OFFICE OF MANAGEMENT AND BUDGET

PRIVACY ACT IMPLEMENTATION

Guidelines and Responsibilities
OFFICE OF MANAGEMENT AND BUDGET
[Circular No. A-108]
HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

Responsibilities for the Maintenance of Records About Individuals by Federal Agencies

1. Purpose. This Circular defines responsibilities for implementing the Privacy Act of 1974 (Public Law No. 93-579, 5 U.S.C. 552a) to assure that personal information about individuals collected by Federal agencies is limited to that which is legally authorized and necessary and is maintained in a manner which precludes unwarranted intrusions upon individual privacy.


b. The Act places the principal responsibility for compliance with its provisions on Federal agencies but also provides that the Office of Management and Budget (OMB) develop guidelines and regulations...and provide continuing assistance to and oversight of the implementation of the...operative provisions of the Act by the agencies.

3. Definitions. For the purpose of this Circular:

(a) the term "agency" means agency as defined in section 552(e) of this title; "The term agency 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." (5 U.S.C. 552 [e] (4)).

(b) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) the term "maintain" includes maintain, collect, use, or disseminate.

(d) the term "record" means any record, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his educational, medical, employment history, and criminal or military history and that contains his name, or identifying number, symbol, or his particular identifying particulars assigned to the individual, such as a finger or voice print or a photograph; and

(e) 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.

4. Coverage. a. This Circular applies to all agencies as defined in the Act.

b. It applies to all agency activities related to the maintenance of systems of records subject to the Act; i.e., groupings of personal data about identifiable individuals. See definitions paragraph 3, above.

5. Responsibilities. a. Each agency head shall establish and maintain procedures, consistent with the Act, OMB guidelines, and related directives issued pursuant to this Circular, to

(1) Identify each system of records which the agency maintains and review the content of the system to assure that it is limited to those systems which are necessary and relevant to a function which the agency is authorized to perform by law or executive order (5 U.S.C. 552a (e) (7)).

(2) Prepare and publish a public notice of the existence and character of those systems consistent with guidance on format issued by OMB. See 5 U.S.C. 552a (e) (4) and (11).

(3) Collect information which may result in an adverse determination about an individual from that individual whenever practicable (5 U.S.C. 552a (e) (2)) and inform individuals from whom information about themselves is collected of the purposes for which the information will be used and their rights, benefits, or opportunities available to persons in accordance with the Act (5 U.S.C. 552a (e) (3)).

(4) Revise any personal data collection forms or processes which they may prescribe for agencies (e.g., standard forms) to conform to the requirements of 5 U.S.C. 552a (e) (3). (Agencies which use such forms to collect information are nevertheless responsible for assuring that individuals from whom information about themselves is solicited are advised of their rights and obligations).

(5) Establish a reasonable administrative, technical, and physical safeguards to assure that records are disclosed only to those who are authorized to have access to and otherwise "to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." See 5 U.S.C. 552a (b), (d) and (e) (11).

(6) Maintain an accounting of all disclosures of information about the records except those to personnel within the agency who have an official need to know or to the public under the Freedom of Information Act, and make that accounting available in a form consistent with guidance on content, format and timing issued by OMB. See 5 U.S.C. 552a (e) (9).

(7) When using a record or disclosing it to someone other than an agency, assure that it is accurate, relevant, timely and complete as is reasonably necessary to assure fairness to the individual. See 5 U.S.C. 552a (e) (5) and (6).

(8) Permit individuals to have access to records pertaining to themselves and to have an opportunity to request that such records be amended. See 5 U.S.C. 552a (d) (11), (2), and (3).

(9) Inform prior recipients when a record is amended pursuant to the request of an individual or a statement of disagreement has been filed, advise any subsequent recipient that a record is disputed, and provide a copy of the statement of disagreement to both prior and subsequent recipients of the disputed information. See 5 U.S.C. 552a (c) (4) and (d) (4).

(10) Publish rules describing agency procedures developed pursuant to the Act and describing any systems which are subject to the Act and are not inconsistent with the provisions of the Act including the reasons for the proposed exemption consistent with guidance on format issued by OMB. See 5 U.S.C. 552a (e) (11).

(11) Review all agency contracts which provide for the maintenance of systems of records by or on behalf of the agency to accomplish an agency function to assure that, where appropriate and within the agency's authority, language is included which provides that such systems will be maintained in a manner consistent with the Act. See 5 U.S.C. 552a (m).

(12) Refrain from renting or selling lists of names and addresses unless specifically authorized by law. See 5 U.S.C. 552a (n).

(13) Prepare and submit to the Office of Management and Budget and to the Congress a report of any proposal to establish or alter a system of records in a form consistent with guidance on content, format and timing issued by OMB. See 5 U.S.C. 552a (o).

(14) Prepare and submit to the Office of Management and Budget, on or before April 30 of each year, a report of its activities under the Act consistent with guidance on content and format issued by OMB. See 5 U.S.C. 552a (p).

(15) Conduct training for all agency personnel who are in any way involved in maintaining systems of records to apprise them of their responsibilities under the Act and to indoctrinate them with respect to procedures established by the agency to implement the Act. See 5 U.S.C. 552a (e) (9).

(16) Establish a program for periodically reviewing agency record-keeping policies and practices to assure compliance with the Act.

b. The Secretary of Commerce shall, consistent with guidelines issued by OMB, issue standards and guidelines on computer and data security.

c. The Administrator of General Services shall, consistent with guidelines issued by OMB,

(1) Issue instructions on the format and timing of agency notices and rules required to be published under the Act. See 5 U.S.C. 552a (e) (4) and (f).

(2) Not later than November 30, 1975 and annually thereafter compile and publish a compendium of agency rules and notices and make that publication available to the public at low cost. See 5 U.S.C. 552a (f).

(3) Issue and/or revise procedures governing the transfer of records to Federal Records Centers for storage, processing, and servicing pursuant to 44 U.S.C. 3103 to ensure that such records are not disclosed except to the agency which maintains the records, or under rules established by that agency which are not inconsistent with the provisions of the Act. It should be noted that, for purposes of the Act, such records are considered to be maintained by the agency which deposited them. See 5 U.S.C. 552a (d) (1).
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(4) Establish procedures to assure that records transferred to the National Archives of the United States pursuant to 44 U.S.C. 2103, are properly safeguarded and that public notices of the existence and character of such records are issued in conformance with 5 U.S.C. 552a (1), (2), and (3).

(5) Revise procedures governing the clearance of Interagency data collection forms for which it is responsible to assure that those requesting information from individuals are advised as required by 5 U.S.C. 552a(c)(3).

(6) Revise procurement guidance to incorporate language consistent with 5 U.S.C. 552a(m); i.e., to provide that contracts which provide for the maintenance of a system of records by or on behalf of an agency to accomplish an agency function include language which assures that such system will be maintained in accordance with the Act.

(7) Revise computer and telecommunications procurement policies to provide that agencies must review all proposed equipment and services procurements to assure that those requests for information are consistent with applicable provisions of the Act; e.g., Report on New Systems.

The Civil Service Commission shall, consistent with guidelines issued by OMB:

(1) Revise civil service personnel information processing and record-keeping directives to bring them into conformance with the Act.

(2) Devise and conduct training programs for agency personnel including both the conduct of courses in various substantive areas (e.g., legal, administrative, ADP) and the development of materials which agencies can use in their own courses.

(3) The Director of the Office of Management and Budget will:

(a) Issue guidelines and regulations to the agencies to implement the Act. While the adoption of the requirements of the Act is the agency's responsibility, interpretive guidelines have been devised to assist agencies in interpreting the requirements of the Act;

(b) Establish minimum standards or criteria, where appropriate, in applying the Act.

(c) Provide illustrative examples of the application of the Act; and assure uniform and constructive implementation of the Act.

(d) Provide assistance, upon request, to agencies.

(e) Review proposed new systems or changes to existing systems.

(f) Compile the annual report to the Congress on agency activities to comply with the Act in accordance with 5 U.S.C. 552a(p).

(g) Revise procedures governing the clearance of data collection forms and reports for which it is responsible to assure that those requesting information about individuals are advised as required by 5 U.S.C. 552a(e)(3).

6. Reports. Agencies are required to submit the following reports consistent with guidance on format, content, and timing to be issued under separate transmittal:

a. Reports on new systems to the Congress, OMB, and, for the period of its existence, the Privacy Protection Study Commission. Reports shall be submitted not later than 90 days prior to the establishment of a new system or the implementation of a change to an existing system.

b. Annual report on agency activities to comply with 5 U.S.C. 552a to OMB not later than April 30 of each year. The provisions of this Circular are effective on September 27, 1975 except that:

(1) Reports on new systems which cover the implementation of new or altered systems of records proposed to be effective after September 27, 1975 shall be submitted not later than 60 days before the effective date of those new systems or changes; and

(2) Rules and notices prescribed by the Act and regulations and guidelines to be issued by the responsible agencies shall be issued in advance of the effective date where required by law (e.g., the Administrative Procedures Act, 5 U.S.C. 553) or as otherwise necessary to permit timely and effective compliance.

8. Inquiries. Inquiries concerning this Circular may be addressed to the Information Systems Division, Office of Management and Budget, Room 9002, NEOB, Washington, D.C. 20503, telephone 202-395-4614.

JAMES T. LYNN, Director.

PRIVACY ACT GUIDELINES—JULY 1, 1975

Implementation of Section 552a of Title 5 of the United States

1. The following introductory text, which was inadvertently omitted, should be inserted immediately after the headings and before "Table of Contents":

This memorandum forwards guidelines for implementing Section 3 of the Privacy Act of 1974 (5 U.S.C. 552a, P.L. 93-579) pursuant to OMB Circular No. A-108 dated July 1, 1975. These guidelines were developed to assist agencies in complying with the Act in an effective and timely manner.

The guidelines will be revised and expanded as necessary and as experience in implementing the Act suggests the need for further interpretation and guidance. Although these guidelines are not issued pursuant to 5 U.S.C. 553 (the Administrative Procedures Act) we invite public comment on them.

JAMES T. LYNN, Director.

1 Section 3 of the Privacy Act of 1974, Pub. L. 93-579.

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(7) FACTORS IN DETERMINING SUITABILITY FOR Freedom of Information Act, 5 United States Code, section 552(1), as amended by H.R. 12471 of this Congress, section 552(e), on which Congress has act to deny.
For the purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies (as defined in section 552(1) of title 5, United States Code, but which perform governmental functions and control information of interest to the public. The bil s expands the definition of "agency" for purposes of sections 552, and 552a, title 5, United States Code, its effect is to assure inclusion under the Act of Government-controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.
The term "government corporation," as used in this subsection, would include a corporation that is a wholly Government-owned enterprise, established by Congress through statute, such as the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation (FCIC), the Tennessee Valley Authority (TVA), and the Inter-American Foundation.
The term "government controlled corporation," as used in this subsection, would include a corporation which is not owned by the Federal Government * * * (House Document 93-878). (Reports on the Freedom of Information Act amendments, H.R. 12741).
The conferences state that they intend to include within the definition of "agency" those entities encompassed by 5 U.S.C. 551 and other entities including the United States Postal Service, Civil Service Commission, and government corporations or government-controlled corporations now in existence or will be created in the future. They do not intend to include corporations which receive appropriated funds but are neither chartered by the Government nor controlled by it, such as the Corporation for Public Broadcasting. Expansion of the definition of "agency" in this subsection is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term "agency" be applied to subdivisions, offices, or units within an agency.
With respect to the meaning of the term "Executive Office of the President" the conferences intend the result reached in Source v. David, 448 F. 2d. 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units not subject to the President's control. The function of the agency is to advise and assist the President." (House Report 93-1800, p. 14-15)
Whether or not an agency can exist within an agency is a somewhat more complex question. In part, the answer to the question in the above quotation from the conference report language in the statement " * * * but it is not intended that the term 'agency' be applied to subdivisions, offices, or units within an agency." The issue was also addressed in debate on H.R. 16373 on the House floor in a statement by Congressman Moosbrugger— * * * 'agency' is given the meaning which it carries elsewhere in the Freedom of Information Act, 5 United States Code, section 551(1), as amended by H.R. 12471 of this Congress, section 552(e), on which Congress has act to deny.
The present bill is intended to give 'agency' its broad statutory meaning. This will permit employees and officers of the agency which maintains the records to which the bill applies to have full access to such records if they have a need for them in the performance of their duties. For example, within the Justice Department—which is an agency under $Ctrol of the Central Intelligence Agency, the Attorney General's offices, the Parole Board, and the Federal Bureau of Investigation would be on a need-for-the-record basis. Transfer outside the Justice Department to other agencies would be more specifically regulated. Thus, transfer of information between the FBI and the Criminal Division of the Justice Department for official purposes would not require additional showing or authority, in contrast to transfer of such information from the FBI to the FBI.
(Congressional Record November 21, 1974, p. H10962).
In addressing this question the Justice Department has advised that it is our firm view that the 1974 (FOIA) Amendments require no change in the original Act, that it is for the over-all—the Department or other higher-level agencies—to determine which totally independent components will function independently for Freedom of Information Act purposes. Moreover, General Counsel noted in that portion of his Memorandum dealing with the subject, "it is sometimes permissible to make the determination differently for purposes of various provisions of the Act—for example, to publish and maintain an index at the over-all level while seeking the public agencies handle requests for their own records." (Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, February 1975, p. 26).
In our view, this practice of giving variable content to the meaning of the term 'agency' for various purposes, was applied to the Privacy Act as well as the Freedom of Information Act. For example, it may be desirable and in furtherance of the purpose of the Act to treat the various components of a Department as separate "agencies" for purposes of entertaining applications for access and ruling upon appeals from denials, while treating the Department as the "agency" for purposes of those provisions limiting intragovernmental exchange of records. (Of course, dissemination among components of the Department must still be on a "need-to-know" basis. 5 U.S.C. 552a(b)(1).) Needless to say, this practice must not be employed invidiously, so as to frustrate rather than to further the purposes of the Act; and there should be a consistency between the practices under the Privacy Act and the Freedom of Information Act for purposes under the Freedom of Information Act. For this reason it seems to us doubtful (though not entirely impossible) that a Department or other over-unit which has treated its components as separate agencies for all purposes under the Freedom of Information Act could successfully maintain that its components can be considered a single "agency" under the Privacy Act, simply to facilitate the exchange of records (Letter from Assistant

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In addition to the matter of determining when a component of an agency is to be considered an agency itself when the entire agency is to be treated as a single entity, the term "agency" is as used in the Act is reasonably to assume that members of temporary task forces, composed of personnel of several agencies, should usually be considered employees of the lead agency and of their own agency or purpose of access to information. Similarly, members of permanent "strike forces" and personnel cross-designated to perform the functions of two or more agencies should usually be treated as employees of both the lead agency and their own employing agency, e.g., employees of State or local offices assigned to interagency crime, and customs officers cross designated to perform other functions.

Individual. Subsection (a)(2) "The term 'individual' includes a citizen of the United States or an alien lawfully admitted for permanent residence;"

This definition is intended to distinguish between the rights which are given to the citizen and the individual under the Privacy Act and the rights of proprietors, businesses, and corporations which are not intended to be covered by this Act. This distinction was to be made to obtain the Federal government's information activities for such purposes as economic regulations. This definition was also intended to exempt from the coverage of the bill intelligence files and data banks devoted solely to foreign nationals or maintained by the State Department, the Central Intelligence Agency and other agencies for the purpose of maintaining information about nonresident aliens and people in other countries. (Senate Report 93-1183, p. 78.)

The language above states that a distinction can be made between individual personal capacity, and individuals acting in an entrepreneurial capacity (e.g., as sole proprietors) and that this definition (and, therefore, the Act) was intended to embrace only the former. This distinction is, of course crucial to the application of the Act since the Act, for the most part, addresses "records" which are defined as "information about individuals" (subsection (a)(4)). Agencies should examine the content of the records in question to determine whether the information is being maintained, in fact and in normal nature. A secondary criterion in deciding whether the subject of an agency file is, for purposes of the Act, an individual, is the manner in which the information is used; i.e., is the subject dealt with in a personal or entrepreneurial role.

Files relating solely to nonresident aliens are not covered by any portion of the Act. Where a system of records covers both citizens and the individual aliens, only that portion which relates to citizens or resident aliens is subject to the Act but agencies are encouraged to treat such system as a separate system under the Act, in their entire, subject to the Act.

The Act and the legislative history are silent as to whether a decedent may be considered an individual and whether anyone may authorize the rights of the decedent to records pertaining to him maintained by Federal agencies. It would appear that the thrust of the Act was to provide the individual rights to living as opposed to deceased individuals. But for the provision enabling parents to act on behalf of minors and guardians to act on behalf of those deemed to be incompetent, the rights of an individual provided by the Privacy Act could not have been utilized in their behalf by those interested. The failure of the Privacy Act to so provide for decedents and the overall thrust of the Act—that individuals be given the opportunity to judge for themselves how, and the extent to which, certain information about them is maintained by Federal agencies is used, and the implicit personal judgement involved in this thrust—indicates that the Act did not contemplate permitting relatives to exercise rights granted by the Privacy Act to individuals after the demise of those individuals. These same records, however, may pertain as well to those living persons who might otherwise seek to exercise the decedent's right with regard to that information and thereby be covered by the Privacy Act. Furthermore, access to a decedent's records may be had by various judicial forums as a part of, or ancillary to, other proceedings.

Maintain. Subsection (a)(3) "The term 'maintained' includes maintain, collect, use, or disseminate;"

The term "maintain" is used in two ways in the Privacy Act.

First, it is used to connote the various record keeping functions to which the requirements of the Act apply; i.e., maintaining, collecting, maintaining, and maintaining, e.g., by agencies or on behalf of the agency, which are not limited to those operated by an agency for itself but include systems operated pursuant to the terms of a contract to which the agency is a party. The qualifying phrase "to accomplish an agency function" limits the applicability of subsection (m) to those systems directly related to the performance of Federal agency functions by excluding from its coverage systems which are financed, in whole or part, with Federal funds, but which are managed by state or local governments for the benefit of State or local governments.

Record. Subsection (a)(4) "The term 'record' means any item, collection 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 identification, assigned to the individual specifically to identify the individual, such as a fingerprint or voice print or a photograph;" The term 'record', as defined for purposes of the Act, means any tangible or documentary record (as opposed to a record contained in someone's memory) and has a broader meaning than the term commonly has when used in connection with record-keeping systems. (It may also differ from the usual definition of a computer record.) An understanding of the term "record", as it is used in the Privacy Act, is essential to interpreting the meaning of many of the Act's requirements.

A "record" means any item of information about an individual that includes an individual identifier:

Includes any grouping of such items of information (it should not be confused with the conventional sense or as used in the automatic data processing (ADP) community):

Does not distinguish between data and information within the scope of the definition; and
Includes individual identifiers in any form including, but not limited to, fingerprint, voice prints and photographs.

The phrase "identifying particular" suggests an element of data (name, number) or other descriptor (fingerprint, voice print, photographs) which can be used to identify an individual. Identifiers may also be unique (i.e., many individuals share the same name) but when they are not unique (e.g., name) they are individually assigned—distinguished from generic characteristics.

The term "record" was defined to assure the intent that a record can include as little as one descriptive item about an individual. (Congressional Record, p. S1818, December 17, 1974 and p. H32246, December 18, 1974). This definition includes the record of present registration, or membership in an organization, or admission to an institution. (Senate Report 93-1183, p. 79.) (While this language was written with reference to the definition of the term "identifying particular" in the Senate bill, it would appear to be equally applicable to the term "record" as used in the Act.)

A record, by this definition, can be part of another record. Therefore prohibitions on the disclosure of a record, for example, apply only to the entire record in the conventional sense (such as a record in a computer system), but also to part of a record or grouping of pieces of information from a record provided that grouping includes an individual identifier.

System of Records. Subsection (a) (5)

The term 'system of records' means a group of records maintained by any agency of the Federal Government 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.

The definition of "system of records" limits the applicability of some of the provisions of the Act to "records" which are maintained by an agency, retrieved by the name of the individual (i.e., those indexing or retrievable capability using identifying particulars, as discussed above, built into the system), and the agency does, in fact, retrieve records about individuals by reference to some personal identifier.

A system of records for purposes of the Act must meet all of the following three criteria:

1. It must consist of records. See discussions of "record" (a) (4), above.

2. It must be 'under the control' of an agency.

3. It must consist of records retrieved by reference to an individual name or some other personal identifier.

The phrase "under the control of an agency" was intended to achieve two separate purposes: (1) To determine possession and establish accountability for personal information contained in agency records from records which are maintained personally by employees of an agency but which are not agency records.

As previously noted, the definition of "maintain" was broadened to encompass all systems used by Federal agencies. The phrase "all systems of any agency" in the definition of "system of records" was not intended to eliminate from the coverage of the Act any of those systems (which would largely be "individual" systems) but rather was intended to assign responsibility to a particular agency to discharge the obligations established by the Privacy Act. An agency is responsible for the "system" which it maintains under the control of that agency. The concept of possession implicit in this phrase is also apparent in the language which begins most of the operative subsections of the Act. For example, the concept is evident although tacit in subsection (b); express in subsection (c) under its control that maintains a system of records; in subsections (d), (e) and (f); "agency records" in subsection (l), and "any system of records within the agency" in the Act.

The intent was, despite the different wording for each subsection, not to have each of the subsection apply to a different roster of systems of records, but to expand, in part, the phrase "with which an agency has to do business" in which systems of records an agency was responsible.

The second purpose of the phrase was to distinguish agency records from those which arise within the physical possession of agency employees and used by them in performing official functions, were not considered "agency records," but records which were in employee files which contained "any system of records within the control of any agency." (Senate Report 93-1183, p. 79.)

The phrase "system of records" includes records which are maintained or used for analytic purposes qualify as "statistical records" under the Act if they are not used by anyone in making any determination about an individual. This means that, for a record to qualify as a "statistical record," it must be held in a system which is separated from systems (some perhaps containing the same information) which contain records that are used in any manner in making decisions about the rights, benefits, or entitlements of an identifiable individual.

The term "identifiable individual" is used to distinguish determinations about specific individuals from determinations about aggregates of individuals as, for example, census data are used to apportion funds on the basis of population.

By this definition, it appears that some so-called "research records" which are used only for analytic purposes qualify as "statistical records" under the Act if they are not in making determinations. A "determination" is defined as "any decision affecting the individual which is in whole or in part based on information contained in the record and which is made by any person or any agency." (House Report 93-1416, p. 15.)

Most of the records of the Census Bureau are considered to be "statistical records" even though, pursuant to section 8 of title 13, United States Code, the Census Bureau is authorized to "furnish transcripts of census records for genealogical and other proper purposes and to make special statistical surveys from census data for a fee upon request." (House Report 93-1416, p. 15.)

In applying this definition, it might be helpful to distinguish three types of collections or groupings of information about individuals: (1) Statistical com-
Again, if a Federal agency such as the Housing and Urban Development Department were to discover a possible fraudulent scheme in one of its programs it could "routinely", as it does, refer the relevant segment of the Small Business Administration investigatory arm, the FBI, to the authorities. It is obviously not prohibited to prohibit such necessary exchanges of information, providing its rule-making procedures are followed. It is prohibited under the Privacy Act to restrict disclosure to private or otherwise irregular purposes. To this end, it would be sufficient if an agency publishes as a "routine use" of its information gathered in any program that an apparent violation of the law will be referred to the appropriate law enforcement authorities for investigation and possible criminal prosecution, civil court action, or regulatory order. (Congressional Record, November 21, 1974, p. H10962)

In discussing the final language of the Act, Senator Ervin and Congressman Moorer in similar statements said that "if the routine should serve as a caution to agencies to think out in advance what uses it will make of information. This Act is not intended to impose an absolute requirement of transfer of information to the Treasury Department to complete payroll checks, the receipt of information by the Social Security Administration to complete quarterly posting of accounts, or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however, intended to discourage the unnecessary exchange of information to other persons or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the information. Treasury Department, Record, December 17, 1974, p. S21816 and December 18, 1974, p. H12244). This implies, at least, that a "routine use" must be not only compatible with, but related to, the purpose for which the record is maintained; e.g., development of a sampling frame for an evaluation study or other similar purposes.

There are certain "routine uses" which are applicable to a substantial number of systems of records but which are only permissible if properly established by each agency:

Disclosures to a law enforcement agency when criminal misconduct is suspected in connection with the administration of a program: e.g., apparently falsified statements on a grant application or suspected fraud on a contract.

Disclosures to an investigative agency in the process of requesting that a background or suitability investigation be conducted on individuals being cleared for access to classified information, employment on contracts, or appointment to a position within the agency.

The Act further limits the extent to which disclosures can be made as "routine uses" by requiring an agency to establish that the "routine use" of information in each case must be to this end, it would be sufficient if an agency publishes as a "routine use" of its information gathered in one program that an apparent violation of the law will be referred to the appropriate law enforcement authorities for investigation and possible criminal prosecution, civil court action, or regulatory order. (Congressional Record, November 21, 1974, p. H10962).

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Disclosures to an investigative agency in the process of requesting that a background or suitability investigation be conducted on individuals being cleared for access to classified information, employment on contracts, or appointment to a position within the agency.
Disclosure is unrelated to the purpose for which the record is maintained but the individual may wish to elect to have his or her record disclosed; e.g., to have information on a Federal employment application reviewed by State to State agencies or to permit information on such record to be checked against other Federal agency's records.

In either case, however, the appropriate agency must be permitted to disclose a record without limit. At a minimum, the consent clause should state the general purposes for which the record is maintained and to whom disclosure may be made. A record in a system of records may be disclosed without either a request from or the consent of the individual to whom the record pertains only if disclosure is authorized below.

**Disclosure within the Agency.** Subsection (b)(1) "To those officers and employees of the agency which maintain the record who have a need for the record in the performance of their duties;" This provision is based on a "need to know" concept. See also definition of "agency" (p. 1). It is recognized that personnel require access to records to discharge their duties. In discussing the conditions of disclosure provision generally, the House Committee said that "It is not the Committee's intent to impede the orderly conduct of government or delay services performed in the interests of the individual. Under the conditional disclosure provisions of the bill, "routine" transfers will be permitted without the necessity of prior written consent. A "non-routine" transfer is a transfer in which the personal information on an individual is used for a purpose other than originally intended."

This discussion suggests that some constraints on the transfer of personnel within the agency were intended irrespective of the definition of agency. Minimal, the recipient officer or employee must have an official need to know. The language would also seem to imply that the use should be generally related to the purpose for which the record is maintained.

Many of records between personnel of different agencies may in some instances be viewed as intra-agency disclosures if that movement is in connection with an inter-agency support agreement in such cases the payrolls are not paid by the agency to which the payroll is sent agreed to by the agencies involved. While such transfers would meet the criteria both for intra-agency and "routine use." they should be treated as intra-agency disclosures for purposes of the accounting requirements (a) (4).

In this case, however, Agency B would remain responsible and liable for the maintenance of such records in conformance with the Act.

It should be noted that the conditions of disclosure language makes no specific provision for disclosures directly required by law other than 5 U.S.C. 552. Such disclosures, which are in effect, are self-terminated "routine uses," should still be as "routine uses" pursuant to subsections (e) (1) and (e) (4). This is not to suggest that a "routine use" must be specifically prescribed in law but which would permit the agency to disclose the record without limit. At a minimum, the consent clause should state the general purposes for which the record is maintained and to whom disclosure may be made. A record in a system of records may be disclosed without either a request from or the consent of the individual to whom the record pertains only if disclosure is authorized below.

**Disclosure to the Public.** Subsection (b)(2) "Required under section 522 of this title;" Subsection (b)(2) is intended to "preserve the status quo as interpreted by the courts regarding the disclosure of personal information" to the public under the Freedom of Information Act (Congressional Record p. S28187, December 17, 1974 and p. H12244, December 18, 1974). It absolves of any obligation to obtain the consent of an individual before disclosing a record about him or her to a member of the public to whom the agency intends to disclose such information under the Freedom of Information Act and permits an agency to withhold a record about an individual from members of the public only to the extent that it is permitted to do so under closed (i.e., they are permitted to be 552(b)). Given the use of the term "required", agencies may not voluntarily make public any record which they are not required to release (i.e., those that they are permitted to withhold) without the consent of the individual unless that consent is obtained under one of the other portions of this subsection.

Records which have traditionally been considered to be in the public domain and are required to be disclosed to the public, such as many of the final orders and opinions of quasi-judicial agencies, press releases, etc., may be released under this provision without waiting for a specific request from the public. For example, opinions of quasi-judicial agencies may be sent to counsel for the parties and to legal reporting services, and press releases may be issued by agencies disclosing record matters such as suits commenced or agency proceedings initiated. Records which the agency would elect to disclose to the public but which are not required to be disclosed (i.e., they are permitted to be withheld under the FOIA) may only be released to the public under the "routine use" provision (subsection (b)(3)). Note, however, that agencies may not rely on any provision of the Freedom of Information Act as a basis for refusing access to a record to the individual to whom it pertains, without the individual's consent, is authorized by an exemption within the Privacy Act. See subsections (d)(1) and (g) below.

**Disclosure for a "Routine Use."** Subsections (b)(3) (a) (4) "For a routine use as defined in subsection (a) (7) of this section and described under subsection (e) (4) (D) of this section;" Records may be disclosed without the consent of the individual for a "routine use" as defined above if that "routine use" has been established and described in the public notice about the system published pursuant to subsections (e) (4) (D) and (e) (11) below.

**Disclosure to the Bureau of the Census.** Subsection (c)(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." Agencies may disclose records to the Census Bureau in individually identifiable form for use by the Census Bureau pursuant to the provisions of Title 13. (Title 13 not only limits the uses which may be made of these records but also makes them immune from compulsory disclosure).

**Disclosure for Statistical Research and Reporting.** Subsection (b)(5) "To a recipient who has provided the agency with adequate written assurance that the record is to 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." Agencies may disclose records for statistical purposes under limited conditions. The use of the phrase "in a form that is not individually identifiable" means not only that the information disclosed or transferred must be stripped of individuals identifiers but also that the identity of the individual cannot be reasonably deduced by anyone from tabulation or other presentations of the information (i.e., the identity of the individual can not be determined or deduced by combining various statistical records or by reference to public records or other available sources of information.) See also the discussion of "statistical record" (a) (6), above. Records, whether or not statistical records as defined in (a) (6), above, may be disclosed for statistical research or reporting purposes only after the agency which maintains the record has received a written assurance that the record has been evaluated and a written statement which:

States the purpose for requesting the records; and

Certifies that they will only be used as statistical records.

Such written statements will be made part of the agency's accounting of disclosures under subsection (c)(1).

A "routine use" as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section.
Viewed from the perspective of the recipient agencies, material thus transferred would not constitute records for its purposes.

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

 Agencies may disclose records to the National Archives of the United States pursuant to Section 2103 of Title 44 of the United States Code which provides for the preservation of records "of historical or other value". This subsection (b) (6) allows not only the transfer of records for preservation but also the disclosure of records to the Archivist to permit a determination as to whether preservation under Title 44 is warranted. See subsections (1) (2) and (1) (3) for a discussion of exceptions on the maintenance of records by the Archivist.

Records which are transferred to Federal Records Centers for safekeeping or storage do not fall within this category. Such transfers are not considered disclosures under the terms of the Act since the records remain under the control of the transferring agency. Federal Records Centers personnel are acting on behalf of the agency which controls the records. See subsection (1) (1), below.

Disclosure for Law Enforcement Purposes. Subsection (b) (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."

An agency may, upon receipt of a written request, disclose a record to another agency or unit of State or local government for a civil or criminal law enforcement activity. The request must specify the law enforcement purpose for which the record is requested; and

The particular record requested.

Blanket requests for all records pertaining to an individual are not permitted. Agencies or other entities seeking disclosure may, of course, seek a court order as a basis for disclosure. See subsection (b) (11).

A record may also be disclosed to a law enforcement agency at the initiative of the agency which maintains the record when a violation of law is suspected; provided, That such disclosure has been established in advance as a "routine use" and that misconduct is related to the purpose for which the records are maintained. For example, certain loan or employment application information may be obtained with the understanding that individuals who knowingly and willfully provide inaccurate or erroneous information will be subject to criminal prosecution. This usage was explicitly addressed by Congressman Mooshead in explaining the House bill, on the floor of the House:

It should be noted that the "routine use" exception is in addition to the exception provided for the law enforcement activity under subsection (b) (7) of the bill. Thus a requested record may be disseminated under either the "routine use" exception, the "law enforcement" exception, or both sections, depending on the circumstances of the case. (Congressional Record November 21, 1974, p. H10693.)

In that same discussion, additional guidance was provided on the term "head of the agency" as that term is used in this subsection (b).

The words "head of the agency" deserve elaboration. The committee recognizes that the heads of Government departments cannot be expected to personally request each of the thousands of records which may properly be disseminated under this subsection. If that were required, such officials could not perform their other duties, and in many cases could not even perform record requesting duties alone. Such duties may be delegated, like other duties, to other officials, when absolutely necessary but never below an assistant chief, and this is what is contemplated by subsection (b) (7). The Attorney General, for example, will have the power to delegate the authority to request the thousands of records which may be required for the operation of the Justice Department under this section.

It should be noted that this usage is somewhat at variance with the use of the term "agency head" in subsections (j), and (k), rules and exemptions, where delegations to this extent are neither necessary nor appropriate.

This subsection permits disclosures for law enforcement purposes only to governmental agencies "within or under the control of the United States." Disclosures to foreign (as well as to State and local) law enforcement agencies may, when appropriate, be established as "routine use."

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Accounts to the Congress. Subsection (b) (9) "To either House of Congress, or a joint committee of Congress or any subcommittee thereof, any joint committee of Congress or subcommittee of any joint committee constituted thereunder."

This language does not authorize the disclosure of a record to members of Congress acting in their individual capacities without the consent of the individual.

Disclosure to the General Accounting Office. Subsection (b) (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."

Disclosure Pursuant to Court Order. Subsection (b) (11) "Pursuant to the order of a court of competent jurisdiction."

Subsection (c) Accounting of Certain Disclosures.

Subsection (c) "Each agency, with respect to each system of record under its control, shall make an 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."

An accounting is required for disclosures outside the agency even when such disclosure is at the request of the individual with the written consent or at the request of the individual.

For disclosures for routine uses (see (b) (3));

For disclosures to the Bureau of the Census (see (b) (4));

For disclosures to a person or another agency for statistical research or reporting purposes (see (b) (5));

For disclosures to the Archives (see (b) (6));

For disclosures for a law enforcement activity consistent with the provisions of subsection (b) (7); and

For disclosures upon a showing of compelling circumstances (see (b) (8));

For disclosures to the Congress or the Comptroller General (see (b) (9) and (10)); or

For disclosures pursuant to a court order (see (b) (11)).

An accounting of disclosures is not required for disclosures to employees of the agency maintaining the record who have a need to have access in the performance of their official duties for the agency.
(Agencies are required to establish safeguards, pursuant to subsection (e) (10), to assure individuals who do not have a “need to know” will not have access.) (see (b) (1)); or

For disclosures to members of the public, which would be required under the Freedom of Information Act (see (b) (2)).

(Note: That the accounting requirement is not one from which an agency may seek an exemption under subsections (j) and (k).

The term ‘accounting’ rather than ‘record,’ [was used] to indicate that an agency need not make a notation on a single document of every disclosure of a particular record. The agency may use any system it desires for keeping notations of disclosures, provided that it can construct from its system a document listing of all disclosures.” (House Report 95-1416, p. 14. For example, if a list of names and other pertinent data necessary to issue payroll or benefit checks is transferred to a disbursing office, the agency need not maintain a separate record of such transfer in each individual record provided that it can construct the required accounting information requested by the individual (subsection (c) (3)) or whenever necessary to inform previous recipients of any corrected or disputed information (subsection (a) (8)). The accounting need not also provide a cross-reference to the basis upon which the release was made including any written documentation as is required in the case of the release of records for statistical or law enforcement purposes.

In some instances, (e.g., investigation or prosecution of suspected criminal activity) a disclosure may consist of a continuing dialogue between two agencies over a period of weeks or months. In such a situation, it may be appropriate to make a general notation that, as of a specified date, such contact was initiated and maintained until the conclusion of the case.

While the accounting of disclosures, when maintained apart from the record, might be considered a system of records pursuant to subsection (c) (3) of this section, this could lead to the situation of having to maintain an accounting of disclosures from the original accounting and having to maintain that second accounting for five years, etc. Note that subsection (c) (3) gives an individual a right of access to the accounting which would not have been necessary if the accounting were considered a separate system of record. Therefore, it would seem that the intent was to view the accounting of disclosures as other than a system of records and to conclude that an accounting need not be maintained for disclosures from the accounting of disclosures.

Retaining the Accounting of Disclosures. Subsection (c) (2) “Retain the accounting of disclosures 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, or to which the record has been disclosed the exact nature of the correction or that a notation of dispute has made. If the recipient was another agency, that agency is required, in turn, to notify those to whom it disclosed the record.

This requirement does not apply to disclosures to personnel within the agency with a “need to know” or to the public under the Freedom of Information Act (sections (b) (1) and (2)) or to disclosures made prior to September 27, 1975 for which no accounting was made. (Note that the language in subsection (c) (4) differs from the corresponding language in H.R. 16373 so that the House report discussion of this provision is no longer applicable).

Given the definition of “record” (a record may be construed to be a part of another record) and the language of subsection (d) (4), below, it would appear that the notification to a previous recipient or of the filing of a statement of disagreement is required only to the extent that the correction or disagreement pertains to the information actually disclosed; i.e., recipients of a portion of a record other than the portion which is subsequently corrected or disputed need not be informed. Where there is any doubt as to whether the corrected information was included in or might be relevant to a previous disclosure, agencies should notify the recipients in question.

The language of this subsection explicitly requires only that prior recipients be notified of corrections made pursuant to a request to amend a record by an individual and does not address records corrected for other reasons; e.g., agency staff detects erroneous data or a third party source provides corrected information. Nevertheless, agencies are encouraged to provide corrected information to previous recipients irrespective of the means by which the correction was made whenever it is deemed feasible to do so if information included in a previous disclosure was changed when the agency is aware that the correction is relevant to the recipient’s use irrespective of the means by which the correction is made.

Subsection (d) Access to Records

Subsection (d) “Each agency that maintains a system of record shall—

Individual Access to Records. Subsection (d) (1) “Upon request by an 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.”

Subsection (d) 2 “The agency must, upon request, provide to any individual a copy of all records or any portion thereof in a form comprehensible to the individual, 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.”

Agencies are required to establish safeguards, pursuant to subsection (e) (10), to assure individuals who do not have a “need to know” will not have access.) (see (b) (1)); or

For disclosures to members of the public, which would be required under the Freedom of Information Act (see (b) (2)).
Agencies shall establish requirements to verify the identity of the requestor. Such requirements shall be kept to a minimum. They shall only be established when necessary to assure that an individual is not improperly granted access to records pertaining to another individual and shall not unduly impede the individual's right of access. Procedures for verifying identity will vary depending upon the nature of the records to which access is sought. For example, no verification of identity will be required of individuals seeking access to records which are otherwise available to any member of the public under 5 U.S.C. 552, the Freedom of Information Act. However, of more stringent measures should be utilized when the records sought to be accessed are medical or other sensitive records.

For individuals who seek access in person, requirements for verification of identity should be limited to information or documents which an individual is likely to have readily available (e.g., a driver's license, employee identification card, Medicare card). However, if the individual can provide no other suitable documentation, the agency should request a signed statement from the individual asserting his or her identity and stipulating that the individual understands that knowingly or willfully seeking or obtaining access to records about another individual under false pretenses is punishable by a fine of up to $5,000. (Subsection (j)(3)).

For systems to which access is granted by mail (by virtue of their location) verification of identity may consist of the individual identifying himself through data (e.g., name, date of birth, or system personal identifier (if known to the individual). Where the sensitivity of the data warrants it, (i.e., unauthorized access to an individual's record may cause harm or embarrassment to the individual), a signed notarized statement may be required or other reasonable means of verifying identity and the necessity for access. Such means is to be necessary, depending on the degree of sensitivity of the data involved.

Notes: That section 7 of the Act forbids an agency to deny an individual any right (including access to a record) for refusing to disclose a Social Security Number unless disclosure is required by Federal statute or by other laws or regulations adopted prior to January 1, 1975.

Agencies are also permitted to require that an individual who wishes to be accompanied by another person when reviewing a written statement authorizing discussion of his or her record in the presence of the accompanying person. This provision may not be used to require that individuals who request access and wish to authorize other persons to accompany them provide any reasons for the access or for the accompanying person's presence. It is designed to avoid disputes over whether the individual granted permission for disclosure of information to the accompanying person.

Agency procedures for complying with the individual access provisions will necessarily vary depending upon the size and nature of the system of records. Large computer-based systems of records clearly require a different approach than do small, regionally dispersed, manually maintained systems. Nevertheless, the right of access is not inconsistent, namely the right of the individual to have access to a record pertaining to him and to have a copy made of all or part of such record is not inconsistent with the right of the agency to utilize an external identifier in the agency's procedures in which the record is used.

Agencies may establish fees for making copies of an individual's record but not for the cost of searching for a record or reviewing it (subsection (f)(5)). When the agency makes a copy of a record as a necessary part of its process of making the record available for review, the record shall be distinguished from responding to a request by an individual for a copy of a record, no fee may be charged. It should be noted that the potential fees from access and fees provisions of the Freedom of Information Act.

The granting of access may not be conditioned upon any requirement to state a reason or otherwise justify the need to gain access.

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pertaining to him, (2) permit an individual to review any record pertaining to him which is contained in a system of records, (3) permit the individual to be accompanied by another person when reviewing a written statement authorizing discussion of his or her record in the presence of the accompanying person, and (4) permit the individual to obtain a copy of any such record in a form comprehensible to him at the reasonable cost. This provision, it should be noted, gives an individual the right of access only to records which are contained in a system of records. See (a)(5), above.

This language further suggests that the Congress did not intend to require that an individual be given access to information which the agency does not retrieve by reference to his or her name or some other identifying particular. See subsection (a)(5). If an individual is named in a record about someone else (or some other type of entity) and the agency only retrieves the portion pertaining to him by reference to the other person's name (or some organization/subject identifier), the agency is not required to release the record. Indeed, if this were not the case, it would be necessary to establish elaborate cross-references among records, thereby increasing the potential for privacy abuses.

The following examples illustrate some applications of this standard.

1. A record on Joan Doe as an employee in a file of employees from which material is accessed by reference to her name (or some identifying number). This is the simplest case of a record in a system of records and Joan Doe would have a right of access.

2. A reference to Joan Doe in a record about James Smith in the same file. This is also a record within a system but Joan Doe would not have a right of access.

3. A record about Joan Doe in a contract source evaluation file about her employer, Corporation X, which is not accessed by reference to individuals' names, or other identifying particulars. This is not a system and, therefore, Joan Doe would not have a right of access to it.

4. If, as in 2, above, an indexing capability were developed and used, however, such a system would become a system of records to which Joan Doe would have a right of access.

Agencies are also required to establish requirements for verifying the identity of the requestor. Such requirements shall be kept to a minimum. They shall only be established when necessary to assure that an individual is not improperly granted access to records pertaining to another individual and shall not unduly impede the individual’s right of access. Procedures for verifying identity will vary depending upon the nature of the records to which access is sought. For example, no verification of identity will be required of individuals seeking access to records which are otherwise available to any member of the public under 5 U.S.C. 552, the Freedom of Information Act. However, of more stringent measures should be utilized when the records sought to be accessed are medical or other sensitive records.

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Neither the requirements to grant access nor to provide copies necessarily require that the physical record itself be made available. The form in which the record is kept (e.g., on magnetic tape) or the context of the record (e.g., access to a document may disclose records about a subject which are not relevant to the request) may require that a record be extracted or translated in some manner, e.g., to expunge the identity of an individual or to reveal the location of sensitive information. However, the requested record should be made available in the form in which it is maintained by the agency and the extraction or translation process may not be used to withhold information in a record about the individual who requests it unless the denial of access is specifically provided for under rules issued pursuant to one of the exemption provisions (subsections (j) and (k)).

Subsection (f)(5) provides that agencies may establish “special procedures, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him.” In addressing this provision the House committee said:

In the judgment of the agency, the transmission of medical information directly to a requesting individual could have an adverse effect on the agency and the record maintenance systems. Nevertheless, the rules which the agency promulgates should provide methods whereby an individual who would be adversely affected by receipt of such data may be apprised of it in a manner which would not cause such adverse effects. An example of a rule serving such purpose is a requirement that the agency inform the requesting individual. (House Report 93-1416, pp. 16-17).

Thus, while the right of individuals to have access to medical and psychological records pertaining to them is clear, the nature and circumstances of the disclosure may warrant special procedures.

While the Act provides no specific guidance on this subject, agencies should acknowledge requests for release of records within 10 days of receipt of the request (excluding Saturdays, Sundays, and legal public holidays). Wherever practicable, that acknowledgment should indicate whether or not access can be granted and, if so, when. When access is to be granted, agencies will normally provide access to a record within 30 days (excluding Saturdays,
Sundays, and legal public holidays) unless, for good cause shown, they are un­able to do so, in which case the individual should be informed in writing within 30 days as to those reasons and when it is anticipated that access will be granted. A “good cause” to keep the record inactive and stored in a records center and, therefore, not as readily accessible. See subsection (d)(1).

Presumably, in such cases the risk of an adverse determination is greater when the individual is not present, and the individual might choose to challenge the relatively low.

Requests for Amending Records. Subsection (d)(2) “Permit the individual to request amendment of a record pertaining to him and—”

Agencies shall establish procedures to give individuals the opportunity to request that their records be amended. The procedures may permit the individual to present a request either in person, by telephone, by mail, or by both methods. The process should not normally require that the individual present the request in person. If the agency deems it appropriate, it may require the requests be made in writing, and the individual furnishes the agency with a copy of the request. Instructions for the preparation of a request and any forms required should be as brief and as simple as possible. Requests should be entertained only upon receipt of a written request, unless the individual, in accordance with subsection (e)(1), informs the agency in writing that the individual has no knowledge of the need for such a request. The request should clearly describe the record to be amended and the reason for the request.

In reviewing an individual's request to amend records, agencies should, wherever practicable, complete the review of the request or the system of records within ten days of the receipt of the request. Prompt action is necessary both to protect the rights of the individual to whom the record pertains and to allow the agency to meet its obligations under law. Individuals may, at the agency's option, be included in the annual report to Congress on the status of requests for amendment of records. A written acknowledgement by the agency to an individual requesting amendment should be made within ten days and the review should be completed as soon as reasonably possible, normally within thirty days.

An amendment to a record is effective only if the record is corrected in writing by the agency and the individual is advised of that fact in writing. If the record is not amended, the individual should be informed of the reasons why the record should not be amended. The record should be maintained in its original form.

If the agency was unable to act within 30 days, the record should be maintained in its original form.

The individual should be advised of that fact in writing. If the record is not amended, the individual should be informed of the reasons why the record should not be amended. The record should be maintained in its original form.

Agency standards for reviewing records are not designed to permit collateral attack upon which has already been the subject of a judicial or quasi-judicial action. For example, these provisions are not designed to permit an individual to challenge a conviction for a criminal offense in another forum or to reopen the assessment of a tax liability. The individual would be able to challenge the fact that conviction or liability has been inaccurately recorded in the record.
appropriate for resolution upon determination of preponderance of evidence.

If the agency agrees with the individual’s request to amend a record, the agency shall:

Advertise the individual;

Correct the record accordingly; and

Where an accounting of disclosures has been made, all previous disclosures of the record of the fact that the correction was made and the substance of the correction.

If the agency, after its initial review of a request to amend a record, disagrees with all or any portion thereof, the agency shall:

To the extent that the agency agrees with any part of the individual’s request to amend, proceed as described above with respect to those portions of the record which it has amended.

Advise the individual of its refusal and the reasons therefor including the criteria for determining accuracy which were employed by the agency in conducting the review.

Tell the individual that he or she may request a further review by the agency head or by an officer of the agency designated by the agency head; and

Describe the procedures for requesting such review, including the name and address of the official to whom the request should be directed. The procedures should be as simple and brief as possible and should indicate where the individual can seek advice or assistance in obtaining such a review.

If the recipient of the corrected information is an agency and is maintaining the information which was corrected in a system of records, it must correct its records and, under subsection (e)(4), apprise any agency or person to which it had disclosed the record of the substance of the correction. Subsequent recipient agencies should similarly correct their records and advise those to whom they had disclosed it. Agencies are encouraged to adopt regulations establishing time limits by which, except under unusual circumstances, transfers of any amendment to a record

Requesting a Review of the Agency’s Refusal To Amend a Record, Subsection (d)(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;”

An individual who disagrees with an agency’s initial refusal to amend a record may file a request for further review of that determination. The agency head or an officer of the agency designated in writing by the agency head should undertake an independent review of the initial determination. If someone other than the agency head is designated to conduct the review, it should be an officer who is organizationally independent of or senior to the officer or employee who made the initial determination. For purposes of this section, an “officer” is defined to be “* * * a justice or judge of the United States and an individual who is——

(1) Required by law to be appointed in the civil service or military service by one of the following acting in an official capacity——

* * *

(2) The President;

(3) A court or the United States.

(4) The head of an executive agency; or

(5) The Secretary of a military department;

(6) Engaged in the performance of a Federal function under authority of law or an executive order;

(b) The head of an Executive agency; or

(c) Engaged in the performance of the duties of his office. (5 U.S.C. 2104(a)).

Delegations must be made in writing. In conducting the review, the reviewing official should use the criteria of accuracy, relevancy, timeliness, and completeness discussed above. The reviewing official may, at his or her option, seek such additional information as is deemed necessary to satisfy those criteria; i.e., to establish that the record contains only that information which is necessary and is as accurate, timely, and complete as necessary to assure fairness in any determination made about the individual on the basis of record.

Although there is no requirement for a formal hearing, pursuant to the provisions of 5 U.S.C. 556, the agency may elect generally or on a case by case basis to use such or similar procedures. The procedures elected by the agency, however, should insure fairness to the individual and promptness in the determination. The procedures should provide that as much of the information upon which the determination is based as possible is part of the written record concerning the appeal. The records of the appeal process should be maintained by agencies only as long as is reasonably necessary for purposes of judicial review of the agency’s refusal to amend a record upon appeal.

If, after conducting this review, the reviewing official also refuses to amend the record in accordance with the individual’s request, the agency shall advise the individual:

Of its refusal and the reasons therefor;

Of his or her right to file a concise statement of the individual’s reasons for disagreeing with the decision of the agency;

Of the procedures for filing a statement of disagreement;

That any such statement will be made available to anyone to whom the record has been subsequently disclosed with the fact that the record is disputed is apparent to anyone who may subsequently access, use, or disclose it. The notation itself should be integral to the record.
and specific to the portion in dispute. For automated systems of records, the notation may consist of a special indicator on the entire record or the specific part of the record in dispute.

The statements of dispute need not be maintained as an integral part of the records to which they pertain. They should, however, be filed in such a manner as to permit them to be retrieved readily when the disputed portion of the record is to be disclosed.

If there is any question as to whether the dispute pertains to information being disclosed, the statement of dispute should be included.

When information which is the subject of a statement of dispute is subsequently disclosed, agencies must note that the information is disputed and provide a copy of the individual’s statement.

Agencies may, at their discretion, include a brief summary of their reasons for not maintaining correction when disclosing disputed information. Such statements will normally be limited to the reasons stated to the individual under subsections (d)(2) and (d)(3) above. Copies of the agency’s statement need not be maintained as an integral part of the record but will be treated as part of the individual’s record for purposes of granting the individual access, subsection (d)(1). However, the agency’s statement will not be subject to subsections (d)(2) or (d)(3) (amending records).

Access to Information Complied In Anticipation of Civil Action. Subsection (d)(5) “Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.”

This provision is not intended to preclude access by an individual to records which are available to that individual under other procedures (e.g., pre-trial discovery). It is intended to preclude establishing by this Act a basis for access to material being prepared for use in litigation other than that established under other procedures (e.g., pre-trial discovery)

Mr. Enloe, Mr. Chairman, as I understand it, the purpose of the amendment is to protect, as an example, the file of the U.S. attorney or the solicitor that is prepared in anticipation of the defense of a suit against the United States for accident or some such thing?

Mr. Butler. That is the subject we have in mind.

Mr. Enloe. I appreciate the gentleman’s concern. I think it is a real concern, and that protection ought to be afforded. The only problem I find with that amendment is this: It would presuppose we issued the definition of “record system,” in order to preclude that type of record. I do not think we did.

If those sorts of records are to be considered a record system under the act, then the agency would have to go through all the formal proceedings of defining the system, its relationship, and publishing in the Federal Register.

Frankly, I do not think the attorney’s file that are collected in anticipation of a lawsuit should be subject to the application of the act in any instance, much less the access to it. It is our view that the act proscribes that it may then presuppose it is covered in the other provisions, and I do not think it is.

Mr. Butler, Mr. Chairman, I share the gentleman’s concern. When this amendment was originally drafted, it stated, “It may, at the request of any record, and we struck the word, “access,” and inserted “information.” So we made it possible we were not elevating an investigation with the word “record,” to the status of records. We didn’t want to make it clear there was not to be such access, because that access would be within the usual rules of civil procedure.

Mr. Enloe. Mr. Chairman, if the gentleman will yield further, it is the gentleman’s contention, under his interpretation of the act, that the other provisions would not apply to the attorney’s files as well; is that correct?

Mr. Butler. The gentleman is correct. (Congressional Record, November 21, 1974, p. H10950).

While the above passage refers primarily to the defense of suits by the government, it is applicable to the assembly of information in anticipation of governmental-initiated law suits.

The mere fact that records in a system of records are frequently the subject of litigation does not bring those systems of records within the scope of this provision. The information must be “compiled in reasonable anticipation of a civil action or proceeding” and therefore the purpose of the compilation governs the applicability of this provision.

The term “civil action or proceeding” does not mean governmental action or inaction is challenged the provision generally would not be available until the initiation of litigation or until information began to be compiled in reasonable anticipation of such litigation. Where the government is prosecuting or seeking enforcement of its laws or regulations, this provision may be applicable to information determining the applicability of this provision. It would seem that governmental action or inaction is challenged the provision generally would not be available until the initiation of litigation or until information began to be compiled in reasonable anticipation of such litigation. Where the government is prosecuting or seeking enforcement of its laws or regulations, this provision may be applicable to information determining the applicability of this provision.

Excerpts from the House floor debate on this provision (Section 5) suggest that this provision was not intended to cover access to systems of records compiled or used for purposes other than litigation.

Section (e) AGENCY REQUIREMENTS

Section (e) “Each agency that maintains a system of records shall—

Restrictions on Collecting Information about Individunals. Subsection (e)(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.”

A key objective of the Act is to reduce the amount of personal information collected by Federal agencies to reduce the risk of intentionally or inadvertently improper use of personal data. In simplest terms, information is collected about an individual cannot be maintained.

The Act recognizes, however, that agencies need to maintain information about individuals to discharge their responsibilities effectively.

Agencies can derive authority to collect information about individuals in one of two ways:

By the Constitution, a statute, or Executive order explicitly authorizing or directing the maintenance of a system of records; e.g., the Constitution and title 3 of the United States Code with respect to the Census.

By the Constitution, a statute, or Executive order authorizing or directing the agency to perform a function, the discharge of which requires the maintenance of a system of records.

Each agency shall, with respect to each system of records which it maintains or proposes to maintain, identify the specific provision in law which authorizes that activity. While the Act does not specifically require it, where feasible, this statutory authority should also be cited in the annual public notice about the system published pursuant to subsection (e)(4). The authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful. Agencies shall review the nature of the information which they maintain in their systems of records to assure that it is, in fact, “relevant and necessary.” Information may not be maintained merely because it is relevant; it must be both relevant and necessary. While this determination is, in the final analysis, judgmental, the following types of questions shall be considered in making such determinations:

How does the information relate to the proper performance of agency functions for which the system is maintained?

What are the adverse consequences, if any, of not collecting that information?

Could the need be met through the use of information that is not in individually identifiable form?

Does the information need to be collected on every individual who is the subject of a record in the system or would a sampling procedure suffice?

At what point will the information have satisfied the purpose for which it was collected? i.e., how long is it necessary to retain the information? Consistent with the Federal Records Act and related regulations could part of the record be purged?

What is the financial cost of maintaining the record as compared to the risks/adverse consequences of not maintaining it?

Is the information, while generally relevant and necessary to accomplish a statutory purpose, specifically relevant and necessary only in certain cases? For example, in establishing financial need as part of assessing eligibility for a program, for which need is a legitimate
This provision does not authorize agencies to destroy records which they are required to retain under the Federal Records Act. Whenever any change is proposed in system of records (subsection (o)).

At least annually, as part of a regular program of review of its record-keeping practices, this should be done for each system prior to reissuance of the public notice. In preparing initial public notices (subsection (e) (4)).

In connection with the initial design of a new system of records (subsection (o)).

Whenever any change is proposed in system of records (subsection (o)).

It should be noted that subsection (e) is not intended to interfere with the presentation of evidence by the parties before a quasi-judicial or quasi-legislative body. For example, a quasi-judicial board or commission need not reject otherwise admissible evidence because it is proffered by a party other than the individual to whom it relates or because it is not "necessary" to the decision or is not "relevant." The normal rules of evidence which would contain in such situations.

The Law provides, however, that parties have a right to obtain information about other parties as a source of information in some cases. When Information called (or in paragraphs (A) through (D) below, should be included on the information collection form, on a tear-off sheet attached to the form, or on a separate sheet which the individual can retain, whichever is most practicable. When information is being collected in an interview, the interviewer should provide the individual with a statement that the individual can retain. However, the interviewer should also orally summarize that information before the interview begins. Agencies may, at their discretion, ask the individuals to acknowledge in writing that they have been informed of the interview.

While this provision does not explicitly require it, agencies should, where feasible, inform third-party sources of the purposes for which information which clients are asked to provide will be used. In addition, the agency may, under certain circumstances, assure a source that his or her identity will not be revealed to the subject of the record (see subsection (k) (2), (6), and (7)). The appropriate use of third-party sources is discussed in subsection (e) (2) above.

In providing the information required by subsections (e) (3) (A) through (D), agencies should be exercised to assure that easily understood language is used and that the material is explicit and informative without being so lengthy as to deter an individual from reading it. Information provided pursuant to this requirement would not, for example, be as extensive as that contained in the system notice (subsection (e) (4)).
Subsection (e) (3) (C) “The routine uses which may be made of the information, as published pursuant to paragraph (D) of this subsection; and” 

“Uses” can be distinguished from “purposes” in that the “purposes” are the objectives for collecting or maintaining information, whereas “uses” are the specific ways or processes in which the information is employed in achieving the objectives. Proponents of the Act and of the new system of records, which is the object of the notice, believe that there should be no system of records whose very existence is secret.

The purposes of the notice are to inform the public of the existence of systems of records.

The kinds of information maintained.

The kinds of individuals on whom information is maintained.

The purposes for which they are used.

Publication of the Annual Notice of Systems of Records. Subsection (e) (4) “Subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

The public notice provision is central to the achievement of one of the basic objectives of the Act; fostering agency accountability through a system of public scrutiny. The public notice provision is based on the concept that there should be no system of records whose very existence is secret.

The purposes of the notice are to inform the public of the existence of systems of records.

The kinds of information maintained.

The kinds of individuals on whom information is maintained.

The purposes for which they are used.

How individuals can exercise their rights under the Act.

All of the systems of records maintained by an agency are subject to the annual public notice requirement. (The general and special exemption sections permit agencies to omit portions of the notice for certain systems. They do not exempt any agency from publishing a public notice on any system of records.)

Care must be exercised to assure that the tone, language, level of detail and length of the public notice are considered to assure that the notice achieves the objective of informing the public of the nature and purposes of agency systems of records.

Defining what constitutes a “system” for purposes of preparing a notice will be left to agency discretion within the general guidelines contained herein. (See also subsection (a) (5)). A system can be a small group of records or, conceivably, the entire complex of records used by an agency for a particular program. Several factors bear on the determination by the agency as to what will constitute a system:

If each small grouping of records is treated as a separate system, then public notices and procedures will be required for each. The publication of numerous notices may have the effect of limiting the information value to the public.

If a large complex of records is treated as a single system, only one notice will be required but that notice and the procedures may be considerably more complex.

Agencies can expect to be required to respond to individual requests for access to records pertaining to them at the level of detail in their public notices, i.e., the level of detail and type of personal information desired. For a particular program as a single system, it may be called upon by an individual to be given access to all information in records pertaining to that individual in the system.

The purpose(s) of a system is the most important criterion in determining whether a system is to be treated as a single system or as a collection of systems for the purposes of the Act. If each of several groupings of agency records is used for a
unique purpose or set of purposes, as delineated in subsection (e) (3) (B) above, each may appropriately be treated as a separate system. An agency should keep in mind that a major purpose of the Act is not the restructuring of existing systems of records, but rather the clarification of what it is that those systems are and how they are used. It does not, of course, preclude such restructuring where otherwise necessary or appropriate such as to reduce the risk of improper access.

Geographic decentralization will not in and of itself be considered a criterion for viewing a system of records as several systems. An agency may treat a decentralized system as a single system and specify several locations and an agency official responsible for the system at each location. See subsections (e) (4) (A) and (F). While the development of central indexes for systems which do not presently require such indexes should be avoided wherever possible, the House report notes that the Department of Health, Education, and Welfare has determined whether a geographically decentralized system of records contains a record pertaining to them (subsection (f) (1)) should not be required to query each location. In deciding whether or not to construct an index, agencies must weigh the potential threat of misuse posed by making individual records more accessible against the capability to meet the needs of those individuals for access to their records. It may, however, be possible to guide individuals as to which location may have a record pertaining to them; e.g., systems segmented by location of birth, or by range of identification number. In any case, if "a system is located in more than one place, each location must be listed." (House Report 93–1146, p. 15) See subsection (e) (4) (A).

A major criterion in determining whether a grouping of records constitutes one system or several, for purposes of the Act, will be the ability to be responsive to the requests of the individual for access to records and general information.

Systems, however, should not be subdivided or reorganized so that information which would otherwise have been subject to the Act is no longer subject to the Act. For example, if an agency maintains a series of records not arranged by name or personal identifier but uses a separate index file to retrieve records by subject matter or by reference to a central index, it should not treat these files as separate systems.

A public notice is required to be published:

For each system in operation on September 27, 1975 on or prior to that date and the notice shall be republished, including any revisions, on or before August 30 of each year thereafter.

For new systems, before the system of records becomes operational; i.e., before any information about individuals is collected.

It should be noted that each "routine use" of a system must have been established in a notice published for public comment at least 30 days prior to the

"The purpose of this requirement is for an individual to determine if information on him might be in (the) system. Therefore it should be clearly stated in non-technical terms understandable to individuals unfamiliar with data collection systems. An example of such a notice is "Pursuant to Public Notice, subsection (6), the categories of records maintained in the system are..." (House Report 93–1146, p. 15). For example, the notice might indicate that the records are maintained on students who applied for loans under a student loan program, not persons who filed form X or who are eligible under section ABC–000.

Any change which has the effect of adding new categories of individuals on whom records are maintained will require publication of a revised public notice. If, in the absence of a revised notice, an individual is the subject of a record in the system would not recognize that fact, a revision should be issued before that change is put into effect. A narrowing of the coverage of the system does not require advance issuance of a revised notice.

Describing Categories of Records in the Public Notice. Subsection (e) (4) (C) "The categories of records maintained in the system;"

This portion of the notice should briefly describe the types of information contained in the system; e.g., employment history or earnings records. As with other notice requirements, the notice should use clear language. The addition of any new categories of records not within the categories described in the then current public notice will require the issuance of a revised public notice before that change is put into effect. The addition of a new data element clearly within the scope of the categories in the notice would not require the issuance of a revised notice.

Describing Routine Uses in the Public Notice. Subsection (e) (4) (D) "Each routine use of the records contained in the system;"

In describing the "routine uses" of the system in the public notice, the notice should be sufficiently explicit to communicate to a reader unfamiliar with the system the general nature of the purposes of the system or the agency's program.

For a more extensive discussion of "routine uses," see subsections (a) (7) (definitions), (b) (3) (conditions of disclosure), (c) (3) (notification to the individual), and (e) (11) (notice of routine uses).

Any new use or significant change in an existing use of the system which has the effect of expanding the availability of the information in the system will require publication of a revised public notice. Any such change in a routine use must be described in the Federal Register to permit public comment before it is implemented.

Describing Records Management Policies and Practices in the Public Notice. Subsection (e) (4) (B) "The categories of individuals in whom records are maintained in the system;"

"The categories of individuals in whom records are maintained in the system;"
This portion of the public notice should describe how the records are maintained, how they are safeguarded, what categories of officials within the agency are permitted to have access, and how long records are retained both on the agency's primary storage system and off-line. In describing record "storage", the agency should indicate the medium in which the records are maintained (e.g., file folders, magnetic tape), "Retrieveability" measures, if any, that ensure the agency's ability to locate and access a record (e.g., by name, combinations of personal characteristics, identification numbers). "Access controls" describe in general terms, what measures have been taken to prevent unauthorized disclosure of records (e.g., physical security, personnel screening) and what categories of individuals within the agency have access. "Retention" and "disposal" cover the rules on how long records are maintained, if and when they are moved to a Federal Records Center, whether they are destroyed, if and when they are destroyed. The description shall not describe security safeguards in such detail as to increase the risk of unauthorized access to the records.

Changes in this item will not normally require immediate publication of a revised public notice unless they reflect an expansion in the availability of or access to the system of records.

Identifying Official(s) Responsible for the System in the Public Notice. Subsection (e) (4) (F) "The title and business address of the agency official who is responsible for the policies and practices governing the system described in (e) (4) (E), above. For geographically dispersed systems, where individuals must deal directly with agency officials at each location in order to exercise their rights under the Act (e.g., to gain access), the title and address of the responsible official at each location should be listed in addition to the agency official described for the entire system. See discussion of subsection (e) (4) (A), above, for special treatment of certain multiple location systems.

A revised public notice shall be issued before the implementation of any change in the address to which individuals may present themselves in person to inquire whether they are the subject of a record in the system or to seek access to a record or in the address to which individuals may mail inquiries, unless the agency has established internal procedures to assure that mail will be forwarded promptly. The description of how the agency will be able to respond to inquiries within the time constraints established in subsection (d). Generally, changes of this type in the interim between the annual publications of the compilation of notices should be avoided if at all possible. Individuals are more likely to rely upon the annual compilation notice than they are to be apprised of modifications published only by means of separate notice in the Federal Register.

Describing Procedures for Determining if a System Contains a Record on an Individual. Subsection (e) (4) (G) "The agency procedures whereby an individual can be notified at his request if the system of records contains a record about him.

This portion of the notice should specify as a minimum, the following:

- The address of the agency office to which inquiries should be addressed or to which the individual may address a request for personal information about himself. This address should be the same as the address specified in subsection (e) (4) (F), above. If this is the case, it need not be reported.

- What identifying information is required to ascertain whether or not the system contains a record about the inquirer.

- The agency may require proof of identity only where it has made a determining access or for contesting the fact that a record about an individual exists would not be required to be disclosed to a member of the public under section 552 of Title 5 of the Code (the Freedom of Information Act). For example, an agency may determine that disclosure of a record in a file pertaining to conflicts of interests would be a clearly unwarranted invasion of personal privacy, within the meaning of 5 U.S.C. 552 (b) (6), and in this instance the agency may require proof of identity.

A revised public notice shall be issued before effecting any change which meets the criteria outlined in subsection (e) (4) (F), above.

This portion of the notice must be consistent with agency rules promulgated pursuant to subsection (f) (1). Any change in these procedures is subject to the requirements of the Administrative Procedure Act as specified in subsection (f).

Describing Procedures for Gaining Access to the Public Notice. Subsection (e) (4) (H) "The agency procedures whereby an individual can identify and be notified of this request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its contents.

This portion of the public notice must include the mailing address(es) and, if possible, the telephone number(s) of officials who handle requests for access to records, and the location of offices to which the individual may go to seek information.

This provision does not specifically require that the actual procedures for obtaining access to records be described in detail. It is intended to assure that the individual will have the assurance that the agency will be able to respond to inquiries within the time constraints established in subsection (d). Generally, changes of this type in the interim between the annual publications of the compilation of notices should be avoided if at all possible. Individuals are more likely to rely upon the annual compilation notice than they are to be apprised of modifications published only by means of separate notice in the Federal Register.

A revised public notice shall be issued before effecting any change about which an individual would want to be informed in order to exercise his or her rights under the Act. Changes of this type in the interim between the annual publications of the compilation of notices should be avoided if at all possible.

This portion of the notice must be consistent with agency rules promulgated pursuant to subsection (f) (2) and (3). Any change in these procedures is subject to the requirements of the Administrative Procedure Act as specified in subsection (f).

Describing Categories of Information Sources in the Public Notice. Subsection (e) (4) (I) "The categories of sources of records in the system.

For systems of records which contain information obtained from sources other than the individual to whom the records pertain, the notice should list the types of sources used:

- Previous employers,
- Financial institutions,
- Educational institutions attended, or
- Persons reviewing records, in connection with records of the review of proposals for research projects.

The notice should indicate if the individual to whom the records pertain is a source of the information in the record. Otherwise all the notices will appear to be violating the requirement that individuals be the main source of information pertaining to them.

Specific individuals or institutions need not be identified. Guidance on when the identity of a source may be withheld is contained in subsection (k) (2), (5) and (7).

Standards of Accuracy. Subsection (e) (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;"

The objective of this provision is to minimize, if not eliminate, the risk that an agency will make an adverse determination about an individual on the basis of inaccurate, incomplete, irrelevant, or out-of-date records that it maintains. Since the final determination as to accuracy is necessarily judgmental, it is particularly critical that this judgment be made with an understanding of the intent of the Act.

The Act recognizes the difficulty of establishing absolute standards of data quality by conditioning the requirement with the language "as is reasonably necessary to assure fairness to the individual." This places the emphasis on assuring the quality of the record in terms of the use of the record in making decisions affecting the rights, benefits, entitlements, or opportunities (including employment) of the individual.

A corollary provision (subsection (e) (6), below) requires that agencies apply the same standard to records which are sent to them except when the agency is sent by a 10 member of the public under the Freedom of Information Act or to another agency. (An agency would be sub-
ject to the Act and, therefore, would have to apply its own standards of accuracy, etc.

Agencies may develop tolerances for "accuracy" and "timeliness" giving consideration to the likelihood that errors within these tolerances could result in an erroneous decision with adverse consequences to the individual (e.g., denial of rights, benefits, entitlements, or employment). For example, for its purposes in determining entitlements based on income, it may only be necessary for an agency to record the fact that income was greater than or less than a stipulated level rather than to ascertain and record the precise amount. In questionable instances, re-evaluation of pertinent information with the individual to whom it pertains may be appropriate.

Unclearly, for assuring "relevance" and "completeness" may be somewhat more difficult to develop. The pursuit of "completeness" could result in the collection of irrelevant information which, if taken into account, could prejudice the decision. Agencies must limit their records to those elements of information which are relevant to the determinations (s) for which the records are intended to be used, and assure that all elements necessary to the determinations are present before the determination is made.

Validating Records Before Disclosure. Subsection (e) (6) "Prior to disseminating any record about an individual to any person other than an agency, the agency must make a system of records pursuant to subsection (b) (3) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes. While the Act recognizes that an agency cannot guarantee the absolute accuracy of its systems of records, any record disclosed to a person outside the agency under this provision must be as accurate as appropriate for purposes of the agency which maintained the record. (See subsection (e) (5)). The only exceptions to this requirement are for disclosing records to the individual to whom the record pertains under the Freedom of Information Act which may not be delayed or impeded.

Recognizing that an agency properly disclosing information (pursuant to subsection (b), conditions of disclosure) is often not in a position to evaluate acceptable tolerances of error for the purposes of the recipient of the information, the primary (obligatory) duty is to assure fairness, nonetheless, to assure that reasonable efforts are made to assure the quality of records disclosed to persons who are not subject to the provisions of subsection (e) (5). The agency must, therefore, make reasonable efforts to assure that a record it discloses is as accurate, relevant, timely, and complete as would be reasonably necessary to assure fairness in any determination that it might make on the basis of that record. It may, for example, be appropriate to advise recipients that the information disclosed was accurate as of a specific date, such as the last date on which the record is determined. For example, on the basis of the record of or of other known limits on its accuracy, etc., its source.

Records on Religious or Political Activities. Subsection (e) (7) "Maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by the individual. Any record which the agency determines to be relevant and necessary to the determination of any individual for purposes of the Act and, therefore, would have to apply its own standards of accuracy, etc.

The record is required by the agency for an authorized law enforcement function.

In the discussions on the floor of the House regarding the authority to maintain such records for law enforcement purposes, it was noted that the objective of the law enforcement amendment on the general prohibition was "to make certain that political and religious activities are not used as a cover for illegal or disruptive activities." However, it was agreed that "no file would be kept of persons who are merely exercising their constitutional rights." And that in accepting this qualification "there was no intention to interfere with First Amendment rights." (Congressional Record, November 20, 1974, H10892 and November 21, 1974, H10852).

Notification for Disclosures under Compulsory Legal Process. Subsection (e) (8) "Make reasonable efforts to serve notice on an individual when any record on such individual is made pursuant to subsection (b) (11)." The issuance of that order or subpoena is made public by the court or agency which issued it, agencies must make reasonable efforts to notify the individual to whom the record pertains. This may be accomplished by notifying the individual by mail at his or her last known address. The most recent address in the agency's records will suffice for this purpose and no separate address records are required. Upon being served with an order to disclose a record, the agency should endeavor to determine whether the issuance of the order is a matter of public record and, if it is not, seek to be advised when it becomes public.

Rules of Conduct for Agency Personnel. Subsection (e) (9) "Establish rules of conduct for agency personnel. Effective compliance with the provisions of this Act will require informed and active support of a broad cross section of agency personnel. It is important that personnel who may have access to systems of records or who are engaged in the development of procedures or systems for handling records, be informed of the requirements of the Act and be adequately trained in agency procedures developed to implement the Act. Personnel with particular concerns include, but are not limited to, those engaged in personnel management, personnel management, personnel management, and related functions), computer systems development and operations, communications, statistical data collec-

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safeguards will, necessarily, have to be
Commission) will also be revising their
mlnJstratlve, technical, and physical
broad policy development and training
insuring that individuals who are not
specific procedural requirements of the
are fully Informed of their obligations

The need to assure the integrity of and
accuracy and reliability of agency Infor-
ment for continuity of agency operations,
information In the system, and provide

The Incorporation of provisions on
privacy into agency standards of conduct,
The discussion of individual employee

Concurrently, those agencies with
broad policy development and training
responsibilities (e.g., the General Services
In the Civil Service Commission) will also be revising their
programs as appropriate to augment agency activities in this area.

This provision is also important in
ensuring that individuals who are potential
victims of the type of harm, embarrassment, inconvenience, or unfairness to any
individual on whom information is maintained;"

The development of appropriate
administrative, technical, and physical
safeguards will, necessarily, have to be
tailored to the requirements of each sys-
tem of records and other related require-
ments and confidentiality. The need to
assure the integrity of and to prevent unauthorized access to, sys-
tems of records will be determined not
only by the requirements of this Act but also by the need for the
requirement for continuity of agency operations, the need to protect proprietary data, apply-
able access restrictions to protect the
national security, and the need for accu-
and reliability of agency Infor-

While the technology of system security
(both for computer-based and other systems) is well developed, it
as it relates to materials classified for rea-
son of national defense or foreign policy,
and standards currently exist to guide the
government in this area. Until such standards are developed and prom-
ulgated, agencies will be required to
analyze each system to the risk of im-
proper disclosure of records and the cost
and feasibility of measures to minimize
those risks. The Department of Com-
merce (National Bureau of Standards) will be issuing guidelines and standards to assist agencies in evaluating various
approaches to providing
security safeguards in their system and
for assessing risks.

Notice: Proposed General Routine Use(s). Subsection (e)(11) "At least 30 days
prior to publication of information un-
der paragraph (4) (D) of this subsection, the Secretary of the agency shall publish or
notice to the public 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.

Agencies are required to publish in the
FEDERAL REGISTER a notice of their inten-
tion to establish "routine uses" for each
of their systems of records. Although this
 provision is designed to supplant the
informal rule-making provisions of 5
U.S.C. 553, the accommodation of the
public comments in the judicial review
of the rule-making exercise was intended
wherever practicable. Agencies should
furnish as complete an explanation of
the routine uses and any changes made
for notice to the public as possible so that
the public will be fully informed of the
proposed use. This is to give the public an opportu-
nity to object to any inappropriate

The proposed "routine use(s)" must be published before a "routine use"
put into effect, i.e. before a record is
disclosed for such a use.

It is clearly permissible to publish the
entire system notice (prescribed by sub-
section (e) (4)) as the notice of "routine
use" provided that such "routine uses"
are not put into effect until the required
30 day notice period. If an entire system
notice is not published, the notice of
"routine use(s)" must be published pursuant to sub-
section (e) (11) as a minimum, contain
the name of the system for which the "routine use" is to be estab-
lished;

Where feasible the authority for the
system (see discussion of subsection (e)
(1), and the required notice to the in-
dividual in subsection (e) (3) (A), above);

The categories of records maintained;

The proposed "routine use(s)";

And the categories of recipients for
each proposed "routine use".

For new "routine use(s)" of systems for
which a public notice under subsection
(e) (4) has already been published, refer-
ence should be made to that public

A notice in the FEDERAL REGISTER invit-
ing public comment on a proposed new
"routine use" is required.

For all existing systems of records not
later than August 28, 1975. (Since 30
days advance notice of a "routine use" is
required, that agency that fails to publish
the necessary notice for existing systems on
or prior to August 28 may find that it is
precluded from making necessary inter-
agency transfers until it has complied with
this provision.)

For an existing system of records, whenever a new "routine use" is pro-
ap. A new "routine use" is one which
attempts to obtain consent and disclose
information 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.

For any new systems of records for
which "routine uses" are contemplated.

SECTION (1) AGENCY RULES

Subsection (1) "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-
"Agencies must promulgate rules to im-
plement the provisions of the Act in ac-
cordance with the requirements of sec-
ction 553 of title 5 of the United States
Code including publication of the rules
in the FEDERAL REGISTER so that inter-
ested persons can have an opportunity
to comment. A "rule" is defined as "the
whole or a part of an agency statement
of general or particular applicability and
future effect designed to implement, in-
terpret, or prescribe law or policy or de-
scribe the organization, procedures, or
practice requirements of agency . . . " (5
U.S.C. 551(4)). Formal hearings are not
required with respect to rules issued
under this section. However, formal hear-
ings are not precluded by this section
and, in particular instances, agencies
may elect to use the formal hearing pro-
cedure.

Two distinct objectives must be satis-
fied by the rules promulgated pursuant
to this subsection;

They must provide the public with
sufficient information to understand how
an agency is complying with the law;
and

They must provide sufficient informa-
tion for individuals to exercise their
rights under the Act.

Rules promulgated under this subsec-
tion differ from notices under subsection
(e) in several ways:

Rules promulgated under this subsec-
tion are subject to requirements of sec-
ction 559 of the Administrative Proce-
dure Act governing the publication of
proposed rules for public comment be-
fore issuing them as final rules.

Rules must only be published twice—
as notice of rule making and when they
are promulgated as final rules— unless
they are subsequently modified. (They
will, however, be included in an annual
compilation published by GSA.)

A separate set of records must not be
published for each system of records that
an agency maintains. The development
of a single set of agency rules is en-
couraged wherever appropriate.

Agencies are required to publish pro-
posed rules under this subsection allow-
ing at least 30 days for public comment
prior to publishing them as final rules.
Only those systems which will be in use on
September 27, 1975, agencies will have
Agencies procedures should provide for acknowledgment of the inquiry within 10 days (excluding Saturdays, Sundays, and legal public holidays).

**Rules for Handling Requests for Access.** Subsection (f) (2) “Define reasonable times, places, and requirements for access to an individual’s record or information pertaining to him before the agency shall make the record or information available to the individual.”

The development of procedures for individuals to identify themselves for the purposes of gaining access to their records will necessarily vary depending on the nature, location, and sensitivity of the records in the system. Care must be exercised to assure that the requirements for verification of identity are not so cumbersome as to prevent individuals from gaining access to records to which they are entitled to have access. Yet the records pertaining to verification of identity which a typical individual about whom records are maintained will necessarily vary depending on the method which is appropriate. If an agency determines that it can grant access to records only by providing a copy of the record through the mails because it cannot provide “reasonable” means for individuals to have access to their records, it may not charge a fee for making the copy.

The issue of access to medical records was the subject of extensive discussion during the development of the Act. As was provided in the Act, individuals have an unqualified right of access to records pertaining to them (with certain exceptions specified in subsections (f) and (k) below) and the process by which individuals are granted access to medical records may, at the discretion of the agency, be modified to prevent harm to the individual. [See subsection (f) (1).]

As a minimum, rules issued pursuant to this subsection shall be consistent with the requirements of subsection (d) (1) and (k) and should include:

Some indication, for requests presented in person, as to whether the individual can expect to be granted immediate access to the record and, for written request, the expected time lag, if any, between receipt of a request for access and the granting of such access (see subsection (d) (2) for guidance on making any response timely).

The locations at which individuals will be granted access to their records or the fact that access will be granted by providing copies by mail. Notice that an individual when reviewing a record in person, may be accompanied by another individual of his choosing and the agency’s requirements, if any, for a written statement authorizing that individual’s presence. Such authorization statements, if employed, should be as brief as possible.

**Rules for Amending Records.** Subsection (g) (4) “Establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, and for whatever additional means may be necessary for each individual to exercise his rights under this section.”

Agency procedures for permitting an individual to request amendment of a record shall be consistent with subsec-
The General Services Administration will issue guidance on the format and timing for submission of rules and notices to reduce the cost of preparing and publishing the rules and notices, to minimize redundancy whenever possible, and otherwise to enhance the utility of these publications. For this purpose, the various provisions of subsection (e) (4) and (f) (1) through (4) calling for lists of names and addresses need not be treated as separate sections of the annual notice for each system.

**Subsection (g) Civil Remedies**

This subsection prescribes the circumstances under which an individual may seek court relief in the event that a Federal agency violates any requirement of the Privacy Act or any rule or regulation promulgated thereunder, the basis for judicial intervention, and the remedies which the courts may prescribe. It should be noted that an individual may have standing to sue under provisions of the law in addition to those provided in this section. For example—

An individual may seek judicial review under other provisions of the Administrative Procedure Act.

An individual may file a complaint alleging possible criminal misconduct under section (1), below.

A Federal employee may file a grievance under personnel procedures. It should be noted that the provisions on fees charged to an individual under this Act differ from those governing fees charged to the public. See 5 U.S.C. 552, as amended, the Freedom of Information Act, for guidance on fees for copies of records made available to the public.

"An agency may not charge the individual for time spent searching for requested records or for time spent in preparing to extend if the fall within the disclosure requirements of the Act." (House Report 93-1416, p. 17.) When an individual requests a copy of a record, pursuant to subsection (d) (1) (access to records), the fee charged may not exceed the direct cost of making the copy (printing, typing, or photocopying and related personnel and equipment costs) and may not include any cost of retrieving the information. In establishing fee schedules, agencies should also consider the cost of collecting the fee in determining the annual charge.

**Annual Publication of Notices and Rules.** Subsection (f) (final paragraph—unnamed) "The Office of the Federal Register shall annually compile and publish the rules promulgated under this section and agency notices published under section (e) (4) of this section in a form available to the public at low cost."

**Civil Remedies (subsection (e) (4)) and agency rules (subsection (f) (1) through (5)) will be produced in a form which promotes the exercise of individual rights under this Act.**
is the key to ensuring the citizen’s right of accuracy, completeness, and relevancy, a denial of access affords the citizen the right to raise these issues in court. This would be the means by which a citizen could challenge any exemption from the requirements of the Act.” (Senate Report 93-1183, p. 62). It should be noted that under the Privacy Act, the courts are not bound by subsection (j) (general exemptions) are permitted to be exempted from this provision.

This provision is also the one by which individuals may contest an agency’s refusal to grant access as a result of its interpretation of the definitions in the Act as they apply to information maintained by an agency and for the exclusion set forth in subsection (d) (5), denial of access to records compiled in reasonable anticipation of litigation. No test of injury is required to bring action under subsection (g) (1) (B). The basis for judicial review and available remedies are found in subsection (g) (3).

Failure to Maintain Accurately. Subsection (g) (1) (C) “Fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities, of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.”

An individual may bring an action under this subsection only if it can be shown that the deficiency in the record resulted in an adverse determination by the agency which maintained the record, on the basis of the record. “An action also lies if the agency makes an adverse determination based upon a record which is inaccurate, untimely, or incomplete. However, in order to sustain such action, the individual must demonstrate the causal relationship between the adverse determination and the incompleteness, inaccuracy, or irrelevance of the record.” (House Report 93-1416, p. 17).

An adverse action is one resulting in the denial of a right, benefit, entitlement, or employment by an agency which the individual could reasonably have been expected to have been given if the record had not been deficient. This provision, in essence, allows an individual to test the agency’s compliance with subsection (e) (5).

It should also be noted that, under this subsection, an agency may be liable as a consequence of its failure to maintain a record accurately only if it is shown that the failure has been “intentional or willful” (subsection (g) (4)).

Neither this subsection nor subsection (g) (1) (A) was intended to permit an individual collaterally to attack information in records pertaining to him which has already been the subject of or for which adequate judicial review is available. For example, these provisions were not designed to afford an individual an alternative to allow agencies to challenge the basis for a criminal conviction or an asserted tax deficiency.

The basis for judicial review and available remedies are found in subsection (g) (4).

Other Failures to Comply with the Act. Subsection (g) (1) (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.”

In addition to the grounds specified in subsections (g) (1) (A) through (C) above, an individual may bring an action for any other alleged failure by an agency to comply with the requirements of the Act or failure to comply with any rule published by the agency to implement the Act (subsection (f) ) provided it can be shown that—

The action was “intentional or willful.”

The agency’s action had an “adverse effect” upon the individual; and

The “adverse effect” was causally related to the agency’s actions.

The basis for judicial review and available remedies provided by this Act are found in subsection (g) (4).

Basis for Judicial Review and Remedies for Failure to Amend a Record. Subsection (g) (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.

When an individual seeks judicial review of the accuracy, timeliness, completeness, or relevance of a record either as a result of an agency’s refusal to amend a record or because the individual alleges that the agency’s process for review does not conform to subsection (d) (3), it is required to review the matter as if it were an initial determination (de novo). Such a review may extend to the agency’s criteria established in conformance with subsections (e) (1) and (5) for “accuracy, relevance, timeliness, and completeness” as they relate to the purposes for which the agency maintains the record.

Unlike judicial review of a denial of access to a record, in a review of refusal to amend a record the burden to justify its action is not expressly placed upon the agency by the Privacy Act. This was intended to result in placing the burden of challenging the accuracy of the record upon the individual. As a result, agencies may maintain additional records solely for the purpose of validating the accuracy, timeliness, and completeness or relevance of other records they maintain.

If the court finds for the individual against the agency it may—

Direct the agency to amend the record or to take such other steps as it deems appropriate.

Require the agency to pay court costs and attorney fees. “It is intended that such award of fees not be automatic, but rather, that the courts consider the criteria as delineated in the existing body of law governing the award of fees.” (House Report 93-1416, p. 17).

Basis for Judicial Review and Remedies for Adverse Determination and Other Failures to Comply. Subsection (g) (4) “In any suit brought under the
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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 amount of:

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

In any action brought for failure to comply with the provisions of the Act, other than those covered in subsection (g) (1) (A) and (B) (refusal to amend a record or denial of access) it must be shown that:

The failure of the agency to comply was "intentional or willful;"

There was injury or harm to the individual; and

The injury was causally related to the alleged agency failure.

As indicated above, these criteria do not apply to suits brought pursuant to subsection (g) (1) (A) so that an individual may, under certain circumstances, properly bring an action either under subsections (g) (1) (A) or (g) (1) (C).

When the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay

Actual damages or $1,000, whichever is greater

Court costs and attorney fees.

Unlike subsections (g) (2) and (3) above, which make the award of court costs and attorney fees discretionary in successful suits brought under subsections (g) (1) (A) and (B), such awards are required to be made in actions in which the individual has prevailed under subsections (g) (1) (A) and (C), and (D). See House Report 93-1416, pp. 18-19 and the Congressional Record, December 18, 1974, P.H. 122245 for further discussion of this point.

Judgment and Time Limits. Subsection (g) (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, 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 pursuant to the effective date of this section."

Action may be brought in the district court for the jurisdiction in which the individual resides or in which the agency records are situated, or in the District of Columbia.

"The statute of limitations is two years from the date upon which the cause of action arises, except for cases in which the agency has materially or willfully misrepresented any information required to be disclosed and when such misrepresentation is material to the liability of the agency. In such cases the statute of limitations is two years from the date of discovery by the individual of the misrepresentation." (House Report 93-1416, p. 18)

A suit may not be brought on the basis of injury which may have occurred as a result of an agency's disclosure of a record prior to September 27, 1978; e.g., disclosure without the consent of the individual or an adverse action resulting from a disclosure. This language is intended to extend to a claim based on disclosure without the consent of the individual, held liable, under this law, for actions arising under subsection (e) (4) of this section, taken prior to its effective date.

Subsection (h) Rights of Legal Guardians

Subsection (h) "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."

This section requires that minors or individuals who have been declared to be legally incompetent have a means of exercising their rights under the Act. It also has the effect of making individuals acting in loco parentis to minors, parents, legal guardians, and custodians the same as the individual for purposes of giving consent for disclosure of records without the knowledge and consent of the individual (subsection (b) (3)). It is somewhat abbreviated. (See subsections (a) (5), definitions, and (e) (4), public notice, for guidelines on what constitutes a system.) It is also noteworthy that, under agency procedures, the officer or employee who maintains the system may not be the one who is responsible for publishing the notice. Agency procedures should make the responsibilities of each clear. The officer or employee responsible for publishing the notice, upon notice of the existence of a system, must make that fact public.

Criminal Penalties for Unauthorized Disclosure. Subsection (i) (1) "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 that specific material is prohibited, willfully discloses the same 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.

It is a criminal violation of the provisions of the Act if an employee, knowing that disclosure is prohibited, willfully discloses a record without the written consent of the individual to whom it pertains, at his or her request, or for one of the reasons set forth in subsections (b) (1) through (11), conditions of disclosure.

Criminal Penalties for Failure To Publish a Public Notice. Subsection (i) (2) "Any officer or employee of any agency who has knowledge of records which are required to be published that the agencies has materially or willfully failed to publish a public notice about each system of records which it maintains. It is a criminal violation of the Act willfully to maintain a system of records and to not publish the prescribed public notice. The exemption provisions, subsections (j) (k), do not allow an agency head to exempt any system of records from the requirement to publish a public notice of its existence, although that notice may be somewhat abbreviated. (See subsections (a) (5), definitions, and (e) (4), public notice, for guidelines on what constitutes a system.) It is also noteworthy that, under agency procedures, the officer or employee who maintains the system may not be the one who is responsible for publishing the notice. Agency procedures should make the responsibilities of each clear. The officer or employee responsible for publishing the notice, upon notice of the existence of a system, must make that fact public.

Criminal Penalties for Obtaining Records under False Pretenses. Subsection (i) (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."

This provision makes it a criminal act knowingly and willfully to request or obtain any record concerning an individual under false pretenses. It is likely that the principal application of this provision will be to deter individuals from
making fraudulent requests under subsection (d)(1), access to records.

Subsections (j) and (k) Exemptions

The drafters of the Act recognized that the application of all of the requirements of the Act to certain categories of records would have had undesirable and often unacceptable effects upon agencies in the conduct of necessary public business.

Two categories of exemptions are established: General exemptions (subsection (j)(1) and (k)(1)), and civil exemptions (subsection (j)(2), (k)(2), and (3)). Civil exemptions (subsection (j)(3)) may be exempted from maintenance of records under subsection (j)(1) or (k)(1). Exemptions under subsection (j)(1) may be exempted from the civil remedies provision and, in particular, the judicial remedies provision (subsections (g)(1)(B) and (g)(3)), civil remedies.

In applying any of the exemption provisions of the Act, it is important to recognize the following:

No system of records is automatically exempt from any provision of the Act. To obtain an exemption for a system from any requirement of the Act, the head of an agency must determine that the system falls within one of the categories of systems which are permitted to be exempted, and publish the determination in a rule in accordance with the requirements (including general notice) of section 553 of the Administrative Procedure Act. That notice must include a statement of the provisions of the Act from which the system is proposed to be exempted and why the agency considers the exemption necessary.

The requirement to publish a public notice (subsection (e)(4), above) applies to all systems of records maintained by an agency. Certain other provisions such as conditions of disclosure (b), accounting for disclosures (c)(1) and (2) and restrictions on maintaining records (First Amendment activities (e)(7)) also apply to all systems of records. Agencies may not exempt any system, as defined in subsection (a)(5) from any of these requirements.

In some instances, systems may contain records which are subject to exemption under more than one subsection in subsections (j) or (k). In those cases the notices claiming exemption should, if possible, specify which types of records are subject to which exemption.

Agency records which are part of an exempt system may be disseminated to other agencies and incorporated into their non-exempt records systems. The public policy which dictates the need for exempting records from some of the provisions of the Act is based on the need to protect the contents of the records in the system—not the location of the records. Consequently, in responding to a request for records where documents of another agency are involved, the agency receiving the request should consult the originating agency to determine if the records in question have been exempted from particular provisions of the Act. A copy of the request may be forwarded to the originating agency for handling of its documents. Whether such a procedure would result in a more rapid response to the request for access but the agency receiving the request remains responsible for assuring that its own records are not exempted from any provision from which the system is being exempted, where a single explanation will serve to explain the entire exemption.

The agency head’s determination is considered to be a rule under the Administrative Procedure Act (APA) and is subject to the requirements of general notice and public comment of that Act. 5 U.S.C. 553. While general notice of a proposed rule is not required under the APA when “persons subject thereto are named and either personally served or otherwise have actual notice thereof,” the use of the phrase “including general notice” means that individual notifications will not suffice.

The systems of records and the number of records (i.e., identifiable records), which were exempted from any of the provisions of the Act under this subsection will be required to be included in the annual report prepared as required by subsection (p). It may also be required that the exemption provisions are permissive; i.e., an agency head is authorized, but not required, to exempt a system from any or all portion of selected provisions of the Act when he or she deems it to be in the best interest of the government and consistent with the Act and these guidelines. In commenting on this provision, the House Committee noted:

The Committee also wishes to stress that this section is not intended to require the C.I.A. and criminal justice agencies to withhold all their personal records from the individuals to whom they pertain. We urge these agencies to keep open whatever files are presently open and to make available in the future whatever files can be made available without clearly infringing on the ability of the agencies to fulfill their missions. (House Report 89-1416, p. 19)

To the extent practicable, records permitted to be exempted from the Act should be separated from those which are not. Further, while the language permits agencies to maintain records for any purpose which the agency determines to be exempt, agencies should exempt only portions of systems wherever it is possible.

General Exemption for the Central Intelligence Agency. Subsection (j)(1) “Maintained by the Central Intelligence Agency; or"

General Exemption for Criminal Law Enforcement Records. Subsection (j)(2) “Maintained by the Department 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) investigation 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 crim-

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NOTICES

SUBSECTION (k) SPECIFIC EXEMPTIONS

Applicability and Notice Requirements. Subsection (k) "The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c) (3), (d), (e) (1), (2), (4) (C), (E), and (I) and (f) of this section if the system of records is-"

"(1) * * * *

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(20) * * * *

"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."

This subsection permits agency heads to exempt systems of records from a limited number of provisions of the Act. In addition to the provisions from which no system may be exempted under subsection (j), a system which falls under any one of the seven categories listed in this subsection may not be exempted from the following provisions:

Informing prior recipients of corrected or disputed records, (c) (4)

Collecting information to be used in determinations about an individual directly from the individual to whom it pertains, (e) (2)

Informing individuals asked to supply information of the authority by and for which it is collected and whether or not providing the information is mandatory, (e) (3)

Maintaining records with such accuracy, completeness, timeliness, and relevance as is reasonable for the agency's purposes, (e) (5)

Notifying the subjects of records disclosed under compulsory process, (e) (8)

Civil remedies, (g)

As with subsection (j), upon determining that a system is to be exempted under this section, the agency head is required to publish that determination as a rule under the Administrative Procedure Act subject to public comment. That notice must, as a minimum, specify:

The name of the system (as in the annual notice under subsection (e) (4)

and

The specific provisions of the Act from which the system is to be exempted and the reason therefor.

The agency head's determination is considered to be a rule under the Administrative Procedure Act (APA) and is subject to the requirements of general notice and public comment of that Act, 5 U.S.C. 553. When the general notice of a proposed rule is not published under the APA when "persons subject thereto are named and either personally served or otherwise have actual notice thereof", the term "general notice" means that individual notification will not suffice.

In addition, the systems of records and the number of records in each, which are exempt from any of the provisions of the Act under this section will be required to be included in the annual report required by subsection (p).

It should also be noted that the exemption provisions are permissive; i.e., an agency head is authorized, but not required, to exempt a system when he or she deems it to be in the best interest of the government and consistent with the Act and these guidelines. "Also as with section (j) records, the Committee urges agencies maintaining section (k) records to open those documents to the individuals named in them insofar as such action would not impair the proper functioning of their agencies." (House Report 93-1416, p. 20)

In the process of utilizing any of these exemptions, agencies should, wherever practicable, segregate those portions of systems for which an exemption is considered necessary so as to hold to the minimum the amount of material which is exempted. While the language permits agency heads to exempt entire systems of records, the language of certain of the specific provisions below suggests that it may, in some instances, be appropriate to exempt only parts of systems where it is not possible to segregate entire systems. For example, records containing classified material to which access may be denied under (k) (1) should be screened to permit access to unclassified material, and only those portions of investigative material which meet all of the criteria in (k) (2) or (3) should be withheld. However, the case of records which are permitted to be exempted to the extent that their disclosure would reveal the identity of a confidential source, would be exercised to ensure that the content of any records being segregated does not disclose the identity of the source.

Exemption for Classified Material

Subsection (k) (1) "Subject to the provisions of section 552(b) (1) of this title;"

This subsection permits agency heads to exempt, from certain provisions of the Act, those systems of records which are "(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." (5 U.S.C. 552(b) (1), as amended by Public Law 93-502)

The Freedom of Information Act, as amended by P.L. 93-502, authorizes de novo judicial review of an agency's decision to classify a document, including in camera consideration of a record when the court deems it necessary to resolve a dispute as to whether a document is properly being withheld under the provisions of subsection (b) (1) of the Freedom of Information Act. See the Conference Report on H.R. 12471, House Report 93-1380, pp 8-9.

Useful guidance in the application of this provision is found in the Senate Committee report discussion of a similar provision on classified information:

"The potential for serious damage to the national defense or foreign policy could arise if the notice describing any information system included categories or sections of information * * * or provided individuals access to files maintained about them * * *

"The Committee does not by this legislation intend to jeopardize the protection of intelligence information related to national defense or foreign policy, or open to inspection information classified pursuant to Executive Order 11652 to persons who do not have an appropriate security clearance or need to know.

This section is not intended to provide a blanket exemption to all information systems or files maintained by an agency which deal with national defense or foreign policy information. Many personnel files and other systems may not be subject to security classification or may not pass to the national defense or foreign policy simply by permitting the subjects of such files to inspect them and seek changes in their contents under this Act. (Senate Report 93-1185, p. 94)

Exemption for Investigatory Material Compiled for Law Enforcement Purposes. Subsection (k) (2) "Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section:"

"The provisions of this Act would require that the content of any records being segregated does not disclose the identity of the source;"
The phrase "investigatory material compiled for law enforcement purposes" is the same phrase as opened exemption (b) (7) of the Freedom of Information Act prior to its recent amendment (Public Law 93-502), with the exception of the use of the word "material" in the Privacy Act, which was amended to include the now amended Freedom of Information Act exemption. The intent was to have the same meaning given to this phrase in the Privacy Act as had been given to it in the Freedom of Information Act except that the phrase "would apply to material as opposed to entire files. The case law, then, which had interpreted "investigatory" and "compiled" and "law enforcement purposes" for the now amended portions of exemption (b) (7) of the Freedom of Information Act should be utilized in defining those terms as they appear in subsection (k) (2) of the Privacy Act.

It was further recognized that "due process" in both civil action and criminal proceedings, for example, could have a reasonable opportunity to learn of the existence of, and to challenge, investigatory records which are to be used in legal proceedings.

To the extent that such an investigatory record is used as a basis for denying an individual any right, privilege, or benefit (including employment) to which the individual would be entitled in the absence of that record, the individual must be granted access to that record except to the extent that access would reveal the identity of a confidential source.

The language permitting an agency to withhold records used as a basis for denying a benefit to the extent that the record would reveal the identity of an individual who furnished information in confidence is very narrowly drawn and must be treated carefully (see also subsections (k) (5) and (7), below). For information collected on or subsequent to the effective date of this section (September 27, 1975), a record may only be withheld to protect the identity of a source in an express guarantee was made to the source that his or her identity would not be revealed. (Such guarantees should be made on a selective basis; i.e., individuals from whom information is obtained for law enforcement purposes should be advised that their identity may be disclosed to the individual to whom the record pertains unless a source expressly requests that his or her identity not be revealed as a condition of furnishing the information.)

The record, if stripped of the identity of the individual, nonetheless has content reveal the identity to the subject. It was recognized that the type of investigatory record covered by subsection (k) (2) currently contains substantial information on the source obtained with the tacit understanding that the identity of the source would not be revealed. For this reason the Act provides that information, such records that were prior to the effective date of the Act may be withheld from the individual to whom it pertains to the extent that it was collected under an implied promise that its source would not be revealed and disclosing it would reveal the identity of the source.

The phrase "to the extent that" is particularly important. As implied above, if a record can be disclosed in such a way as to conceal its source, a promise of confidentiality to the source is not sufficiently honored. Obviously the content of certain records is such that it reveals the identity of the source even if the name of the source or other identifying particulars are removed; e.g., the record contains information that could only have been furnished by one individual known to the subject. Only in those cases may the substance of the record be revealed if the identity of a source and then only to the extent necessary to do so. It is recognized, however, that it may in some instances be very difficult for an agency to know whether the content of a record would, in and of itself, reveal the source. Therefore, it may be appropriate in light of the intent underlying this exemption, to allow an agency to determine whether a reasonable doubt exists as to whether its disclosure would reveal the identity of a confidential source.

Additional guidance on the circumstances under which an agency may withhold a record on the basis of its disclosure would reveal the identity of a source who provided information under a pledge of confidentiality is found in Senator Ervin's statement on the compromise bill on the floor of the Senate.

The compromise provision for the maintenance of information received from confidential sources represents an acceptance of the fact that the House was obtaining an assurance that in no instance would that language deprive an individual from knowing the existence of any information maintained in a record about him which was received from a "confidential source." The amendment that disclosure of even a small part of a particular item would reveal the identity of a confidential source would not have to be characterized in some general way. The phrase of the item's existence and a general denial of the source would have to be made known to the individual in every case.

Furthermore, the acceptance of this section in no way precludes an individual from knowing the substance and source of confidential information, should that information be used to deny him a promotion in a government job or access to classified information or some other right, benefit or privilege for which he was entitled to bring legal action when the government wished to base any part of its legal case on that information.

Finally, it is important to note that the House provision would require that all future promises of confidentiality to sources of information and not implied promises. Under the authority to prepare guidelines for the administration of this act it is expected that the Office of Management and Budget will work closer with agencies to assure that Federal investigators make full use of the ability to make express promises of confidentiality.

(Federal Register, December 17, 1974, p. 32/1810)

The foregoing discussion with respect to confidentiality of sources is also applicable to the provisions of subsections (k) (5) and (7), below.

Exemption for Records Maintained To Protective Services. Subsection (k) (5) "Maintained in connection with the protection of the President of the United States or other individuals pursuant to section 3068 of title 18." This exemption covers records which are not clearly within the scope of law enforcement records covered under subsection (k) (2) but which are necessary to assuring the safety of the individuals protected pursuant to 18 U.S.C. 3068.

It was noted that "access to Secret Service intelligence files on certain individuals would vitiate a critical part of Secret Service work which was specifically recommended by the Warren Commission that investigated the assassination of President Kennedy and funded by Congress." (House Report 93-1416, p. 19)

Exemption for Statistical Records. Subsection (k) (4) "Required by statute to be maintained and used solely as statistical research or 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 18." It is the intent of this provision to permit exemptions for those systems of records which by operation of statute cannot be used to make a determination about an individual.

The provision permits an agency head to exempt a system of records which is used is only for statistical, research, or program evaluation purposes, and which is not used to make decisions on the rights, benefits, or entitlements of individuals except as permitted by section 8 of Title 13. The use of the language "required by statute to be maintained and used solely as statistical research or purposes only" suggests that systems of records which qualify to be exempted under this provision are those comprised exclusively of records that by statute are prohibited for any purpose including the making of a determination about the individual to whom they pertain; not merely that the agency does not engage in such use.

Disclosure of statistical records (to the individual) in most instances would not provide any benefit to anyone, for these records do not have a direct effect on any given individual; it would, however, interfere with a legitimate, Congressionally-sanctioned activity. (House Report 93-1416, p. 19)

Exemption for Investigatory Material Compiled for Determining Suitability for Federal Employment or Military Service. Subsection (k) (5) "Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civil service 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.

This provision permits an agency to exempt material from the individual access provision of the Act which would otherwise cause the identity of a confidential source to be revealed only if all of the following conditions are met:

The material is maintained only for purposes of determining an individual's qualifications, eligibility, or suitability for military service, employment in the civilian service or on a Federal contract, or access to classified material. By implication, employment would include appointments to Federal advisory committees or to membership agencies, whether or not salaried.

The material is considered relevant and necessary to making a judicious determination as to qualifications, eligibility, or suitability and could only be obtained by providing assurance that the source is not or her identity would not be revealed to the subject of the record, e.g., for critical sensitive positions, and

Disclosure of the record with the identity of the source removed would likely reveal the identity of the source; e.g., the record contains information which could only have been furnished by one or several individuals known to the subject.

(Since information collected prior to the effective date of the Act may have been gathered under an implied promise of confidentiality, that pledge may be honored and those records exempted if the other criteria are met.)

See subsection (k) (2), above, for a more extensive discussion of the circumstances under which records may be withheld to protect the identity of a confidential source.

The language was included to take into account the fact that the screening of personnel to assure that only those who are properly qualified and trustworthy are placed in governmental positions, from the time to time, require information to be collected under a pledge of confidentiality. Such pledges will be limited only to the most compelling circumstances; i.e.,

Without the information thus obtained, unqualified or otherwise unsuitable individuals might be selected; or

The potential source would be unwilling to provide needed information without a guarantee that his or her identity will not be revealed to the subject; or

To be of value in the personnel screening and often highly competitive assessments in which it will be used, the information must be of such a degree of frankness that it can only be obtained under an express promise that the identity of the source will not be revealed.

The Civil Service Commission and the Department of Defense (for military personnel) will issue regulations establishing procedures for determining when a pledge of confidentiality is to be made and otherwise to implement this subsection. These regulations and any implementing procedures will not provide that all information collected on individuals being considered for any particular category of positions will automatically be collected under a guarantee that the identity of the source will not be revealed to the subject.

This provision has been among the most misunderstood in the Act. It should be noted that it grants authority to exempt records only under very limited circumstances. Just because the customary thing to make these promises of confidentiality, so that most all of the information (in investigatory records) will be made available to Congress under a Congressional Record, November 20, 1974, p. 10887.)

The term "Federal contract" covers investigatory material on individuals being considered for employment on an existing Federal contract as well as investigatory material compiled to evaluate the capabilities of firms being considered in a competitive procurement.

Exempting Information in Examinations Material. Subsection (k) (6) "Testing or examination material used solely to determine individual qualifications for appointment or promotion in the armed services or in a Federal government agency shall not be exempted under this section except as provided in subsection (k) (7)."

"This provision permits an agency to exempt testing or examination material used to test the qualifications of an individual for appointment or promotion in the armed services or in a Federal government agency except when disclosure of the test questions or answers would reveal test questions or answers or testing procedures." (44 U.S.C. 3103 (l).)

It was not the intent of this subsection to permit exemptions of information which are required to be made available to employees or members or are, in fact, made available to them as a matter of current practice. The presence of exemption (k) (7) is an indication of the intended narrow coverage of the exemptions set forth in (k) (6) and, similarly, the exemptions of (k) (5) and (k) (6) indicate the intended narrow coverage of the exemption set forth in subsection (k) (5).

Exemption for Material Used To Evaluate Potential for Promotion in the Armed Services. Subsection (k) (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 the Act, under an implied promise that the identity of the source would be held in confidence."

This subsection addresses maintenance of those records which are transferred to the General Services Administration. It should be noted for purposes of this section, there is a substantial difference between records which have been placed in records centers operated by the Administrator of General Services for "storage processing and servicing" pursuant to Section 3103 of Title 44; and records which are accepted by the Administrator of General Services for "deposited records" in the United States (because they have sufficient historical or other value to warrant their continued preservation by the United States Government" pursuant to Section 2103 of Title 44.

The former, those for which the General Services Administration is essentially a custodian, are addressed in subsection (l) (1). The latter, archival records which have been transferred to the Archives and are maintained by the Archivist, are addressed in subsections (l) (2) and (l) (3).

Records Stored in GSA Records Centers. Subsection (l) (1) "Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with the provisions for a substantial increase in operating efficiency," (44 U.S.C. 3103), are deemed to be part of the records of the agency which sent them and are subject to the provisions of this section, the same as if they were maintained on the agency's premises. This language, in effect, constitutes a clarification of the term "maintain" (subsection (a) (3)) with respect to records which have been physically...
transferred to GSA for storage. While records are stored in a records center, the agency responsible for maintaining them to storage remains accountable for them and the General Services Administration effectively functions as an agent of that agency and maintains them pursuant to rules established by that agency. Records stored in records centers often constitute the inactive portion of systems of records, the remainder of which are kept at agency premises; e.g., agency payroll and personnel records. Whenever practicable, these inactive records should be treated as part of the total system of records and be subject to the same rules and procedures. In no case may they be subject to rules which are inconsistent with the Privacy Act.

To assure the orderly and effective operation of the records center and consistent with its authority to issue regulations governing Federal agency records management policies (under title 44 of the United States Code), the Privacy Act and any applicable laws, the General Services Administration shall issue general guidelines to the agencies on preferred methods for handling systems of records stored in records centers. In the event the underlying provision, agencies may consider that the records stored in Federal records centers are transferred intra-agency and need not publish notice of "routine use" to enable these transfers.

Records Archived Prior to September 27, 1975. Subsection (1)(3) "Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States Government 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 records control or records retrieval. The records shall be subject to the provisions of this section except subsections (e)(4) (A) through (G) of this section." Records transferred to the Archives pursuant to 44 U.S.C. 2103 (for "preservation") or on or after September 27, 1975 are considered to be maintained by the Archives for purposes of the Act but are not subject to selected provisions of the Act. "[They] are only subject to those provisions of this Act requiring annual public notice of the existence and character of the information systems maintained in the Archives, archival rule making of appropriate safeguards to insure the security and integrity of preserved personal information, and promulgation and implementation of rules to insure the effective enforcement of those safeguards." (Congressional Record, December 18, 1974, p. H12245.)

The notice required for these records is on a system by system basis. "Since the records would already have been organized in conformity with the requirements of this section by the agency before transferring them to the Archives, maintaining them in continued conformity with this law would not require any special effort." (House Report 93-1416, p. 29.)

The exclusion of archival records from the provisions of the Act establishing the right to have access or to amend a record was also discussed in the House Report:

Records under the control of the Archives would not, however, be subject to the provisions of this law which permit changes in documents at the request of the individual and which require a uniform rule holding that archivists may not remove or amend information in any records placed in their custody. They also point out that the integrity of records is considered one of the most important rules of professional conduct.

Thus, it is important to know the true condition of past government records when doing research; they often find the fact that a record was incorrect and should not be relied upon as important as the fact that a record was accurate.

The Committee believes that this rule is eminently reasonable and should not be breached even in the case of individually identifiable records. Once those documents are given to the Archives, they are no longer used to make any determination about any individual, so amendment would not aid anyone. Furthermore, the Archives has no way of knowing the true state of contested information, since it does not participate in the program for which the data was collected; it cannot make judgments as to whether records remain intact and must be altered. (House Report 93-1416, p. 21.)

The Archivist is required to establish rules of conduct for GSA personnel to assure that records in the Archives are used only in a manner consistent with 44 U.S.C. 2103 and the Act, and that they are properly instructed in the rules governing access to and use of archival records.

However, when a record has been disclosed in the Archives is disclosed to an agency and becomes part of any agency's records which could be used in making a determination about an individual, that record would again be subject to the other applicable provisions of the Act.

Subsection (m) Government Contractors

Subsection (m) "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, or 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.

The extent to which the provisions of the Act would apply to records other than those physically maintained by Federal agency personnel was one of the principal areas of difference between the Senate and House privacy bills (S. 3418 and H.R. 1637).

The Senate bill would have extended its provisions outside the Federal government only to those contractors, grantees or parties acting in agency status for the Federal government, where the purpose of the contract, grant or agreement was to establish or alter an information system. It addressed a concern over the policy governing the sharing of Federal criminal history information with State and local government law enforcement agencies and for the amount of money which has been spent through the Law Enforcement Assistance Administration for the purchase of State and local government criminal information systems.

The compromise amendment would now permit Federal law enforcement agencies to determine to what extent their information systems would be covered by the Act and extend all other provisions of the Act to those with which they share that information or resources.

At the same time it does not diminish the many Federal agencies contract for the operation of systems of records on behalf of the agency in order to accomplish an agency function. It was provided therefore the such contractors and any employees thereof shall be considered to be employees of the agency and subject to the provisions of the legislation. (Congressional Record, Dec. 17, 1974, p. S218188)
It was also agreed that the Privacy Protection Study Commission should be directed to study the applicability of the provisions of the Privacy Act to the private sector and make recommendations to the Congress and the President (see subsection (d) of the Act).

The effect of this provision is to clarify, further, the definition of the term "maintain" as it establishes agency accountability for systems of records. (See subsection (e) (1)). It provides that systems operated under a contract which are designed to accomplish an agency function are, in effect, deemed to be maintained by the agency. It was not intended to cover private sector record keeping systems but to cover de facto as well as de jure Federal agency systems.

"Contract" covers any contract, written or oral, subject to the Federal Procurement Regulations (FPR's) or Armed Services Procurement Regulations (ASPR's), but only those which provide "* * * for the operation by or on behalf of the agency of a system of records to accomplish an agency function * * * " are subject to the requirements of the subsection. While the contract need not provide for the operation of such a system, the system would be formally as a specific requirement of the contract. There may be some other instances when this provision will be applicable even though the contract does not expressly provide for the operation of a system; e.g., where the contract can be performed only by the operation of a system. The requirement that the contract provide for the operation of a system was intended to ease administration of this provision and to avoid covering a contractor's system used as a result of his management discretion. For example, it was not intended that the system of personnel records maintained by large defense contractors be subject to the provisions of the Act.

Not only must the terms of the contract provide for the operation (as opposed to the ownership) of a system of records, the operation of the system must be to accomplish an agency function. This was intended to limit the scope of the coverage to those systems actually taking the place of a Federal system which, but for the contract, would have been performed by an agency and covered by the Privacy Act. Information pertaining to individuals may be maintained by an agency (according to subsection (e) (1)) only if such information is relevant and necessary to a purpose of the agency required to be accomplished by statute or Executive order of the President. Although the statute or Executive order need not specifically require the creation of a system of records from this information, the operation of a system of records required by contract must have a direct nexus to the accomplishment of a statutory or Presidential directed goal.

If the contract provides for the operation of the system of records to accomplish an agency function, then "* * * the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system." The clause "* * * consistent with its authority * * * " makes it clear that the subsection does not give an agency any new authority. It requires, in addition, that the agency cause the requirements of the section to be applied to systems is not set forth, the manner of doing so must be consistent with the agency's existing authority. The method of accomplishing this was envisioned to be a clause in the contract, but as with the "Buy America" provision in Government contracts, the breach of the clause was not necessarily intended to result in a termination of the contract. In addition, several of the requirements of the Privacy Act are simply not applicable to systems maintained by contractors, and this clause was a method of indicating that an agency was not required to impose those new standards. Agencies were given some discretion in determining the method or manner in which the requirements of the Privacy Act were to be applied, and the extent that the contractual instrument must specify, to the extent consistent with the agency's authority to require it, that those records be maintained in accordance with the Act. Agencies will modify their procurement procedures and practices to ensure that all contracts are reviewed before award to determine whether a system of records within the scope of the Act is being contracted for and, if so, to include appropriate language regarding the maintenance of any such systems.

For systems operated under contracts awarded on or after September 27, 1975, contractor employees may be subject to the criminal penalties of subsections (1) and (2) (for disclosing records the disclosure of which is required by contract or for failure to publish a public notice). Although the language is not clear on this point, it is arguable that such a contractor with liability only exists to the extent that the contractual instrument has stipulated that the provisions of the Act are to be applied to the contractually maintained system. However, an agency which fails, within the limits of its authority, to require that systems operated on its behalf under contracts, may be civilly liable to individuals injured as a consequence of any subsequent failure to maintain records in conformance with the Act. The reference to contractors as employees is intended only for purposes of the requirements of the Act and not to suggest that, by virtue of this language, they are employees for any other purposes.

Subsection (n) Mailing Lists

Section (n) "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." The language in this section is susceptible of various interpretations and must be read in the context of relevant legislative history. It is clear, however, that this provision seeks to reach the sale or rental of lists of names and addresses for commercial or other purposes not related to the purposes for which the information was collected.

Language included in the legislation would prohibit the sale or rental of mailing lists, names and addresses, by Federal agencies maintaining them. The philosophy behind this amendment is that the Federal Government is not in the mailing list business, and it should not be Federal policy to make a profit from the routine business of government. Particularly would it be inappropriate for such lists to have been authorized under the Freedom of Information Act. In other words, such lists cannot be maintained by an agency unless it determines that the mailing lists constitute a useful public service.

An agency contracts with a state or private educational organization to provide training and the records generated on contract students pursuant to their attendance (attendance forms, grade reports) are similar to those maintained on other students and are commingled with their records on other students.

When a system of records is to be operated by a contractor on behalf of an agency for an agency function, the contractual instrument must specify, to the extent consistent with the agency's authority to require the contractor to maintain those records on other students and are commingled with their records on other students.

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a clearly unwarranted invasion of privacy under section 552(b)(6) of title 5, United States Code.

Thus, the language of the bill before us does not ban the release of such lists where either sale or rental is not involved. (Congressional Record, December 18, 1974, p. 912294).

While the reference to the FOIA speaks only of "a clearly unwarranted invasion of personal privacy" (see 5 U.S.C. 552 (b)(6)) agencies may presumably withhold names and addresses from the public under any of the exemptions to the FOIA (5 U.S.C. 552(b)) when they deem it appropriate to do so.

It is apparent, however, that is prohibited "sale or rental" of such lists and the language may be read to prohibit "the sale or rental of lists of names and addresses by Federal agencies unless the sale or rental is specifically authorized by law. (emphasis added.)" (Senate Report 93-1183, p. 31).

The Senate report, when read in combination with the House floor discussion cited above, suggests that agencies may not sell or rent mailing lists for commercial or solicitation purposes unless they are specifically authorized by law to sell or rent such lists. It is equally apparent that this language in no way creates an authority to withhold any records otherwise required to be disclosed under the Freedom of Information Act (5, U.S.C. 552). It is problematic whether the language "may not be sold or rented" precludes the charging of fees authorized under the Freedom of Information Act.

It would seem reasonable to conclude that fees permitted to be charged for materials required to be disclosed under the Freedom of Information Act are not precluded and that lists, such as agency telephone directories, which are currently sold to the public by the Superintendent of Documents can continue to be sold.

Finally, this provision appears not to have been intended to reach the disclosure of names and addresses to agencies or other organizations other than for commercial or solicitation purposes. Other disclosure, e.g., the disclosures of names and addresses for a statistical study or to issue checks would be subject to the requirements of section (b).

Section (e) Report on New Systems

Section (e) "Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals and the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers."

This subsection is intended to assure that proposals to establish or modify systems of records are made known in advance so that there is a basis for monitoring the development or expansion of agency record-keeping activity.

The Commission established by section 5 can reevaluate the classification and protection of personal information and the application of technology.

This provision resulted from the discussions surrounding the need for an independent agency to evaluate and oversee the implementation of the Act:

The compromise amendment still would require that agencies provide adequate advance notice to the Office of Management and Budget and of any proposal to establish or alter a system of records in order to permit an evaluation of the privacy impact of that proposal. In addition to the privacy impact, consideration should be given to the effect the proposal may have on our Federal system and on the separation of powers between the three branches of government. These concerns are expressed in connection with repropose by the General Services Administration and Department of Agriculture to establish a greater level of sharing of information between those and perhaps other departments. The language in the Senate report contains the concern attached to the inclusion of this language in 83618. (Senate Report 93-1183, page 64-66).

The acceptance of the compromise amendment does not question the motivation or need for improving the Federal Government's data gathering capabilities. It does express a concern, however, that the Office of Management and Budget and Congress should be given an opportunity to examine the impact of new or altered data systems on our citizens, the provisions for confidentiality and security in those systems and the extent to which the creation of the system will alter or change interagency or intergovernmental relationships related to information programs. (Congressional Record, December 17, 1974, p. 8 2181).

A report is required to be submitted for each proposed new system of records and for changes to existing systems. The criteria for determining what constitutes a change in an existing system requiring the preparation of a report under this subsection are the same as those discussed under subsection (e) (4), the public notice; namely any change which:

Increases the number or types of individuals on whom records are maintained;

Expands the type or amount of information maintained;

Increases the number or categories of agencies or other persons who may have access to those records;

Alters the manner in which the records are organized so as to change the nature or scope of those records; e.g., the combining of two or more existing systems;

Modifies the way in which the system operates or its location(s) in such a manner as to alter the process by which individuals can exercise their rights under the Act; e.g., to seek access or request amendment of a record; or

Changes the configuration on which the system is operated so as to create the potential for greater access; e.g., adding a telecommunications capability.

The reports required under this section are to be submitted to the Congress, to the Director of the Office of Management and Budget (Attn: Information Systems Division) and to the Privacy Protection Study Commission.

SUBSECTION (p) Annual Report

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

This subsection provides that the President submit to the Congress a list of systems exempted from the terms of section (j) or (k). "Also to be included in the annual report would be the reasons for such exemptions and other information indicative of the agency's compliance with the law. It is hoped that all such information would be made public. If, however, the nature of any such exemption requires a security classification marking, it should be placed in a separate part of the report so as not to affect the remainder of the annual report." (House Report 93-1416, p. 21).

Agencies will be required to prepare reports to the Office of Management and Budget (Attn: Information Systems Division) by April 30 of each year (beginning April 30, 1976) covering their activities under the Act during the preceding calendar year. The Office of Management and Budget will analyze data contained in the agency reports and prepare the required Presidential report to the Congress.

Appendix A- The Act is to be administered by the Director of the Office of Management and Budget, the Director of the National Technical Information Service, and the Director of the FOIA Exemption/Fees Study Commission. The Exemption/Fees Study Commission will issue, under separate cover, more detailed guidance on the format, timing, and content of the reports.

Exemptions—A list of systems which are exempted during the year from any
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of the operative provisions of this law permitted under the terms of subsections (j) and (k), whether or not the exemption was obtained during the year, the number of records in each system exempted from each specific provision and reasons for invoking the exemption.

Number of systems—A brief summary of changes to the total inventory of personal data systems subject to the provisions of the Act including reasons for major changes; e.g., the extent to which review of the relevance of an necessity for records has resulted in elimination of all or portions of systems of records or any reduction in the number of individuals on whom records are maintained. Agencies will also be requested to provide OMB with a detailed listing of all their systems of records, the number of records in each and certain other data to facilitate oversight of the implementation of the Act. (Detailed reporting procedures will be issued under separate cover.)

Operational Experiences—A general description of operational experiences including estimates of the number of individuals (in relation to the total number of records in the system) requesting information on the existence of records pertaining to them, refusing to provide information, requesting access to their records, appealing initial refusal to amend records, and seeking redress through the courts.

More extensive data will be requested on those cases where the agency was unable to comply with the requirements of the Act or these guidelines; e.g., access was not granted or a request to amend could not be acknowledged within prescribed time limits.

More detailed instructions on the format, content and timing of these reports will be issued by OMB.

SECTION (q) Effect of Other Laws

Subsection (q) "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."

This provision makes it explicit that an individual may not be denied access to a record pertaining to him under subsection (d)(1) access to records, because that record is permitted to be withheld from members of the public under the Freedom of Information Act. The only grounds for denying an individual access to a record pertaining to him are the exemptions stated in this Act, subsections (j) and (k), and subsection (1) archival records. In addition consideration may have to be given to other statutory provisions which may govern specific agency records.

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