the specific exemptions are likely to be exempt from the Privacy Act's access and correction provisions. Nevertheless, since the access and correction exemptions are not always applied when available, those seeking records should not be discouraged from making a request. Also, the FOIA can be used to seek access to records exempt under the Privacy Act.

The first specific exemption covers record systems containing information properly classified in the interest of national defense or foreign policy. Classified information is also exempt from disclosure under the FOIA and will normally be unavailable under both the FOIA and Privacy Acts.

The second specific exemption applies to systems of records containing investigatory material compiled for law enforcement purposes *other than* material covered by the general law enforcement exemption. The specific law enforcement exemption is limited when—as a result of the maintenance of the records—an individual is denied any right, privilege, or benefit to which he or she would be entitled by Federal law or for which he or she would otherwise be entitled. In such a case, disclosure is required except where disclosure would reveal the identity of a confidential source who furnished information to the government under an express promise that the identity of the source would be held in confidence. If the information was collected from a confidential source before the effective date of the Privacy Act (September 27, 1975), an implied promise of confidentiality is sufficient to permit withholding of the identity of the source.[39]

The third specific exemption applies to systems of records maintained in connection with providing protective services to the Presi-

[39] This distinction between express and implied promises of confidentiality is repeated throughout the specific exemptions of the Privacy Act.

dent of the United States or other individuals who receive protection from the Secret Service.

The fourth specific exemption applies to systems of records required by statute to be maintained and used *solely* as statistical records.

The fifth specific exemption covers investigatory material compiled *solely* to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. However, this exemption applies only to the extent that disclosure of information would reveal the identity of a confidential source who provided the information under a promise of confidentiality.

The sixth specific exemption applies to systems of records that contain testing or examination material used *solely* to determine individual qualifications for appointment or promotion in Federal service, but only when disclosure would compromise the objectivity or fairness of the testing or examination process. Effectively, this exemption permits withholding of questions used in employment tests.

The seventh specific exemption covers evaluation material used to determine potential for promotion in the armed services. The material is only exempt to the extent that disclosure would reveal the identity of a confidential source who provided the information under a promise of confidentiality.

3. Medical Records

Medical records maintained by Federal agencies—for example, records at Veterans Administration hospitals—are not formally exempt from the Privacy Act's access provisions. However, the Privacy Act authorizes a special procedure for medical records that operates, at least in part, like an exemption.

Agencies may deny individuals direct access to medical records, including psychological records, if the agency deems it necessary. An agency normally reviews medical records requested by an individual. If the agency determines that direct disclosure is unwise, it can arrange for disclosure to a physician selected by the individual or possibly to another person chosen by the individual.

4. Litigation Records

The Privacy Act's access provisions include a general limitation on access to civil litigation records. The act does not require an agency to disclose to an individual any information compiled in reasonable anticipation of a civil action or proceeding. This limitation operates like an exemption, although there is no requirement that the exemption be applied by regulation to a system of records before it can be used.

H. ADMINISTRATIVE APPEAL PROCEDURES FOR DENIAL OF ACCESS

Unlike the FOIA, the Privacy Act does not provide for an administrative appeal of the denial of access. However, many agencies have established procedures that will allow Privacy Act requesters to appeal a denial of access without going to court. An administrative appeal is often allowed under the Privacy Act, even though it is not required, because many individuals cite both the FOIA and

Privacy Act when making a request. The FOIA provides specifically for an administrative appeal, and agencies are required to consider an appeal under the FOIA.

When a Privacy Act request for access is denied, agencies usually inform the requester of any appeal rights that are available. If no information on appeal rights is included in the denial letter, the requester should ask the Privacy Act/FOIA officer. Unless an agency has established an alternative procedure, it is possible that an appeal filed directly with the head of the agency will be considered by the agency.

When a request for access is denied under the Privacy Act, the agency explains the reason for the denial. The explanation must name the system of records and explain which exemption is applicable to the system. An appeal may be made on the basis that the record is not exempt, that the system of records has not been properly exempted, or that the record is exempt but no harm to an important interest will result if the record is disclosed.

There are three basic elements to a Privacy Act appeal letter. First, the letter should state that the appeal is being made under the Privacy Act of 1974. If the FOIA was cited when the request for access was made, the letter should state that the appeal is also being made under the FOIA. This is important because the FOIA grants requesters statutory appeal rights.

Second, a Privacy Act appeal letter should identify the denial that is being appealed and the records that were withheld. The appeal letter should also explain why the denial of access was improper or unnecessary.

Third, the appeal should include the requester's name and address. It is a good practice for a requester to also include a telephone number when making an appeal.

Appendix 1 includes a sample letter of appeal.

I. AMENDING RECORDS UNDER THE PRIVACY ACT

The Privacy Act grants an important right in addition to the ability to inspect records. The act permits an individual to request a correction of a record that is not accurate, relevant, timely, or complete. This remedy allows an individual to correct errors and to prevent incorrect information from being disseminated by the agency or used unfairly against the individual.

The right to seek a correction extends only to records subject to the Privacy Act. Also, an individual can only correct errors contained in a record that pertains to himself or herself. Records disclosed under the FOIA cannot be amended through the Privacy Act unless the records are also subject to the Privacy Act. Records about unrelated events or about other people cannot be amended unless the records are in a Privacy Act file maintained under the name of the individual who is seeking to make the correction.

A request to amend a record should be in writing. Agency regulations explain the procedure in greater detail, but the process is not complicated. A letter requesting an amendment of a record will normally be addressed to the Privacy Act/FOIA officer of the agency or to the agency official responsible for the maintenance of the record system containing the erroneous information. The envelope

containing the request should be marked "Privacy Act Amendment Request" on the lower left corner.

There are five basic elements to a request for amending a Privacy Act record.

First, the letter should state that it is a request to amend a record under the Privacy Act of 1974.

Second, the request should identify the specific record and the specific information in the record for which an amendment is being sought. Copies of the records sought to be amended may be included.

Third, the request should state why the information is not accurate, relevant, timely, or complete. Supporting evidence may be included with the request.

Fourth, the request should state what new or additional information, if any, should be included in place of the erroneous information. Evidence of the validity of the new or additional information should be included. If the information in the file is wrong and needs to be removed rather than supplemented or corrected, the request should make this clear.

Fifth, the request should include the name and address of the requester. It is a good idea for a requester to include a telephone number.

Appendix 1 includes a sample letter requesting amendment of a Privacy Act record.

J. APPEALS AND REQUIREMENTS FOR AGENCY RESPONSES

An agency that receives a request for amendment under the Privacy Act must acknowledge receipt of the request within 10 days (not including Saturdays, Sundays, and legal holidays). The agency must promptly rule on the request.

The agency may make the amendment requested. If so, the agency must notify any person or agency to which the record had previously been disclosed of the correction.

If the agency refuses to make the change requested, the agency must inform the requester of: (1) the agency's refusal to amend the record; (2) the reason for refusing to amend the request; and (3) the procedures for requesting a review of the denial. The agency must provide the name and business address of the official responsible for conducting the review.

An agency must decide an appeal of a denial of a request for amendment within 30 days (excluding Saturdays, Sundays, and legal holidays), unless the time period is extended by the agency for good cause. If the appeal is granted, the record will be corrected.

If the appeal is denied, the agency must inform the requester of the right to judicial review. In addition, a requester whose appeal has been denied also has the right to place in the agency file a concise statement of disagreement with the information that was the subject of the request for amendment.

When a statement of disagreement has been filed and an agency is disclosing the disputed information, the agency must mark the information and provide copies of the statement of disagreement. The agency may also include a concise statement of its reasons for not making the requested amendments. The agency must also give

a copy of the statement of disagreement to any person or agency to whom the record had previously been disclosed.

K. FILING FOR JUDICIAL APPEAL

The Privacy Act provides a civil remedy whenever an agency denies access to a record or refuses to amend a record. An individual may sue an agency if the agency fails to maintain records with accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any agency determination *and* the agency makes a determination that is adverse to the individual. An individual may also sue an agency if the agency fails to comply with any other Privacy Act provision in a manner that has an adverse effect on the individual.

The Privacy Act protects a wide range of rights about personal records maintained by Federal agencies. The most important are the right to inspect records and the right to seek correction of records. Other rights have also been mentioned here, and still others can be found in the text of the act. Most of these rights can become the subject of litigation.

An individual may file a lawsuit against an agency in the Federal District Court in which the individual lives, in which the records are situated, or in the District of Columbia. A lawsuit must be filed within 2 years from the date on which the basis for the lawsuit arose.

Most individuals require the assistance of an attorney to file a lawsuit. An individual who files a lawsuit and substantially prevails may be awarded reasonable attorney fees and litigation costs reasonably incurred. Some requesters may be able to handle their own case without an attorney. Since this is not a litigation guide, details about the judicial appeal process have not been included. Anyone considering filing a Privacy Act lawsuit can begin by reviewing the provisions of the Privacy Act on civil remedies.[40]

[40] See note 31.

APPENDIXES

APPENDIX 1.—SAMPLE REQUEST AND APPEAL LETTERS

A. FREEDOM OF INFORMATION ACT REQUEST LETTER

Agency Head [or Freedom of Information Act Officer]
Name of Agency
Address of Agency
City, State, Zip Code

Re: Freedom of Information Act Request

Dear :

This is a request under the Freedom of Information Act.

I request that a copy of the following documents [or documents containing the following information] be provided to me: [identify the documents or information as specifically as possible].

In order to help to determine my status for purposes of determining the applicability of any fees, you should know that I am (insert a suitable description of the requester and the purpose of the request).

[Sample requester descriptions:

a representative of the news media affiliated with the _____ newspaper (magazine, television station, etc.), and this request is made as part of news gathering and not for a commercial use.

affiliated with an educational or noncommercial scientific institution, and this request is made for a scholarly or scientific purpose and not for a commercial use.

an individual seeking information for personal use and not for a commercial use.

affiliated with a private corporation and am seeking information for use in the company's business.]

[Optional] I am willing to pay fees for this request up to a maximum of $____. If you estimate that the fees will exceed this limit, please inform me first.

[Optional] I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. [Include specific details, includ-

ing how the requested information will be disseminated by the requester for public benefit.]

[Optional] I request that the information I seek be provided in electronic format, and I would like to receive it on a personal computer disk [or a CD–ROM].

[Optional] I ask that my request receive expedited processing because _____. [Include specific details concerning your "compelling need," such as being someone "primarily engaged in disseminating information" and specifics concerning your "urgency to inform the public concerning actual or alleged Federal Government activity."]

[Optional] I also include a telephone number at which I can be contacted during the hours of _____, if necessary, to discuss any aspect of my request.

Thank you for your consideration of this request.

Sincerely,

Name
Address
City, State, Zip Code
Telephone number [Optional]

B. FREEDOM OF INFORMATION ACT APPEAL LETTER

Agency Head or Appeal Officer
Name of Agency
Address of Agency
City, State, Zip Code

Re: Freedom of Information Act Appeal

Dear :

This is an appeal under the Freedom of Information Act.

On (date), I requested documents under the Freedom of Information Act. My request was assigned the following identification number: _____. On (date), I received a response to my request in a letter signed by (name of official). I appeal the denial of my request.

[Optional] I enclose a copy of that response letter.

[Optional] The documents that were withheld must be disclosed under the FOIA because (provide details you would want an agency head or appeal officer to consider when deciding your appeal.)

[Optional] I appeal the decision to deny my request for a waiver of fees. I believe that I am entitled to a waiver of fees. Disclosure of the documents I requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. (Provide details)

[Optional] I appeal the decision to require me to pay review costs for this request. I am not seeking the documents for a commercial use. (Provide details)

[Optional] I appeal the decision to require me to pay search and/or review charges for this request. I am a representative of the news media seeking information as part of news gathering and not for commercial use.

[Optional] I appeal the decision to require me to pay search and/or review charges for this request. I am a representative of an educational institution seeking information for a scholarly purpose.

[Optional] I appeal the decision to require me to accept the information I seek in a paper or hardcopy format. I requested this information, which the agency maintains in an electronic form, in an electronic format, specifically on a personal computer disk [or a CD–ROM].

[Optional] I also include a telephone number at which I can be contacted during the hours of _____, if necessary, to discuss any

aspect of my appeal.

Thank you for your consideration of this appeal.

Sincerely,

Name
Address
City, State, Zip Code
Telephone number [Optional]

C. PRIVACY ACT REQUEST FOR ACCESS LETTER

Privacy Act or Freedom of Information Officer
Name of Agency
Address of Agency
City, State, Zip Code

Re: Privacy Act and Freedom of Information Act Request for Access

Dear :

This is a request under the Privacy Act of 1974 and the Freedom of Information Act.

I request a copy of any records [or specifically named records] about me maintained at your agency.

[Optional] To help you to locate my records, I have had the following contacts with your agency: [mention job applications, periods of employment, loans or agency programs applied for, etc.].

[Optional] I am willing to pay fees for this request up to a maximum of $____. If you estimate that the fees will exceed this limit please inform me first.

[Optional] Enclosed is [a notarized signature or other identifying document] that will verify my identity.

[Optional] I also include a telephone number at which I can be contacted during the hours of _____, if necessary, to discuss any aspect of my request.

Thank you for your consideration of this request.

Sincerely,

Name
Address
City, State, Zip Code
Telephone number [Optional]

D. PRIVACY ACT DENIAL OF ACCESS APPEAL

Agency Head or Appeal Officer
Name of Agency
Address of Agency
City, State, Zip Code

Re: Appeal of Denial of Privacy Act and Freedom of Information Act Access Request

Dear :

This is an appeal under the Privacy Act and the Freedom of Information Act of the denial of my request for access to records.

On (date), I requested access to records under the Privacy Act of 1974. My request was assigned the following identification number: _____. On (date), I received a response to my request in a letter signed by (name of official). I appeal the denial of my request.

[Optional] I enclose a copy of the response letter.

[Optional] The records that were withheld should be disclosed to me because (provide details you would want an agency head or appeal officer to consider when deciding your appeal.)

[Optional] Please consider that this appeal is also made under the Freedom of Information Act. Please provide any additional information that may be available under the FOIA.

[Optional] I also include a telephone number at which I can be contacted during the hours of _____, if necessary, to discuss any aspect of my appeal.

Thank you for your consideration of this appeal.

Sincerely,

Name
Address
City, State, Zip Code
Telephone number [Optional]

E. PRIVACY ACT REQUEST TO AMEND RECORDS

Privacy Act and Freedom of Information Act Officer
Name of Agency
Address of Agency
City, State, Zip Code

Re: Privacy Act Request to Amend Records

Dear :

This is a request under the Privacy Act to amend records about myself maintained by your agency.

I believe that the following is not correct: [Describe the incorrect information as specifically as possible].

The information is not (accurate) (relevant) (timely) (complete) because (provide details you would want an agency official to consider when reviewing your request.)

[Optional] Enclosed are copies of documents that show that the information is incorrect.

[Optional] I also include a telephone number at which I can be contacted during the hours of _____, if necessary, to discuss any aspect of my request.

I request that the information be [deleted] [changed to read:].

Thank you for your consideration of this request.

Sincerely,

Name
Address
City, State, Zip Code
Telephone number [Optional]

F. PRIVACY ACT APPEAL OF REFUSAL TO AMEND RECORDS

Agency Head or Appeal Officer
Name of Agency
Address of Agency
City, State, Zip Code

Re: Privacy Act Appeal of Refusal to Amend Records

Dear :

This is an appeal under the Privacy Act of the refusal of your agency to amend records as I requested.

On (date), I requested that records about me be amended. My request was assigned the following identification number _____. On (date), I was informed by (name of official) that my request was rejected. I appeal the rejection of my request.

The rejection of my request for amendment was wrong because (provide details you would want an agency head or appeal officer to consider when deciding your appeal.)

[Optional] I enclose additional evidence that shows that the records are incorrect and that the amendment I requested is appropriate.

[Optional] I also include a telephone number at which I can be contacted during the hours of _____, if necessary, to discuss any aspect of my appeal.

Thank you for your consideration of this appeal.

Sincerely,

Name
Address
City, State, Zip Code
Telephone number [Optional]

APPENDIX 2.—BIBLIOGRAPHY OF CONGRESSIONAL PUBLICATIONS ON THE FREEDOM OF INFORMATION ACT

CONGRESSIONAL HEARINGS, REPORTS, DOCUMENTS, AND PRINTS

(LISTED CHRONOLOGICALLY BY PUBLICATION DATE)

Note on availability: Most of these publications are out of print. Copies of all congressional publications should be available at Federal Depository Libraries located throughout the country.

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APPENDIX 3.—BIBLIOGRAPHY OF CONGRESSIONAL PUBLICATIONS ON THE PRIVACY ACT OF 1974

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APPENDIX 4.—TEXT OF THE FREEDOM OF INFORMATION ACT

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

* * * * * * *

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

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. 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. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and

(ii) 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.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of process-

ing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided,* That the court's review of the matter shall be limited to the record before the agency.

(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 de 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. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(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.

(D) [Repealed.]

(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 Special Counsel 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 Special Counsel, after investigation and consideration of the evidence submitted, shall submit his find-

ings 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 Special Counsel 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.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(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[41] (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)[42] In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii)

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[1] Under section 12(b) of the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104–231; 110 Stat. 3054), the amendment made by section 8(b) of such Act striking "ten days" and inserting "20 days" shall take effect on October 3, 1997.

[2] Under section 12(b) of the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104–231; 110 Stat. 3054), the amendment made by section 7(b) of such Act striking subparagraph (B) and inserting a new subparagraph (B) shall take effect on October 3, 1997. As a result of that amendment, upon that date subparagraph (B) will read as follows:

(B)(i) 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 unusual circumstances 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, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(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.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group

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.[43]

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of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

[1] Under section 12(b) of the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104–231; 110 Stat. 3054), the amendments made by section 7(c) of such Act inserting "(i)" after "(C)" and adding at the end new clauses (ii) and (iii), shall take effect on October 3, 1997. As a result of those amendments, upon that date clauses (ii) and (iii) will read as follows:

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

Under section 12(b) of the Electronic Freedom of Information Act Amendments of 1996 (Pub. L. 104–231; 110 Stat. 3054), the amendments made by sections 7(a) and 8(a) and (c) of that Act adding at the end of this paragraph new subparagraphs (D) through (F), shall take effect on October 3, 1997. As a result of those amendments, upon that date subparagraphs (D) through (F) will read as follows:

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

Continued

(b) This section does not apply to matters that are—

(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would

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(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

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. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the ex-

istence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

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

(B)(i) 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; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may es-

tablish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 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 subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "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; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

APPENDIX 5.—TEXT OF THE PRIVACY ACT OF 1974

§ 552a. Records maintained on individuals

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

(1) the term "agency" means agency as defined in section 552(e)[44] 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;

(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;

(8) the term "matching program"—

(A) means any computerized comparison of—

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include—

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not

[41] Reference probably should be to "552(f)". Section 1802(b) of Public Law 99–570 redesignated subsection (e) as (f) of section 552.

be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches—

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel[45]

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel; or

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in

[42] So in original. The amendment made by Public Law 103–66 (107 Stat. 611, sec. 13581(c)(1)) struck "; or". It did not put back any punctuation.

a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(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 and Records Administration 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 Archivist of the United States or the designee of the Archivist 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;

(11) pursuant to the order of a court of competent jurisdiction; and

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of 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 upon establishment or revision 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 sub-

stantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(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; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(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 biennially 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 ben-

efits 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 September 27, 1975.

(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)(4)(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 gen-

eral 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.

(l)(1) ARCHIVAL RECORDS.—Each agency record which is accepted by the Archivist of the United States 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 Archivist of the United States 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.—(1) 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.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(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) MATCHING AGREEMENTS.—(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying—

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to—

(i) applicants for and recipients of financed assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall—

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if—

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) VERIFICATION AND OPPORTUNITY TO CONTEST FINDINGS.—(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until—

(A)(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that—

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)(i) the expiration of any time period established for the program by statue or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of—

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) SANCTIONS.—(1) Notwithstanding any other provision of law, no source agency may disclose any record with is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement

entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless—

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) REPORT ON NEW SYSTEMS AND MATCHING PROGRAMS.—Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) BIENNIAL REPORT.—The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)(1) 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.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) DATA INTEGRITY BOARDS.—(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board—

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching

programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including—

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership to structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement

for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that—

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) The Director of the Office of Management and Budget shall, annually during the first 3 years after the date of enactment of this subsection and biennially thereafter, consolidate in a report to the Congress the information contained in the reports from the various Data Integrity Boards under paragraph (3)(D). Such report shall include detailed information about costs and benefits of matching programs that are conducted during the period covered by such consolidated report, and shall identify each waiver granted by a Data Integrity Board of the requirement for completion and submission of a cost-benefit analysis and the reasons for granting the waiver.

(7) In the reports required by paragraphs (3)(D) and (6), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) OFFICE OF MANAGEMENT AND BUDGET RESPONSIBILITIES.—The Director of the Office of Management and Budget shall—

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to an oversight of the implementation of this section by agencies.

(Added Public Law 93–579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Public Law 94–183, § 2(2), Dec. 31, 1975, 89 Stat. 1057; Public Law 97–365, § 2, Oct. 25, 1982, 96 Stat. 1749; Public Law 97–375, title II, § 201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Public

Law 97–452, § 2(a)(1), Jan. 12, 1983, 96 Stat. 2478; Public Law 98–477, § 2(c), Oct. 15, 1984, 98 Stat. 2211; Public Law 98–497, title I, § 107(g), Oct. 19, 1984, 98 Stat. 2292; Public Law 100–503, §§ 2–6(a), 7, 8, Oct. 18, 1988, 102 Stat. 2507–2514; Public Law 101–508, title VII, § 7201(b)(1), Nov. 5, 1990, 104 Stat. 1388–334; Public Law 103–66, title XIII, § 13581(c), Aug. 10, 1993, 107 Stat. 611.)

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