

INTERFACE:
Freedom of Information Act
and
Privacy Act

The Statutes

Freedom of Information Act

- Codified at 5 U.S.C. 552.
- Passed in 1966, became effective July 5, 1967.
- Act passed after protracted legislative efforts, including a decade of hearings.

Privacy Act

- Codified at 5 U.S.C. 552a.
- Passed in 1974, became effective September 27, 1975.
- Act passed in haste as an outgrowth of Watergate reforms and the growing use of computers.

Policy Objectives

Freedom of Information Act

- Ensures an informed citizenry.
- Opens government to public scrutiny.

Privacy Act

- Establishes a code of fair information practices.
- Restricts disclosure of personally identifiable records.
- Grants individuals an increased right of access to records about them.
- Allows individuals the right to seek amendment of records that are not accurate.

Records

Freedom of Information Act

Records are either:

1. Created or maintained by the agency
2. Under agency control.

Privacy Act

Records are:

Any item, collection or grouping of information about an individual that is maintained by an agency in a “system of records.”

**No requirement to create records that do not exist under either statute.

Access Provisions

Freedom of Information Act

- “Any person” can gain access to non-exempt records
- Exemptions apply

Privacy Act

- Applies only to U.S. Citizens and aliens lawfully admitted for permanent resident
- Access rights only to the subject of the record or authorized designee
- Access may also be granted through “exceptions” or a properly published “routine use”

Exercise

- Under which Act would you process these requests?
 - A request from an individual who wants access to his own personnel file.
 - A request from a company seeking access to a copy of the winning contract for IT support services.
 - A request from an individual seeking access to the arrest record of her neighbor.

Conducting a Search

Freedom of Information Act

- Reasonable search of all records created or maintained by the agency, including those in Privacy Act systems of records.

Privacy Act

- Search is limited to records contained in a system of record maintained by the agency.
- Unless you have reason to believe that records exist in non-Privacy Act files.

Processing Time Limits

Freedom of Information Act

- Processing times outlined in statute.
- 20 working days
- 10 additional days in exceptional circumstances.

Privacy Act

- Statute does not specify processing time limit on requests for access.
- Processing times are defined by agency regulation.
- Time lines on requests for amendments are outlined in the statute.
 - 10 days for considering an initial request.
 - 30 days to conduct a second review or “appeal.”

Appeal Rights

Freedom of Information Act

- Adequacy of search.
- Failure to comply with time limits.
- Denial of information in full or part pursuant to an exemption.
- Denial of fee waiver or expedited processing.
- Process included in statute and implementing regulation.

Privacy Act

- Denial of access.
- Denial of amendment.
- Process established by regulation not statute in access cases.
- Process established by statute in amendment cases.

Fees

Freedom of Information Act

- Uniform fee schedule prescribed by OMB.
- Sets search, review and duplication costs based on identity of the requester.
- Provision for fee waivers
- Must resolve fee matters prior to processing.

Privacy Act

- Fees limited to duplication costs.
- Costs outlined in implementing regulations

Comparison - Exemptions

■ FOIA

- (b)(1) exempts from disclosure information properly classified pursuant to prevailing executive order on classification.

■ Privacy Act*

- (k)(1) exempts properly classified information.

*Privacy Act exemptions must be properly published in order for an agency to use it to deny access, except in the case of (d)(5), which is self executing.

Comparison - Exemptions

■ FOIA

- (b)(2) high – exempts internal personnel rules and practices.
- (b)(3) – information exempted from disclosure by statute.

■ Privacy Act

- (k)(6) exempts testing and evaluation materials.
- (k)(3) exempts information related to protection of the President.
- (j)(1) CIA records.

Comparison - Exemptions

■ FOIA

- (b)(4) – trade secrets, commercial or financial information.
- No comparable FOIA exemption.

■ Privacy Act

- No comparable Privacy Act exemption.
- (k)(4) used solely as statistical record.

Comparison - Exemptions

■ FOIA

- (b)(5) – exempts deliberative, attorney work product and attorney-client privilege.

■ Privacy Act

- (d)(5) exempts information compiled in anticipation of a civil action or proceeding.
- Most similar to attorney-work product privilege.

Comparison - Exemptions

■ FOIA

- (b)(6) unwarranted invasion of personal privacy.

■ Privacy Act

- No similar exemption, however:
- (k)(5) exempts investigative 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 disclosure of such material “would reveal the identity” of a confidential source

Comparison - Exemptions

■ FOIA

- (b)(7)(A) – (b)(7)(F) exempt records compiled for law enforcement purposes.
- (b)(7)(D) – exempts information related to confidential sources.

■ Privacy Act

- (j)(2), (k)(2) and (k)(5) exempts investigative material compiled for law enforcement purposes.
- (k)(7) exempts evaluation materials (provided by confidential source).

Comparison - Exemptions

■ FOIA

- (b)(8) stability reports (financial institutions).
- (b)(9) exempts geological data concerning wells.

■ Privacy Act

- No similar exemptions

Litigation

Freedom of Information Act

- Judicial review after exhausting administrative remedies.
 - Denials or procedural matters.
- Option for immediate judicial review in timeliness cases.
- Attorney fees and litigation costs.

Privacy Act

- Judicial review for access, accuracy or amendment cases.
- Private right of action for violations.
 - Civil and criminal penalties.

Processing under FOIA

- Any person.
- Reasonable description of records sought.
- Conduct a reasonable search for responsive records.
- Conduct a line by line review.
- Withhold segregable portions of otherwise releasable documents.
- Provide appropriate appeal rights.

Processing under Privacy Act

- Ensure that you have an appropriate request.
 - 1st party or authorized representative.
 - Disclosure pursuant to a published routine use.
- Go to the system notice to determine if any exemptions apply.
 - Properly published exemptions, except (d)(5) which is self executing.
- Continue to process under FOIA.
 - Records must contain both a FOIA and a Privacy Act exemption to be withheld.
- Provide appropriate appeal rights.

Interface Scenario

- Will I. Wynn writes and asks for all records relating to him. Under which statute do we process and why?
- Records exist in a non-exempt Privacy Act system. Does he get access? Why?
- Records exist in an exempt Privacy Act system. Does that change the result? Should the agency process under FOIA?

Interface Scenario

- After processing under both statutes, you determine that no exemptions apply. Does the requester get access to the records?
- What happens when there is both an exemption under the Privacy Act and an exemption under FOIA?

Rules to Responding

- Requester doesn't always know which statute applies to his or her request.
- Review the threshold requirements of each statute in conjunction with the subject of the request.
- Once a decision is made on which statute(s) applies, follow your agencies regulations as a guide to process the request.
- Know your agencies published Privacy Act system notices.

FOIA/Privacy Act Toolkit

- Statutes:
 - Freedom of Information Act, as amended – 5 U.S.C. § 552.
 - Privacy Act of 1974, as amended – 5 U.S.C. § 552a.
- Published Privacy Act system of records notices.
- Implementing FOIA and Privacy Act regulations.
- Other agency issuances or procedural guidance concerning FOIA and Privacy Act.
- DOJ/OIP Guidance on FOIA:
 - http://www.justice.gov/oip/foia_guide09.htm
- DOJ/OPCL Guidance on Privacy Act:
 - <http://www.justice.gov/opcl/1974privacyact-overview.htm>
- OMB guidance on Privacy Act:
 - <http://www.whitehouse.gov/omb/inforeg/infopoltech.html#prm>